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In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **GILES ALBERT NADEY, JR.,** **Defendant and Appellant.**	**CAPITAL CASE** S087560

Alameda County Superior Court No. 129807
Hon. Alfred A. Delucchi, Judge

RESPONDENT'S BRIEF

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DEATH PENALTY

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STATEMENT OF THE CASE

On March 19, 1997, a grand jury for Alameda County returned an indictment alleging appellant Giles Albert Nadey, Jr., committed murder (Pen. Code,[1] §§ 187, subd. (a), 189; count one), and forcible sodomy (§ 286, former subd. (c); count two), and that during the commission of both offenses he personally used a knife (§ 12022, subd. (b)). The indictment alleged the special circumstance that appellant committed the murder during the commission of forcible sodomy (§ 190.2, former subd. (a)(17)(iv)). The indictment further alleged appellant had incurred felony convictions on: (1) October 4, 1993, for second-degree burglary and petty theft with a prior; and (2) November 4, and 19, 1985, for two first-degree burglaries, for which he served a prison term. (2CT 355-357.) On March 21, 1997, the prosecutor advised his office would seek the death penalty. (2CT 345, 365, 370.) On April 4, 1997, appellant pleaded not guilty, and denied the special circumstance and prior conviction allegations. (2CT 387.)

Trial proceedings commenced October 19, 1998. On November 9, 1998, appellant admitted the prior conviction allegations. (3CT 764; 4RT 596-598.) Individual voir dire of prospective jurors (panelists) began on December 1, 1998. (3CT 778.) On January 26, 1999, a jury and alternates were sworn, and the prosecutor began his case-in-chief. (3CT 816-817; 18RT 3797.) On February 23, 1999, the jury found appellant guilty of murder in the first degree and forcible sodomy, and that during the commission of both crimes he personally used a knife. The jury found true the forcible sodomy special circumstance. (3CT 897-899; 4CT 903-906; 28RT 5225-5229.)

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[1] Further unspecified statutory references are to the Penal Code.

The evidentiary portion of the penalty phase commenced March 2, 1999. (4CT 999; 29RT 5324.) On March 12, 1999, when the jury could not reach a verdict, the court declared a mistrial. (4CT 1047, 1108; 33RT 6087-6088.) On June 2, 1999, the court denied appellant's new trial motion and his alternative motion to allow DNA "lingering doubt" evidence at the penalty retrial. (6CT 1604; 34RT 6103; see 4CT 1115-1118 [motion], 1119-1121 [prosecution opposition].)

Individual jury voir dire for the penalty retrial began November 29, 1999. (6CT 1621; 38RT 6524.) The prosecutor commenced his case-in-chief on January 18, 2000. (6CT 1657; 48RT 8563.) The jury returned a death verdict on February 7, 2000. (6CT 1784; 7CT 1816; 55RT 9732-9734.)

On April 12, 2000, the court denied appellant's motions for retrial on guilt and penalty, and to reduce the penalty to life without the possibility of parole (LWOP) (§§ 190.4, subd. (e), 1181). (7CT 1845-1846; 55RT 9746-9754.) The court imposed the death penalty, stayed the aggregate determinate term of eight years for the sodomy count and the personal use allegations, and struck the prior conviction allegations (7CT 1845-1847, 1879-1880; 55RT 9758-9759.)

This is the automatic appeal from that judgment. (§ 1239, subd. (b).)

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecutor's case-in-chief

On January 18, 1996, Terena and Donald Fermenick,[2] were living with Donald's parents, Lori and Mark Fermenick, in Pleasanton. Terena and Donald had a five-month-old daughter, Regan. (18RT 3842-3847 (Lori); 19RT 4053 (Donald); see also 48RT 8599-8600, 8605.[3])

Donald had been the minister in training to his grandfather at the Church of Christ in Alameda. Donald's grandfather had died three months before, and Donald had become the church's full-time minister. The church was located on Santa Clara Avenue near Walnut Street. The rectory was at 1515 Walnut Street, and one side of the rectory faced the back of the church. (18RT 3843 (Lori); 18RT 3873-3874 (Ofc. Enry); 19RT 4053-4057 (Donald); People's Exh. No. 2 ("Exh. No.");[4] see also 48RT 8588, 8600-8611, 8620.)

Terena and Donald were in the process of cleaning the rectory so they could move in. (18RT 3843, 3856 (Lori); 19RT 4057 (Donald); see also 48RT 8605.) On January 16, 1996, two days before the murder, the couple moved a guest bedroom bed into the master bedroom. (19RT 4070, 4083 (Donald).) While doing so, they discovered a knife/dagger in a sheath,

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[2] To avoid confusion, references to various members of the Fermenick family are by their first name.

[3] As noted below, respondent does not repeat the testimony given by the various witnesses at the penalty retrial regarding the factual circumstances of the murder. References to "see also" and volume 48 et seq. of the reporter's transcript refer to penalty retrial testimony.

[4] The prosecutor's exhibits at the guilt trial were labeled numerically, as were his exhibits at the penalty retrial ("PR Exh. No."). The court's exhibits were listed by roman numerals. The defense exhibits were labeled alphabetically.

belonging to Donald's cousin Joshua. Donald put the knife on the window ledge above the master bedroom bed, where police crime scene technician Nice later recovered it, when she raised the blinds. (19RT 4070-4071, 4082-4083 (Donald); Exh. No. 26; see also 48RT 8613-8614.)

Donald's grandparents had owned two dogs. Terena and Donald needed to clean urine spots from the carpets. On January 16, 1996, Terena telephoned and hired an Emeryville carpet cleaning company, Skyline Chem Dry (Chem Dry), to clean the carpets on the afternoon of January 18. (18RT 3843-3845 (Lori); 19RT 3988 (Chem Dry Mgr. Paul Miller), 4057-4058 (Donald); see also 48RT 8604-8606, 8645, 8649.)

Donald also worked the graveyard shift at a packaging plant, and, in accord with his normal pattern, he went to sleep after returning from work on the morning of January 18, 1996. Terena woke Donald before she left for Alameda to meet the carpet cleaner. Donald went back to bed, waking up somewhere between 3:00 and 4:00 p.m. (18RT 3843, 3847-3848, 3851, 3858 3860 (Lori); 19RT 4053, 4059, 4072, 4074-4076 (Donald); see also 48RT 8600, 8604, 8606-8607.)

Terena left the Pleasanton residence in the couple's Saturn shortly after noon, to wait for the carpet cleaner at the rectory. She took Regan. It was a very stormy day. (18RT 3845, 3847-3849, 3862 (Lori); see also 48RT 8607-8608.)

Terena called Lori around 1:30 p.m. to say that she was at the rectory and was waiting for the carpet cleaner. (18RT 3849-3850, 3863 (Lori); 21RT 4256-4257, 4262 (PacBell representative Capili); cf. 18RT 3863 [cross-exam of Lori that Terena told her the carpet cleaner was already there].) Terena was concerned about living in the rectory, especially at night, since Donald worked the night shift: She "was afraid of being alone in a bigger, city-type place." (18RT 3857 (Lori).) During the 1:30 p.m. telephone call, Terena told Lori she did not want to be alone with a

stranger. Lori advised Terena to let the carpet cleaner in, go into downtown Alameda, and return when it was time to pay the cleaner. (18RT 3850, 3857, 3868-3869.)

Around 1:45 p.m., Terena, carrying Regan, visited an Alameda antiques store. Terena talked with the owner, Pauline Kelly, telling her she had a short time to kill before letting the carpet cleaner into the rectory. After browsing in the store, Terena returned to Kelly at around 2:05 p.m. Terena told Ms. Kelly she had lost track of time, and that she had been supposed to meet the carpet cleaner at 2:00 p.m. (18RT 3893-3896 (Kelly).)

Appellant worked for Chem Dry on January 18, 1996. Earlier that morning, Chem Dry manager Paul Miller picked up appellant at the Fruitvale BART station. Appellant drove his assigned van that day. Appellant and Miller worked one job together that morning, before they returned to the company office around 1:30 p.m. When they returned to the office, appellant "munch[ed]" on a small portion of his lunch, but he did not take time to sit down and eat all of it before he left around 1:45 p.m., for his 2:00 p.m. appointment to clean the Fermenicks' carpets. (19RT 3990-3994, 4003, 4005, 4008 (Paul Miller); see also 48RT 8647-8650, 8656-8657.)

According to Paul Miller, appellant wore white canvas shoes, blue work pants, a white work shirt, and "an old yellow raggedy raincoat, falling apart." (19RT 3994; see also 48RT 4647.) The rain coat was small, evidently did not button, and reached down to appellant's waist. The originally-scheduled job should have taken appellant between one hour and one-and-one-half hours to complete. Appellant wrote on the work order that he started the job at 2:16 p.m. (19RT 3994, 3998-4000, 4011, 4013-4014 (Paul Miller); see also 48RT 8647, 8650, 8653, 8657-8658.)

Terena left appellant at the rectory, and sometime after 3:00 p.m., she shopped at the South Shore Lucky's grocery store in Alameda. Terena tendered a check for diapers at approximately 3:30 p.m. (18RT 3900, 3902-3906 (Store Mgr. Valencia).)

Upon completing a job, the normal procedure at Chem-Dry is for the cleaner to do a walk-through with the customer, and have the customer pay and sign the work order. The cleaner is then to telephone the office to report that the job has been completed, and that the cleaner is on the way back to the office "or whatever." (19RT 3995.) The cleaner may use the client's telephone, "[b]ut if they don't feel comfortable, we recommend that they go to the pay phone." (19RT 4016.) According to Miller, it would not have been unusual for appellant to stop to "grab a bite to eat[,]" before returning to the office. (19RT 4010, 4016.)

When appellant did not return as expected, Miller directed the company secretary, Louisa, to page him. As Louisa started to page appellant somewhere between 4:10 and 4:30 p.m., he telephoned her. (19RT 3995, 4017-4019 (Paul Miller); see also 48RT 8655, 8658.) Appellant said he had finished the job and was at a Jack-in-the-Box on East 14th Street/International Boulevard in Oakland. Louisa asked appellant to pick up a pack of cigarettes for her before returning to the office. (19RT 4001-4002, 4019 (Paul Miller); 20RT 4236 (Det. Miller), 4247 (Insp. Brosch); see 20RT 4247-4252 [18 visible Alameda and Oakland public telephones on the shortest route between the rectory and the Jack in the Box]; see also 48RT 8655.)

Appellant returned to the shop around 4:45 p.m. (19RT 3995-3996 (Paul Miller); cf. 19RT 4019 [Paul Miller's cross examination appellant returned around 4:30 p.m.]; see also 48RT 8654 [arrival around 4:30 p.m.].) Appellant did not have his raincoat. Miller did not see blood "or anything unusual" on appellant's shoes or pants. (19RT 4020; see also 48RT 8659.)

Appellant's demeanor was "nothing out of the ordinary." (19RT 4022 (Paul Miller); see also 48RT 8650-8651, 8654, 8659.)

Appellant brought back the original work order, signed by Terena, and a check from Terena for $184.89. The work order included Terena's driver's license number as well as the notation in appellant's handwriting that he had cleaned the master bedroom carpet. Appellant noted on the work order that he completed the job at 3:54 p.m. (19RT 3997-3999, 4022 (Paul Miller); Exh. No. 37A; see also 48RT 8651-8654.) According to Mr. Miller, the job had evidently taken more time than originally-scheduled because of the heavy urine staining, and because Terena also had appellant clean the master bedroom carpet. Miller stated that, given the additional time appellant would have needed to clean the master bedroom carpet, the time necessary to complete the job was "about average." (19RT 4009-4013.) However, Donald testified the master bedroom was uncarpeted and was not scheduled to be cleaned. (19RT 4066-4067; Exh. Nos. 28 & 30 [showing hardwood floors].)

When Terena did not return to the Pleasanton residence, Donald called the rectory several times, each time getting the answering machine. Donald became more and more concerned. (18RT 3852, 3870-3871 (Lori); 19RT 4060-4062 (Donald); see 21RT 4256-4259, 4262 [per PacBell representative Capili there were incoming calls from the Pleasanton residence to the rectory at 4:55, 6:07, 6:39, 7:29 & 8:31 p.m.]; see also 48RT 8606-8608.)

Donald asked to borrow Mark's car and he left for the rectory to look for Terena around 8:45 p.m. Donald arrived at the rectory around 9:15 to 9:20 p.m. He noticed their Saturn was the only car in the church parking lot; it was parked near the rectory's kitchen door. (19RT 4062-4063 (Donald); Exhs. No. 2 & 17; see 18RT 3874, 3876 (Lori), 3885-3886 (Ofc. Bartosz), 3914 (Tech. Nice); see also 48RT 8589-8590, 8608-8609, 8620.)

Regan was in her car seat, looking like "she had been there for a while." (19RT 4064 [Donald]; see also 48RT 8608.) Donald opined Terena would never leave Regan unattended in a car. Donald took Regan in his arms and held her as he walked around the rear of the rectory, calling out for Terena. (19RT 4059 [Terena "never let [Regan] out of her sight. She always had her"], 4060, 4064 (Donald); see 48RT 8608-8610.)

Donald looked through the kitchen window and saw Terena laying on the family room floor. The kitchen door was locked; Terena had the couple's only key. (19RT 4064-4066.) The door could be locked using the interior door knob. The dead bolt was unlocked. (19RT 4064-4066, 4073-4074; see also 48RT 8610.)

Donald kicked out the upper window of the kitchen door and unlocked the door. (19RT 4065-4066 (Donald); Exh. No. 24; see 18RT 3875-3876 (Enry), 3892, 3914-3916 (Nice); see also 48RT 8589, 8591, 8611, 8617-8619, 8628-8629.) Terena was lying face down, mostly naked (her jeans were gathered on her lower right leg and she was wearing her left sock), on the floor next to a wall in the family room. There was feces on Terena's buttocks near her rectum. (Exh. No. 5; 18RT 3916 (Nice); see 18RT 3802-3803 (Dr. Rogers); see also 48RT 8612.) Above her was a telephone which rested on a window sill. "[T]here was blood all over the walls." (19RT 4067 (Donald); see Exh. No. 5 [showing blood splotches on the wall above Terena and below the window sill]; 18RT 3915, 3920, 3923 (Nice); see also 48RT 8611-8612, 8619, 8628-8630, 8638.) Donald ran to the kitchen telephone and called 911. After making a short report to 911, Donald hung up and quickly called his father. He then returned to the

family room, where Terena's body was cold.[5] (19RT 4067-4069; see also 48RT 8612.)

Shortly before 9:30 p.m., Alameda Police Officer Enry arrived at the rectory upon a call that a man had found his wife raped and dead on the floor. Donald was in the family room, squatting over Terena, who was still lying face-down, against the wall below the window. Donald was holding Regan. (18RT 3873, 3876-3877 (Enry), 3887-3888 (Bartosz); see also 48RT 8568-8569, 8584, 8588, 8591-8593 [Donald appeared to be in shock], 8613, 8638.)

There was blood around Terena's body, a substantial portion of which was pooled around her head. Terena's panties were twisted in her jeans. (18RT 3888 (Bartosz), 3916-3917 (Nice); Exh. No. 33; see 18RT 3802-3803 (Rogers); see 48 RT 8612, 8622, 8638.) Officer Damian and Sergeant Beetle arrived momentarily. One of the officers took Regan, and Officer Enry handcuffed Donald and removed him from the house. (18RT 3878-3879 (Enry); 19RT 4069 (Donald)); see 20RT 4173 (Sgt. Taranto).)

An officer took Regan to the police station, arriving around 10:00 p.m. Regan "was very wet. The clothes were soiled." Regan's diaper "was more than just soiled. It was very soiled [i.e., full] and had . . . fermented for a while so you could tell it was jelled up." (19RT 3986 (Dispatcher Morrow).)

In the master bedroom, there was a large pool of blood on the lower, left hand side of the bed (facing the wall), and blood on the bedding. There

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[5] On cross examination, Donald testified he had sued, on his own, and on Regan's behalf, among others, appellant, Paul Miller, and Chem Dry. He received a portion of the one-million-dollar lump sum agreed to as part of a settlement. More than 50 percent of the lump sum was to be held in trust for Regan. Regan was to receive payments totaling $1,789,000. (19RT 4074, 4085, 4095, 4097-4099.)

was hair matted in blood on the sheet and comforter. There was pooled blood on the floor and a pillow rested on the floor leaning against the bed. (Exh. No. 27; 18RT 3885-3888 (Bartosz), 3918-3919, 3921-3922, 3926-3927 (Nice); 19RT 3964-3966 (Nice); see 18RT 3928 [per Nice, photos of the mattress showed three "swipes," which were indicative of wiping of blood with an "implement"]; see also 48RT 8619, 8621, 8631-8632, 8636; 49RT 8687.)

Terena's closed wallet was partially covered by bedding. Next to the wallet was Terena's Penny's credit card. A ball point pen lay next to the credit card. (Exh. No. 29; 18RT 3918-3919, 3921-3922 (Nice); see also 48RT 8635.) Terena's nursing bra was wrapped up with her sweatshirt and shirt closer to the top of the bed. Ms. Nice opined all of Terena's upper clothing had been "pulled off" over Terena's head at the same time. Human feces was on the bedding. (18RT 3931-3932; see also 48RT 4643.)

Terena's left running shoe, and a copy of the Chem Dry work order/receipt,[6] folded in half, were on the floor to the right of the bed. A blood trail led from the bed to where Terena was found in the family room. Terena's hands were in a folded, "clasped" position, and she was wearing her engagement ring and wedding band on her left ring finger, and a Mickey Mouse watch on her wrist. There appeared to be "fibers underneath some [of Terena's] fingernails." (18RT 3888 (Bartosz), 3915, 3918-3924, 3929-3931 (Nice); 19RT 3778 (Nice); 20RT 4176, 4180 (Taranto); Exh. Nos. 28 & 34; see also 48RT 8622, 8632-8633, 8635, 8638-8640, 8632-8633; 49RT 8687.)

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[6] The original work order which appellant returned to Mr. Miller was the same as the copy beside the bed in the master bedroom. (20RT 4161; see Exhs. No. 36A & 37A.)

Responding officers did not notice any knives or cutting instruments during their initial search of the residence, but, as noted, Ms. Nice later found Joshua's dagger on the window sill above the master bedroom bed. Nice had had to pull up the mini blinds before she saw it. (18RT 3891 (Bartosz), 3917 (Nice);19RT 3967-3968, 3981 (Nice); see also 48RT 8593, 8613-8614, 8641-8642.) There was dust on the dagger. Lead detective Alameda Police Sergeant Taranto did not believe the dagger was initially processed for fingerprints. (20RT 4175-4177; see also 48RT 8643, 8683-8684.) Nice did not observe any blood on the dagger and it was not damp. She did not test the dagger for the presence of blood. (19RT 3971; see 20RT 4177; see also 48RT 8643; 49RT 8684.)

A paring knife, with a serrated three-inch blade, was found on top of some stacked materials in the storage bedroom. It was not tested for fingerprints or the presence of blood. (19RT 3971-3973, 3982 (Nice); 20RT 4177 (Taranto); see also 49RT 8682-8684.) The house key Terena had used to gain entry into the rectory was in the house. (20RT 4202 (Taranto).)

Sometime before midnight, Sergeant Taranto and assisting Police Detective Rod Miller went to the rectory. Taranto looked inside the Saturn. He observed a McDonald's bag, a carton, a drink carton with some liquid remaining, and an empty french fries bag. (20RT 4171, 4208 (Taranto), 4218-4219 (Det. Miller); see also 49RT 8672-8673, 8686, 8689.)

During the late-evening-early-morning hours of January 18-19, officers took Donald to Highland Hospital for a sexual assault examination. Hospital staff took blood, and did pubic hair combings. (19RT 4069-4070 (Donald); 20RT 4051-4052 (Nurse Wilson); see 20RT 4146-4147, 4167 (Taranto).)

Responding to a telephone call from Detective Miller, Paul Miller drove appellant to the Alameda Police Department on the afternoon of

January 19. According to Mr. Miller, as the day before, appellant's appearance was "neat and clean." (19RT 4007.) On the way, appellant told Mr. Miller Terena "was a nice lady," and that Regan had been sick with a cold. (19RT 4000, 4007 (Det. Miller); 20RT 4147 (Taranto); see also 49RT 8673-8674 [interview in a.m.]; 8702.) Paul Miller reported to Detective Miller that appellant had told him he had left his raincoat on a restroom hanger at the East 14th Street Jack in the Box. That Jack in the Box is "[n]ot [on] the most direct" route between the rectory and the company office. (19RT 4000-4001 (Det. Miller); see 19RT 3996, 4014-4015 [cross examination of Detective Miller concerning alternative routes back to the office using, at least in part, Oakland surface streets]; see also 48RT 8654, 8690.)

Appellant gave a tape-recorded statement to Sergeant Taranto. (20RT 4148-4151, 4196 (Taranto); Exh. Nos. 38 [cassette] & 38A [transcript of cassette]; see also 49RT 8702.) Appellant told Taranto he had used his Chem Dry van to do two cleaning jobs on the morning of January 18, 1996. That afternoon he cleaned the carpets in the Walnut Street rectory. (Exh. No. 38A, pp. 1-2.)

Appellant told Taranto he was "running late that day." (Exh. No. 38A, p. 4; see *id.* at p. 2.) Appellant believed he arrived at the rectory sometime between 2:00 and 2:30 p.m. Appellant pulled into the parking lot and saw the Fermenicks' Saturn near the door. As appellant knocked on the kitchen door, Terena opened it. Terena identified herself (her name was already on the work order). Terena had a female infant (Regan) with her. Appellant told Taranto Regan was sick. (Exh. No. 38A, pp. 2-4.)

Appellant had Terena do a "walk-through" of the residence with him. According to appellant, the "whole carpet" "was pretty trashed . . . I mean it was urine." (Exh. No. 38A, p. 4.) Appellant pointed out the possible problems with cleaning the carpet. Terena told appellant, "'just do the best

you can.'" (*Id.* at p. 4.) Terena asked appellant if she could leave him alone to clean the carpets. Appellant said yes. Terena asked how long it would take for appellant to clean the carpets. Appellant told Terena it would take him between one-or-two hours to complete the job. Terena left with Regan "'to do some things.'" (*Ibid.*)

Terena returned to the rectory at around 3:55 p.m., as appellant was "halfway" finished loading his van, and his only remaining task was to spray deodorizer. Appellant estimated he was at the rectory for "close to an hour an[d] a half." (Exh. No. 38A, p. 4.) Terena left Regan in the Saturn and came into the rectory to pay appellant. (*Id.* at pp. 6, 9.)

Terena made out the check to Chem Dry in the agreed-upon amount of $184.80, "on the counter next to the sink" "right there by the [kitchen] door." (Exh. No. 38A at p. 9; see *id.* at p. 6.) Prior to signing the work order, Terena displayed her driver's license to appellant who wrote it down on the work order. (*Id.* at pp. 5, 10.) When appellant left, Terena "was standing in the kitchen." (*Id.* at p. 7.) On the way out, appellant asked Terena if she wanted him to close the kitchen door. "She says, 'No, my kid is in the car'. And I said, 'Okay'. And walked out. Got into the truck and left." (*Ibid.*)

Terena had not made any sexual advances toward appellant: "No, not in the least. She was "a nice lady. . . . [S]he told me all about . . . how she's trying to save money to move back East or mid East, mid West or something like that. That her and her husband were going to stay there for a little bit. He was a preacher or pastor or something like that." (Exh. No. 38A, p. 10.)

Appellant told Taranto he had been wearing "blue pants, white company shirt, [and a] Skyline Chem Dry jacket." (Exh. No. 38A, p. 6; see *id.* at p. 3.) Appellant explained the jacket "[i]s blue, and it has Skyline Chem Dry on the back and on the front." Appellant had carried a

"Leatherman's tool" (a multi-functional, "utility" tool), which had "a little 3 inch blade . . . ." (*Id.* at pp. 6-7.)

Appellant related that, in accord with company policy, he called the office from a pay phone in front of a Jack in the Box on East 14th Street in Oakland, before he did his "duty." Louisa asked him to bring her some cigarettes. (Exh. No. 38A, pp. 5-7.) Appellant "went to a Quick Stop" "on 14th. I think it is. By Highland Hospital. Picked up the cigarettes . . . ." He then "jumped on the freeway and headed to the shop." (*Id.* at pp. 7, 10.) He got back at the shop "[a]bout 4:35 or so, because I clocked out at 4:40." (*Id.* at p. 7.)

Based upon his conversation with Mr. Miller, Detective Miller went to the Oakland Jack in the Box around 4:30 p.m. that afternoon (Jan. 19). Appellant's rain coat was not in the restroom. None of the restaurant employees had found the rain coat. (20RT 4219-4220, 4237 (Det. Miller); see also 49RT 8690-8691, 8704.)

On January 20, 1996, Sergeant Taranto obtained a search warrant for appellant's Hayward home and person. Taranto, Detective Miller, and other officers executed the warrant at 10:30 p.m. Appellant and his brother were in their respective beds in their bedroom. (20RT 4152-4157 (Taranto); see also 49RT 8674-8679, 8691.) When Taranto asked appellant if he knew why Taranto was there, appellant responded: "'No, not really.'" (20RT 4214.) After Taranto told appellant he had a search warrant for his person, car, and house, appellant stood up and "began to wretch like he was going to vomit." (20RT 4214; see also 49RT 8679-8680.)

Two Leatherman's tools and their cases were seized from the brothers' bedroom. One of the tools was on one dresser and the other was on the other dresser. (20RT 4200, 4220-4224, 4238; 21RT 4360-4361; see also 49RT 8692-8693.) The officers found a writing tablet in the center drawer of the night stand next to appellant's bed. A letter in the tablet

began with the salutation: "Hi There Sexy." (20RT 4224-4226 (Det. Miller); Exh. No. 41; see also 49RT 8693, 8695.) The letter related the following information:

> . . . I really enjoy . . . gently squeezing your nipples with one hand while my other hand is slowly working up the juices in you [sic] hot love tunnel by sliding one finger in & out . . . . we can shimmy, we can shake, we can make the earth quake as we engage in some plain ol animalistic hard fucking.
>
> [¶] . . . I also like to endure in Anal Sex, which by the way is one of my specialty – you will come so hard your eyes will roll back in your head. [¶] . . . [I] know I'm a good lover because I have to compensate as I only have a 6-1/4' dick so what I don't have in size I make up for in technique
>
> [¶] Your Play Toy, [¶] Al

(Exh. No. 41; see 20RT 4226, 4241 (Det. Miller); see also 49RT 8695.) Appellant also wrote: "I am not violent in any way." (20RT 4241.) There were drawings of male and female genitalia on the letter's concluding page. (20RT 4225; Exh. No. 41; see also 49RT 8693.)

Along with indicia for appellant, officers found a "pornography book entitled Deep Thrills" in the middle drawer of appellant's bedroom dresser. That book contained many "short stories," including one titled "'Back Door Lovers, Sliding Up the Old Dirt Road.'" Officers also found other sexually-oriented magazines, "hand written articles," and a video tape in that drawer. (20RT 4227-4229 (Det. Miller); Exh. No. 42A; see also 49RT 8694, 8696-8697.)

Sergeant Taranto took appellant to Oakland's Highland Hospital for a sexual assault examination during the late evening-early morning hours of January 20-21, 1996. (19RT 4045-4047 (Nurse Wilson); 20RT 4164-4165, 4188 (Taranto).) Dr. Connell and Nurse Wilson conducted the examination. According to Wilson, appellant "was very disheveled." (19RT 4048; see 20RT 4165, 4189, 4192-4193 (Taranto).) Appellant "sort

of stood out because of a general affect, a general way he carried himself – very quiet, the tattoos on his for arm [sic], fingers, and things like that." (19RT 4051 (Wilson).)

Wilson collected pubic hair, and possible "evidence around the foreskin and within the [urethra] itself." (19RT 4047, see 19RT 4050; 20RT 4189-4191 [Taranto].) The area around appellant's penis and scrotum "was crusty [i.e., "[f]lakey, kind of foreign material"], unkempt. Obviously there was no hygiene." (19RT 4048 (Wilson); see 20RT 4165 & 4193 [Dr. Connell's physical examination, and Taranto's observation, of appellant's genital area showed it "appeared to be somewhat dirty. The pubic hair was encrusted with flaky material and lint as well as the exterior surface of [appellant's] penis"], 4193.) There was an abrasion on the head of appellant's penis, near the urethra. (20RT 4166, 4212-4214 [Taranto].) Wilson collected a blood sample and an oral swab. (19RT 4048, 4050; 20RT 4165 [Taranto].) Wilson also collected fingernail scrapings, and appellant's clothing. Wilson turned the various items over to Sergeant Taranto. (19RT 4049-4050; 20RT 4166-4167.)

Sergeant Taranto took the blood sample, and the rectal, vaginal, and vulva swabs obtained from Terena during the autopsy, as well as those samples collected from Donald and appellant, to the Alameda County Sheriff's Department crime lab for examination. He also transported Terena's blue jeans and one of the "Leatherman's tools." (20RT 4167-4169, 4182, 4199-4200.) On January 26, 1996, Taranto took samples prepared by sheriff's criminalist Sharon Smith of the blood submitted for Terena, Donald, and appellant, and well as Terena's rectal, vaginal, and vulva swabs, to senior criminalist Steven Myers at the California Department of Justice (DOJ) Berkeley DNA lab. Taranto also took samples from Terena's blue jeans, also prepared by Ms. Smith. (20RT 4169-4170, 4203-4204:)

On January 24, 1996, Detective Miller obtained a search warrant directed at Pacific Bell for the records for the rectory's out-going and in-coming calls on the day of the murder. (20RT 4230-4232 (Det. Miller).) Among the outgoing telephone calls were brief calls to "900-area-code" numbers made between 3:00 and 3:10 p.m. (20RT 4232-4233, 4242; see also 49RT 8701.) One telephone call was to Real Swingers Hot Line. The second telephone was made to the Info Service Entertainment Line. (20RT 4234; see also 49RT 8701, 8702 [both calls were made to sexually-oriented telephone services], 8707 [length of calls].) During the brief durations of those telephone calls, the caller was advised to use a credit card for further access "for what they had for sale." (20RT 4243-4244.)

On January 25, 1996, Officer Rodekohr was part of a team assigned to conduct a 24-hour surveillance of appellant. Rodekohr drove one police vehicle; and four other officers drove other police vehicles. (19RT 4032-4034 [Rodekohr]; see 19RT 4038-4039 [the close surveillance began on January 21, and Rodekohr joined the surveillance team on January 23 or 24]; 20RT 4196 [Taranto].) Appellant's mother drove appellant to an unincorporated area on Harvey Avenue in Hayward. Appellant left his mother's car and proceeded on foot down a gravel road to a residence. Rodekohr followed in his car about five feet behind appellant. Rodekohr parked between 20-50 feet from the residence. Appellant went in and out of the residence several times. (19RT 4034-4035.)

Appellant approached Rodekohr's car and told the officer "he was going to cooperate with us as much as he could, letting us know where he was going to drive to and so that we could easily follow him around. [¶] And he asked . . . that when we arrested him, if we can do it at his place of work instead of his house so it wouldn't embarrass his mother." (19RT 4035-4036.) Appellant told Officer Rodekohr he had bad shoulders, and

asked that when they arrested him, that they double cuff him to avoid straining his shoulders. (19RT 4036.)

Officer Rodekohr and appellant again interacted at the Harvey Street residence later that evening. Appellant told Rodekohr he and his mother were going to meet with a lawyer in Livermore the following morning. (19RT 4036-4037, 4042.) Appellant looked at Rodekohr "kind of quizzically," and said he "must be the lead suspect . . . because [he] was the last one at the house." (19RT 4037.)

The following afternoon (Jan. 26), Officer Rodekohr resumed surveillance as appellant returned from Livermore to the Harvey Street residence. Appellant told Rodekohr he had spoken to an attorney, and that he had been advised not to speak to the police. Rodekohr told him that was "fine[,]" and appellant went into the residence. Appellant then came back out to Rodekohr's car and said that he was starting "to feel the weight of this, all this on my shoulders." (19RT 4037.) Several times during their various contacts, Officer Rodekohr advised appellant, "'You don't have to talk to me.'" (19RT 4038.)

On January 30, 1996, Criminalist Myers told Sergeant Taranto he had conducted two PCR (polymerase chain reactions) DNA tests on one of Terena's vulva swabs, where the majority of the semen was consistent with having come from a person matching appellant's profile. Those tests indicated there was a one in 130 "chance" appellant had been a donor. (20RT 4205-4207, 4209, 4212, 4215-4216 [Taranto].) Based on Myers' information, Taranto arrested appellant that day. (20RT 4196, 4205-4207, 4212, 4215-4216 [Taranto].) Myers told Taranto he would attempt to do RFLP (restriction fragment length polymorphisms) DNA testing on Terena's rectal swabs. (20RT 4216.)

2. The prosecutor's medical and DNA testimony

Pathologist Thomas Rogers was employed by the Oakland Institute of Forensic Sciences (IFS), a group of forensic pathologists contracted to conduct autopsies for Alameda County. He testified regarding an autopsy conducted on Terena on January 19, 1996, by another pathologist from the Institute, Dr. Paul Herrmann.[7] (18RT 3798-3740, 3830.) Sergeant Taranto was present at the autopsy. (20RT 4184.)

According to Dr. Herrmann's autopsy protocol and the photos taken by Dr. Herrmann at the time of the autopsy, there was fecal matter around Terena's anus, which Dr. Rogers opined could have been caused by someone sodomizing Terena. (18RT 3817-3818.)

Dr. Herrmann had observed incised wounds, caused by a "sharp cutting-type instrument." (18RT 3504-3505.) Those included eight wounds to Terena's neck area, a wound to the right hand, several wounds to the fingers of the left hand, and two on the right side of Terena's torso between the sternum and hip. Dr. Rogers opined the wounds to Terena's fingers and hand were consistent with "defensive" wounds. (18RT 3804-3808, 3814-3815.) One of the wounds on Terena's right hip reached half an inch underneath the skin and the other extended an inch-and-one-half-to-two inches below the skin. The second stab wound to the hip had penetrated the diaphragm and also entered the abdominal cavity. The stab wounds to Terena's right hip were "potentially survivable." (18RT 3815-3816.)

There were seven superficial wounds to Terena's left neck. The eighth incised wound was "large [and] deep[.]" (18RT 3814-3815.) That

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[7] Dr. Rogers had been present for a portion of the autopsy, and when he went to review the case he "had some vague recollection of it." (18RT 3832.)

stab wound had gone through Terena's neck muscles and completely severed her left jugular vein. (18RT 3804, 3814-3815.) Dr. Rogers believed Terena may have gone into shock, and he opined Terena would have died from the severed jugular vein within three-to-five minutes. (18RT 3818, 3827.) Dr. Rogers opined the blade of the cutting instrument used to make the various incised wounds was one-and-one-half inch in length or greater. (18RT 3816.) A Leatherman's tool seized from appellant's bedroom could have caused Terena's stab wounds. (18RT 3824-3825).

Dr. Herrmann took evidentiary swabs from Terena's rectum, vaginal vault, and vulva area. (18RT 3819-3823.) While Dr. Herrmann had evidently gathered fibers from underneath some of Terena's fingernails, they were never analyzed. (20RT 4180-4181.)

Terena's stomach contents were consistent with her having eaten a hamburger and french fries within a half hour to several hours before her death. (18RT 3825-3826.) Terena had been lactating at the time of her death. (18RT 3831.) There was no detectable blood alcohol; nor were there any controlled substances in Terena's blood stream. (18RT 3840-3841.)

Dr. Herrmann observed "blunt" force injuries, which included bruises or contusions, scrapes and abrasions. There was a blunt force abrasion or scrape on Terena's right wrist. There was also a bruise on Terena's right hip/buttock area, which was consistent with being a "hickey or monkey bite[.]" (18RT 3805, 3808-3811, 3833; cf. 18RT 3836 [bruise also consistent with bruising from other sources].)

One of the photographs taken by Dr. Herrmann showed five deep, premortum, blunt-force-trauma lacerations or breaks in the skin surrounding Terena's anus. Those wounds were consistent with penile penetration, and could have been painful. (18RT 3811-3812, 3817, 3832.)

Criminalist Smith obtained the various pieces of evidence from Sergeant Taranto, including the whole blood samples obtained from Donald and appellant, and Terena's body. Taranto also gave Smith the rectal, vaginal, and vulva swab samples obtained from Terena' body during the autopsy, and the jeans which had been dangling from Terena's right ankle. (21RT 4265-4271.)

A swab taken from Terena's rectum was positive for the presence of semen. (41RT 4271.) Criminalist Smith did not see a smear on the coroner's rectal microscopic slide, "so I didn't see much microscopic debris" on that side. (21RT 4302-4303; see 21RT 4352 [saw no sperm].) However, Smith saw spermatozoa on a rectal slide she prepared. (21RT 4271-4273.)

Smith's initial presumptive test for semen on one of Terena's vaginal swabs was inconclusive. (21RT 4273-4274.) Smith saw the head of a sperm on top of a skin cell, an intact sperm, and several sperm heads on the coroner's vaginal slide. (21RT 4303-4306, 4327, 4352-4354.) There had been no coroner's vulva slide, but one of Terena's vulva swabs was positive for semen. (21RT 4274, 4306.)

Ms. Smith made an additional vaginal slide, using one of the vaginal swabs. That slide had two possible sperm heads. (21RT 4320-4324, 4327.) Ms. Smith made another vaginal slide, using another of Terena's vaginal swabs. She did not observe any sperm or sperm heads on that slide. (21RT 4325, 4327, 4354-4355.)

Smith used one of the rectal swabs to both test for the presence of semen and to make a rectal slide. She saw multiple sperm heads. Smith also made a vulva slide from one of the vulva swabs. She observed multiple sperm heads. (21RT 4347-4349, 4351-4353.)

Smith did blood typing of the various whole blood samples. Appellant's blood ABO typing was type AB and his Lewis blood type was

type A. Terena was ABO type AB and Lewis type B. Donald was ABO type O and Lewis type B. Smith found blood stains on Terena's jeans. She also found several areas of light yellow-brown stains on the back of Terena's jeans. When Smith tested two of the yellow-brown stains, they were positive for semen. (21RT 4725-4276.)

Smith repacked the swabs, and prepared samples which she had taken from the three whole blood samples. (21RT 4277-4280; Exh. Nos. 44A [Terena], 45A [Donald] & 46A [appellant].) Smith cut out two samples of the semen stains from Terena's jeans. (21RT 4280-4283; Exh. Nos. 47A [stained and control areas] & 48A [same].)

Smith tested both "Pliers Plus" seized from appellant's bedroom for blood with negative results. Smith found no blood on the tool cases. (21RT 4360-4361; see 21RT 4374 [thorough washing could remove fresh blood from a hard object].) Smith examined the paring knife taken from the rectory for blood with negative results. (21RT 4365-4367.) Smith tested a swab obtained from the area of the contusion on Terena's buttock for saliva with negative results. (21RT 4370.) Smith did not notice cuts or separations on Terena's sweat shirt, but she did see puncture marks on other parts of Terena's outer garments. (21RT 4372-4373.) Smith observed what appeared to be blood stains on both of the fingernail clippings the coroner had obtained from Terena's body. (21RT 4373.)

In April 1996, Criminalist Smith released various portions of the evidence to Sergeant Taranto, in part so that various samples could be tested for DNA. Smith used various procedures to prevent contamination of the whole blood and semen samples. (21RT 4283-4284, 4356, 4371-4375.)

On cross-examination, Smith admitted she had made both a clerical (a "typo") and a reagent mistake in a "blood proficiency test" "in the early '80s." (21RT 4299-4300.) On another occasion, another lab criminalist

had mistakenly mixed two samples together, and Smith had reviewed and approved the "mistaken result." (21RT 4300.)

Senior criminalist Steven Myers from the DOJ Berkeley Laboratory performed DNA testing on known (i.e., "reference") blood samples obtained from Terena's body, and from Donald and appellant, as well as semen samples obtained from Terena's vaginal, rectal, and vulva swabs, and from her jeans. Mr. Myers utilized both RFLP and polymerase chain reaction/short tandem repeat (PCR/STR) DNA testing techniques in the course of his work. (23RT 4457-4458, 4468-4469, 4478, 4496-4498.)

Myers' testing excluded Donald as the source of the semen on Terena's jeans. (23RT 4487.) The RFLP DNA testing showed the DNA profile of the sperm taken from Terena's jeans and from one of her rectal swabs matched appellant's DNA profile. (23RT 4481-4496.) That profile is exceptionally rare, being expected to occur "in approximately . . . one in 32 billion Caucasians . . . ." (23RT 4482, 4490-4584; see 24RT 4634-4636 [the very conservative "ceiling approach" calculation was one in 15 million], 4260.)

Myers also conducted PCR DNA testing on the three blood samples, the semen stains on Terena's jeans, one of the two vulva swabs, and a different rectal swab collected from Terena's body. Using the D1S80 DQ-alpha, and the five-marker polymarker test kits, the DNA from the rectal swab and jean semen stain "matched" appellant so that "within the limits of those tests, [appellant] was included as a potential donor." (23RT 4497-4498, 4501-4502.) The frequency estimate for the seven markers used in this testing, as reflected in FBI data bases, was one in 150,000 Caucasians. (23RT 4506, 4584.)

During his DNA testing of a sample from one of the vulva swabs, Myers found that during preparatory washing there had been incomplete separation of the sperm and non-sperm DNA. He found "very few sperm

and a lot more non-sperm cells" in that sample. (23RT 4498.) The non-sperm fraction was mostly consistent with Terena, "as well as some additional types consistent with some carry over of the sperm." (23RT 4498.) The sperm fraction was mostly of one predominant type. However, two fractions showed an additional donor that was inconsistent with Terena, Donald, or appellant: In other words, "there was a mixture of DNA." (23RT 4498-4499; see 23RT 4558.) "This additional donor was a very minor donor and was only clearly detected at a few loci."[8] (23RT 4499; see 23RT 4499 ["there was a mixture of DNAs"]; 4500 [in that "mixture . . . we are seeing . . . at least three people involved"].) Myers also found possible human non-sperm fractions, not belonging to appellant, Donald, or Terena, on a sample taken from Terena's jeans. (23RT 4559.)

Laboratory quality assurance procedures showed that any cross-contamination in the samples likely came from "something cellular and it was on the sample prior to any receipt." (23RT 4502.) While some of the results inconsistent with these three persons were "on areas that are potentially cross-hybridization spots . . . . [¶] . . . [from] the other markers, I was able to definitely see additional types." (23RT 4561-4562.) Myers believed the addition of the third donor on the vulva slide did not occur through contamination in the DOJ laboratory. (23RT 4502.)

Myers also conducted a third DNA PCR test, called the short tandem repeat (STR) test. Myers tested material from one of the vulva swabs and the "sperm fraction." He concluded the "major donor" of DNA on the

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[8] Another vulva swab was available for testing, since Myers "always tr[ied to] maintain evidence for defense retesting, and [so he] did not consume that other vulva swab." (23RT 4502.) Myers also saved enough of the rectal swabs and pants stains "for potential defense retesting, because really the best way to take care of any risk of sample mixup is to retest the evidence. And so we always try and gear towards having that available for the defense." (23RT 4509.)

vulva swab matched appellant's DNA profile, with a frequency expected to be "seen in approximately one in 38 million African Americans and one in 1.6 million Caucasians." (23RT 4506-4508; see 23RT 4584 [used computer bases created by the test manufacturer].) Given the results of testing "on the STRs and the D1S80 and the PM, DQA1, all of these PCR markers . . . run on the vulva swab, and the totality of the profile, the major donor was all consistent with [appellant]. And so this is [really] strong evidence that [appellant] . . . is the major donor to the sperm fraction of the vulva swab." (23RT 4508; see 23RT 4508-4509, 4511-4512.)

In the course of cross-examination, Myers agreed it is possible for a DNA analyst to override or adjust the computer, so that in making "manual assists" where there are very light bands not originally detected by the computer, the criminalist can more precisely direct the computer to that particular area. (23RT 4580-4581.) In testing materials in this case, Myers' supervisor, Gary Sims, manually overrode his computer readings several times. (24RT 4683-4686.)

Mr. Myers also explained contamination can occur when DNA-containing materials are inadvertently introduced into evidence being analyzed for DNA type. (23RT 4512-4513; 24RT 4687.) At some point, evidently the person previously using the typing trays used by Myers in this case had used tap as opposed to ionized water to clean the tray. That had introduced ions into the tray. Mr. Myers did not consider this to be DNA contamination. (24RT 4687-4691, 4698-4701.)

Apparently on June 24, 1996, during the typing process in this case, Myers mistakenly allowed material from one well in a "reference" typing tray to spill over into the next well. (24RT 4691- 4692, 4699-4700, 4704-4705.) Myers repeated the test. (24RT 4705.) Myers had cross-contaminated samples in four cases between 1993 and 1995. (24RT 4692-4697.)

Mr. Myers had never reported an incorrect result on a proficiency test. However, on one occasion, he obtained the correct results, but incorrectly noted the type of "dots" on the reading. (24RT 4614.) Myers went back and again looked at the results and corrected the error. (24RT 4615.)

3. Defense Case

During the relevant time frame, Mark Fermenick worked in San Leandro. He generally returned home between 5:30 and 6:30 p.m. Mark regularly used a company car. Prior to Donald and Terena's marriage in July 1994, Terena lived at the Fermenick residence for approximately one year. (25RT 4819-4820.)

On January 18, 1996, Mark arrived home between 5:45 and 6:15 p.m. Lori and Donald were present. Later that evening, Mark and Lori left, Lori leaving around 7:00 p.m. to attend Weight Watchers. (25RT 4829-4830.)

Donald borrowed Mark's van somewhere around 8:30 to 8:45 p.m. He wanted to go to the church in Alameda to look for Terena. (25RT 4830-4833.) Donald called Mark at approximately 9:30 p.m., telling him at minimum that "'I found her. She's naked.'" The phone connection "went dead." (25RT 4833.)

Mark's father had been the minister at the Alameda church and Mark had lived in the rectory for six months, beginning in January 1992, before moving to the Pleasanton home. Mark and his family attended the Alameda church and he usually visited with other family members on Sundays. (25RT 4820-4821.) After Mark's father died on October 11, 1995, Terena wanted to move into the rectory. But, she was also apprehensive about being at the rectory at night since Donald would be working a graveyard shift, and she was afraid for her and Regan's safety. Terena told Mark she was fearful because "a lot of traffic [went] through the area." (25RT 4822-4825, 4831.) According to Mark: "There was a passageway that ran between a fence and the church building, and [on rare

occasions] we would hear people come through there." (25RT 4825.) Also, sometimes people used the respective sidewalks in front of the church and the rectory. A year-to-a-year-and-a-half prior to his father's death, Mark had found a stranger in a church classroom. (25RT 4825-4828.)

Sergeant Beetle was one of the initial Alameda Police officers responding to the report of a possible homicide at the rectory. Officer Enry was already there. Donald was seated on the floor, holding Regan. (26RT 4837-4838.) At Beetle's direction, Officers Enry and Damian handcuffed Donald for "security reasons." Donald "looked like he was in complete shock." (26RT 4837-4839 [Donald was staring ahead blankly]; cf. 26RT 4837 [in his police report Beetle wrote Donald "seemed extremely calm considering the circumstances. He appeared to be breathing normally"].)

Alameda Police Officer Ellis took Donald to the hospital for a sexual assault examination. Donald was "very quiet" and "void of emotion . . . ." (26RT 4842-4843.) During the examination, the nurse pulled out one or two of Donald's pubic hairs. Donald "odd[ly]" commented, "I'm losing my hair or my hair is thinning on top but I'm not losing it down here." (26RT 4843-4844.)

At the request of the Alameda Police Department, on January 26, 1996, FBI Special Agent Skeels used an "alternative light source" in an attempt to find blood and/or semen in the van appellant used on January 18, 1996. She did not find any blood or semen residue. (26RT 4845-4847.) Skeels did not smell or see anything visible inside the van indicating it had been cleaned. (26RT 4848.)

The parties stipulated: (1) based upon photographs prepared by the defense, and entered into evidence, that there was a public telephone at the Jack in the Box and one across the street from the restaurant (Def. Exhs. M1 & M2); and (2) to the admission into evidence of copies made by Detective Miller of his calls to the "900" numbers called from the rectory

on January 18, 1996, each one lasting 40 seconds (Def. Exh. N[9]). (26RT 4850.)

B. Penalty Retrial

1. Prosecutor's Case-in Chief[10]

a. Facts and circumstances evidence

Dr. Paul Herrmann was a pathologist employed by IFS. The institute, a partnership of pathologists, is contracted by the Alameda County Coroner to conduct all "medical/legal" autopsies to determine the cause of death. (48RT 8563-8565.)

Dr. Herrmann conducted an autopsy on Terena on the morning of January 19, 1996. (48RT 8566-8567.) When Dr. Herrmann initially saw Terena's body, he observed "a great deal of blood present in many areas of the body, particularly about the neck. Blood had run from the neck to the lower parts of the body. There was blood on the hands, particularly the left hand, and blood was also present on her face." (48RT 8567.) Terena was "partially clothed," since there was a pair of blue jeans hanging around one leg, inside of which was a pair of bikini-type panties. Terena was wearing

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[9] The 3:07 p.m., telephone call was to "real swingers" introduction line, and the second, 3:08 p.m. telephone call was "information services," where the caller could speak to a "young lady," a psychic, obtain a horoscope by an astrologer, or find out "scores and pro picks." (Exh. N1.)

[10] As noted above, respondent does not repeat the prosecutor's "facts and circumstances" evidence proffered at the penalty trial, since that evidence was substantially the same, as noted in the above alternate citations, as the prosecutor's guilt phase evidence. Respondent sets out the testimony of pathologist Paul Herrmann, since Dr. Rogers testified in the guilt phase using Dr. Herrmann's autopsy protocol and the photos Herrmann took during the autopsy. The prosecutor did not elicit, among other things, evidence concerning appellant's appearance at the time of his sexual assault examination, appellant's contacts with police during their surveillance of him prior to arrest, and the serological and DNA evidence—including any chain of custody evidence—at the penalty retrial.

a pair of white sweat socks and she was still wearing a running shoe on her right foot, underneath the dangling jeans. There was blood on the clothing. (48RT 8566-8568.)

Terena "had a number of wounds." (48RT 8568.) Appellant had cut a deep wound in Terena's neck, the wound running from nearly the front of the neck to the left side of the neck, "expos[ing] the muscles and even the [spinal] bone . . . ." (48RT 8568-8569; see 48RT 8573-8574.) Appellant had completely severed the left jugular vein, but he had not impacted the carotid artery. That wound caused Terena's death, and Dr. Herrmann believed Terena would probably have gone into shock within a minute, and died within "a few minutes." (48RT 8577-8579.) Appellant had made seven additional, superficial and non-life-threatening stab wounds (cuts which did not extend into the muscle) to Terena's neck. (48RT 8568-8569, 8577, 8582-8583.)

Appellant also stabbed Terena twice on her right flank "one above the other, and there was blood that had run from those, as well, outside the body." (48RT 8569, 8572-8573.) The upper cut penetrated the abdominal cavity, striking the rib cage and Terena's diaphragm. That wound was "ordinarily" "a survivable wound." (48RT 8577.)

Appellant had also made six cuts on the palm side of Terena's fingers on her left hand, and one similar cut on a finger of Terena's right hand. These wounds were consistent with being defensive wounds, where the victim attempts to either grab or push away the cutting instrument. (48RT 8569, 8573.)

Dr. Herrmann noted an unusual purple-blue contusion on Terena's right buttock, and several smaller contusions on her thighs and legs, a few of which appeared to be several days old. (48RT 8569-8572, 8574.) According to Dr. Herrmann, the contusion on Terena's buttock was "oblong . . . with an area of pallor, black and blue around the outside, and

in the center it's somewhat pale. It suggested to me at the time I first saw it of the possibility of it being a bite mark, but I wasn't sure." (48RT 8575; see 48RT 8580-8581.)

Terena's anus was dilated and there was dried fecal matter around her anus. Dr. Herrmann observed five tears around and to Terena's anus which led into her rectum. Dr. Herrmann opined something larger than Terena's anal opening caused the tearing of the skin around the anus and that tearing had occurred prior to Terena's death. The tearing was consistent with Terena being sodomized. The fecal matter around the anus was also consistent with Terena being sodomized. (48RT 8569-8571, 8574-8575.) Dr. Herrmann believed the sodomy was probably "very painful." (48RT 8578.) There was no sign of alcohol or drugs in Terena's blood. (48RT 8578-8579.)

b. Other aggravating evidence

(1) Prior convictions

The prosecutor introduced certified copies of the record of appellant's October 4, 1983, felony convictions in Orange County for commercial burglary and petty theft with a prior, those offenses having occurred at the same time. (48RT 8661-8663.) The prosecutor also introduced appellant's section 969, subdivision (b), packet, showing appellant had been convicted in Orange County for first degree burglary on September 26, and October 7, 1985, for which he had served a prison term. (48RT 8661-8663.)

(2) January 1990 possession of a billy club[11]

During the early morning hours of January 5, 1990, Rialto Police Officer Huddleston was in a marked patrol car, "doing extra patrol of construction sites as a result of theft from property." (50RT 8871-8872.) At approximately 2:35 a.m., Officer Huddleston saw a car stopped in the middle of the road. Appellant started the motor, turned on the car lights, and drove away. As Huddleston got closer, he noticed several large pieces of plywood or particle board sticking out of the car's trunk. As appellant turned onto an intersecting street, the material in the trunk shifted. Huddleston stopped appellant for having an unsafe load. Appellant was alone. (50RT 8871-8873.)

Officer Huddleston looked inside the car and saw a billy club between the driver's seat and door. The club was approximately three feet long, about the size of a baseball bat. The diameter of the thicker end of the club was approximately four inches, and the club tapered down to the other end, which had a diameter of about three inches. The club's handle had a grove carved into it, designed to afford a better gripping surface. (50RT 8873-8875.)

Appellant's hands were dirty, and his knees were wet and dirty. Appellant gave Officer Huddleston inconsistent versions of how he obtained the plywood, initially saying he got the plywood from his

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[11] The prosecutor did not introduce evidence concerning appellant's January 1990 possession of the billy club or his October 1999 jail possession of a razor at the first penalty trial. Nor, did the prosecutor introduce at the first penalty trial, rebuttal evidence concerning: (1) Deputy Borland's observation of the effects of the use of a razor as a weapon; (2) Inspector Brosch's testimony and the PacBell exhibit relating to the telephone calls to sexually-explicit numbers made from the Nadey residence to Guyana, Hong Kong, and the United Kingdom; and (3) Mr. Giles's testimony concerning appellant's December 1992 exposure of his penis to Giles and his sister.

grandfather. After Huddleston arrested appellant, appellant told Huddleston he got the plywood from a friend, Gordon. Subsequently, Huddleston learned the plywood had been taken from a construction site. (50RT 8874-8875.)[12]

(3) April 1990, carrying a concealed weapon

On April 28, 1990, at around 4:30 p.m., Fontana Police Officer Jacobson stopped appellant for having a large crack in his windshield. Appellant was shirtless, wearing short pants, and knee-high socks. Appellant's socks were pushed down so that they "bunched up" around his ankles. (49RT 8711-8714, 8718, 8723.) Appellant was accompanied by a woman in the front passenger seat and children in the back seat. (49RT 8718.) The car was registered to a person by the name of Yeoman.[13] From the various items found in the car, it appeared someone was in the process of moving. (49RT 8726-8727.) Jacobson issued appellant a citation for the cracked windshield. (49RT 8713.)

During the stop, Jacobson ran appellant's driver's license. He determined appellant's driver's license was either suspended or revoked. Jacobson impounded the car. (49RT 8713.) Jacobson pat-searched appellant prior to transporting him to jail. When Jacobson felt a hard object concealed by the sock on appellant's right foot, he removed a dirk/dagger, i.e., a straight-edge knife with a point sharpened on both sides. Appellant had been carrying the dirk in a sheath, which had been tucked inside

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[12] The trial court took judicial notice of, and admitted into evidence, certified copies of documents from the San Bernardino County Municipal Court showing appellant was arrested for possession of a billy club, and on May 7, 1990, he was convicted of that offense. Appellant was sentenced to 30 days in the county jail. (53RT 9351-9352, 9437; PR Exh. No. 51A.)

[13] Ann Yoeman was appellant's long-time girlfriend, and the mother of his three daughters. (49RT 8760.)

appellant's right shoe. (49RT 8713-8715; see PR Exh. No. 39 [xerox of a similar dagger].)[14]

(4) May 1994 molestation of Sarah S.

On May 10, 1994, 13-1/2-year-old Sarah S. lived in a room at the Caravan Inn in Anaheim, with her mother, the mother's boyfriend, and Sarah's two siblings. Appellant, his girlfriend, Ann Yeoman (Ann), and their three girls, then ages four to eleven, had also been living at the motel, and appellant and Ann were friends of Sarah's mother. (49RT 8746-8747, 8781; 52RT 9299-9300.) Prior to May 10, Sarah had known appellant for between one and two years and had babysat his daughters. (49RT 8760.) Appellant and Ann had separated, and appellant was renting a room at the Little Blue Boy motel. That motel was less than a block from the Caravan Inn. (49RT 8761, 8781-8782.)

Sometime during the late afternoon or early evening of May 10, 1990, appellant asked Sarah if she and her friend, 11-or-12-year-old Kim, wanted to join him in at his room at the Little Boy Blue to "have fun, play cards." At around 11:00 p.m., Sarah, Kim, and Sarah's 11-or 12-year-old sister, Susan, went to appellant's room. When they arrived, appellant, appellant's friend, Rick Ritchey,[15] and "20 something" Michelle were present. (49RT 8747-8749, 8761-8763, 8781-8783.) The three adults were drinking alcoholic beverages. (49RT 8763.)

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[14] The court took judicial notice of, and admitted into evidence, court documents which showed appellant was convicted on May 16, 1990, for carrying a dirk, and was sentenced to 19 days in county jail. (53RT 9391-9392, 9436; PR Exh. No. 51B.)

[15] According to Ritchey, he met appellant a year previous, when he and his girlfriend lived next door to appellant and Ann at the Caravan Inn. (49RT 8790-8791.) Ritchey explained he and appellant "talked like normal friends," and consumed methamphetamine together. (49RT 8779-8780; see 49RT 8790-8791.) On May 10, Ritchey was staying in a friend's room at the Caravan Inn. (49RT 8796-8797.)

As soon as the three girls arrived, appellant offered some powdered methamphetamine (meth) to Sarah. (49RT 8749-8750; see 49RT 8800 [according to Ritchey the meth was on a glass mirror on a desk].) Appellant did not offer any to Kim or Susan because "they were too young. [Sarah] told them not to even look." (49RT 8750.) Sarah and appellant went into the bathroom to "snort" meth. Sarah had never before been alone with appellant. Appellant gave Sarah what she characterized as a "friend[ly]" hug while they were in the bathroom. (49RT 8750-8751.)

Even though Sarah was "a little dizzy," appellant offered her more meth. Again, they snorted it in the bathroom. (49RT 8751.) Appellant again hugged Sarah several times, in what she again characterized as a non-sexual way. (49RT 8768.) Ritchey and Michelle were also doing meth. (49RT 7852, 7864-8765.)

After Susan left for home on Sarah's instructions, Sarah and Kim continued to party with the three adults. The group drank and ingested meth for about three or four hours. Appellant gave Sarah meth an additional three, "maybe more[,]" times. (49RT 8752-8753.) Sarah also consumed "[m]ore than five beers," and wine coolers. (49RT 8753, 8777.) After her last ingestion of meth, Sarah "didn't feel real comfortable. I was . . . feeling more dizzy, feeling tired from doing it." (49RT 8753.) Michelle left. Initially, Kim lay on one of the room's two beds. According to Sarah, Kim was not under the bed covers. (49RT 8753, 8766, 8805-8806.)

Subsequently, Sarah went and lay next to Kim. Sarah lay on her back under some sheets, fully dressed. Initially, appellant sat on the bed before he also lay down; according to Sarah, he was outside the sheets. He situated himself next to Sarah, "[w]atching TV and glancing over at [her]." (49RT 8753-8755, 8769-8770, 8805-8807.) Ritchey lay on the other bed. (49RT 8770-8771.)

At the time of her testimony, Sarah did not remember appellant having touched her other than accidently while the two were on the bed. (49RT 8767-8768; see 49RT 8775.) Several days after the "party," Sarah told Anaheim Police Officer Imperial appellant "rubbed [her] breasts while [she was] under the covers[.]" (49RT 8756.) Sarah passed out. When Sarah woke up, she was still fully dressed and appellant lay next to her. (49RT 8755-8756, 8769.) Sarah testified that during that time period, Ritchey "wasn't really like all there." (49RT 8769; see 49RT 8795-8796 [Ritchey testified his mental state "was cloudy" during that period, and at the time of trial he was disabled from long-time meth use].)

Responding to a report by Sarah's mother, Keneen, Officer Imperial went to the Caravan Inn on May 23, 1994. Officer Imperial interviewed Sarah in Keneen's presence. (49RT 8758; see 49RT 8820-8823.) Sarah told Imperial that she had been at the Little Blue Boy motel with appellant, Ritchey, Michelle, Kim, and Susan. Sarah and Kim lay down on a bed around 3:00 a.m., because they were tired. Sarah related that just before she "dozed off, [appellant] had come in, got into bed with her and the other young lady and apparently started fondling her breasts under the covers." (49RT 8823-8824.) Sarah had been unsure whether appellant had fondled her on top or under her clothing. (49RT 8824.) According to Sarah, based on the police interview, Keneen and "and Ann were mad and went to . . . find" appellant. (49RT 8758.)

Mr. Ritchey reported he and appellant had been together for about one-and-a-half days prior to Sarah's arrival at the party. Appellant secured the meth consumed by various members of the group, and Ritchey and appellant had started using the meth earlier that day. According to Ritchey, the people in the room both snorted and smoked the meth. (49RT 8784, 8797-8798, 8802.) Ritchey believed "[t]o the best of [his] recollection,"

that appellant and Sarah went into the bathroom together once. (49RT 8785.)

Mr. Ritchey testified that from his observation point on the other bed, both Sarah and appellant were underneath the sheets. After Sarah passed out, Ritchey saw appellant reach his hand over Sarah under the sheets and fondle her breasts and genital area. This went on for about five minutes. (49RT 8785-8787.)

While appellant and Sarah were still in bed, Ritchey left the room to purchase cigarettes. When Ritchey returned about 15-to-20 minutes later, appellant and Sarah were exiting the bathroom. (49RT 8788, 8812.) When Sarah returned to the bathroom, appellant told Ritchey he had taken Sarah into the bathroom, and had tried unsuccessfully to vaginally penetrate her: "She was too tight, too young, so he finger banged her." (49RT 8788-8789; see 49RT 8813.)

Officer Imperial also interviewed Ritchey on May 23, 1994. (49RT 8790, 8821, 8825.) According to Ritchey at that time, "he saw [appellant] go in and get in the bed with [Sarah] and [Kim], and he saw [appellant] lay down with them, and then he saw [appellant] put his hands under the covers and was fondling [Sarah's] breasts and vaginal area." (49RT 8824.) Ritchey had further related to Officer Imperial, that later appellant "told him that they went inside the bathroom, and when they were in the bathroom, he finger banged her . . . and . . . fooled around . . . ." (49RT 8824.)

Appellant was not charged. (49RT 8828.)

(5) 1995 Virginia shooting and other Virginia probation violations

Appellant moved to Virginia in June 1994, to live with his father, Albert Giles Nadey, Sr. ("father" or "Mr. Nadey"). Appellant's father

owned a station wagon with rescue squad license plates. (50RT 8904-8905.)

Ms. Lori Sisson became appellant's probation officer during the summer of 1994, under courtesy supervision from Orange County. Appellant was on probation following his convictions for the Nordstrom's burglary and petty theft with a prior. (50RT 8902-8903, 8911, 8913.) At a September 1994 meeting, Ms. Sisson advised appellant "in detail" of the terms of his probation. (50RT 8905, 8911.) Those terms including that appellant was "[t]o maintain a stable home, to maintain stable employment, to be of good behavior, to violate no laws, to remain drug free." (50RT 8905.) In addition, appellant was prohibited from possessing a firearm, and he was to regularly submit to drug testing. (50RT 8902-8906, 8911-8914; 52RT 9273.)

Through the end of 1994, appellant's adjustment on probation was "marginal." Appellant had difficulty maintaining steady employment, and he had issues with his father and adjusting to life in Virginia. (50RT 8906.)

On April 17, 1995, Virginia Hendrix was living in Casanova, Fauquier County, Virginia. At approximately 9:30 p.m., Ms. Hendrix was driving home in a 1993 Dodge Shadow after evening college classes. She was traveling around the posted speed limit of 55 mph, on a narrow two-lane country road. The road was unlighted, curvy, had no shoulders, and there were "a lot of residences along it . . . ." As Ms. Hendrix started to navigate an "S" curve, the station wagon belonging to appellant's father "flew up behind [Ms. Hendrix] with their high beams on" and tailgated Hendrix. Ms. Hendrix "tr[ied] to get out of the way," but there was no place for her to pull over. As the "S" curve ended, the road turned into a "straightaway." (50RT 8877-8880, 8891, 8893.)

The station wagon accelerated and moved adjacent to Ms. Hendrix despite the presence of a double yellow line between the two lanes of

traffic. Once the car was next to Hendrix the driver maintained a constant speed. (50RT 8883, 8892.) The station wagon was "[c]lose enough to [Hendrix so that she would have been] able to touch the car . . . ." (50RT 8883, 8886-8887.) Ms. Hendrix looked over and saw the passenger side window was down and someone held a short-barreled pistol out the window. Given her proximity to the station wagon, Hendrix could have touched the pistol. (50RT 8884.)

Having "nowhere . . . to go," Ms. Hendrix took her foot off the accelerator to slow down. As the station wagon pulled ahead of Hendrix she saw the pistol still pointed out the window at her, and she heard a gun shot. It missed Ms. Hendrix's car. She lost sight of the station wagon as she turned toward home. (50RT 8884-8887, 8893.)

Ms. Hendrix memorized the station wagon's license plate number, but could determine only that two individuals were in the station wagon. (50RT 8886-8887.) Upon arriving home, Ms. Hendrix "basically was hysterical, and the only thing I was able to say was I saw a gun, and I kept repeating the license number, and they called the cops." (50RT 8888.) When a deputy sheriff arrived to interview Hendrix, she gave him the license plate number: The deputy "knew who it was." (50RT 8888.) Ms. Hendrix told that deputy the "shot was fired in the air[.]" (50RT 8898.)

During the subsequent police investigation, Ms. Hendrix told the investigator the passenger held and shot the pistol. At the time of trial, Hendrix testified she could not remember if the shooter had been the passenger, and could only remember that the pistol was pointed out of the passenger window. (50RT 8899-8900.)

The following morning, appellant's father advised Probation Officer Sissons that the police had contacted him, wanting to speak to appellant because of the station wagon's involvement in a "drive-by shooting." At Sissons' request, appellant came to her office that afternoon. Appellant

was directed to supply a urine sample, and he tested positive for marijuana. (50RT 8907.) Based upon that test and several prior positive tests, as well as appellant's failure to follow through with his treatment requirements, Sisson gave appellant two hours to arrange for the care of his children. Appellant surrendered later that afternoon. (50RT 8907-8908; 52RT 9273.)

Appellant's father had earlier observed appellant violate the probation term not to use alcohol. After appellant was taken into custody, he admitted to his father he had also used drugs. (52RT 9274.)

On April 21, Ms. Sissons meet with appellant at the jail. When Sissons read the violation notice alleging he had possessed a firearm, appellant interrupted to say he had possessed and fired a gun on April 17. He claimed he had not shot at Ms. Hendrix's car, but rather he had shot at a bird that was on a fence. At his May 3, 1995, preliminary hearing on the violation notice, appellant admitted he had possessed a .22 caliber handgun, which he had fired. (50RT 8908-8910.)

Based upon a probable cause determination, probation officials decided to return appellant to Orange County. Eventually, Orange County Probation decided not to extradite appellant. Virginia Probation "lifted" the warrant under which appellant was being held, so that appellant could return voluntarily to Orange County to face probation violation proceedings. (50RT 8919-8921.) Appellant personally obtained a bus ticket to return to California. (50RT 8924-8925.) Virginia authorities never charged appellant regarding the April 17, shooting. (50RT 8922.)

In April 1995, Karen King (Karen) was married to Jeff King (Jeff). Appellant and his three daughters had come to live with his father, who lived next to the Kings. Jeff and appellant had the same employer. Appellant, Jeff and Karen became close friends, and Jeff and appellant "would hang out sometimes after work, or we'd all go out together, or sometimes they would go out together places." (50RT 8927-8929, 8931.)

In September 1995, Jeff pleaded guilty to the April incident involving Ms. Hendrix. (50RT 8929.) Jeff had been jailed for the incident in June 1995, and according to Karen, either at that point or when he later pleaded guilty, Jeff first mentioned the incident to her. He told his wife appellant "was the gunman and that he was taking the rap" (50RT 8930), "because he didn't want [appellant] to get sent back to California or that [appellant] would get in more trouble than he would . . ." (50RT 8934; see 50RT 8930-8933). Jeff, whose only prior arrest was for driving under influence, was sentenced to "a couple" of weekends in jail.[16] (50RT 8930.)

(6) October 1999, possession of a razor blade while in segregation

Alameda County Sheriff's Deputy Rocha worked at Santa Rita jail. Appellant was housed in administrative segregation during the pendency of these proceedings. A detainee in administrative segregation is separated from other inmates, and is single-celled. Inmates can be in administrative segregation for various reasons, including the crimes for which they are charged, or if they are violent. Detainees in administrative segregation have different rules than those in the general population. These include rules prohibiting administrative segregation inmates from possessing certain items available to "mainline" inmates. Among the prohibited items are nail clippers, "Bic" plastic razors, and certain commissary items, since an inmate can turn those items into a weapon. A deputy gives an administrative segregation detainee a razor so the he can shave. After shaving, the detainee is required to return the razor to the deputy. (49RT 8729-8732.)

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[16] Appellant entered into evidence a Virginia court record showing Jeff pleaded guilty to brandishing a firearm. (52RT 9283-9284: see Exh. E.)

Deputy Rocha had observed plastic razors that had been turned into weapons by breaking the blade out of the razor and attaching it to an object such as a toothbrush. The implement can then be used as a "slicing weapon." (49RT 8733; see 51RT 9132.)

On October 28, 1999, appellant was preparing to go to the law library. Rocha and Deputy Suchman searched appellant's "legal works and legal boxes." They found a plastic razor hidden in appellant's "legal box." (49RT 8731.) That razor had not been issued to appellant. (49RT 8738.) Appellant admitted having the razor, and he received 15 days' loss of privileges. (49RT 8733, 8741-8742.)

(7) Victim impact evidence

When Donald learned several days after he had discovered his wife's body that she had been sodomized:

> [M]y life was just already in pieces . . . . I didn't even know where I was at that time. I mean I couldn't even get out of bed. I couldn't move. I couldn't function. I mean just the fact she had to go through that – I mean that's not even human. Nobody would have to go through that. [¶] . . . [¶] . . . I couldn't eat. I couldn't sleep. If I did sleep . . . I would fall asleep for a few hours in the middle of the day. I would be up all night. [¶] . . . I had my five-month old baby with me. . . . [F]or a while after that, I really had nothing to do with making sure she was fed or changed. . . . [¶] . . . I would lie in my bed for hours . . . I would have . . . articles of Terena's clothing that I would just hold next to me. . . . It was . . . unreal.

(50RT 8939-8940.)

Terena's murder changed Donald's life "[i]n every single way." (50RT 8941.) While Donald and Terena had planned to settle down and raise a family, Terena's murder had terminated those plans and he "was obviously aimless for a long time." (50RT 8941.) Donald left the ministry, and for a long time he went from job to job. (50RT 8941.) He moved to Washington state because "[e]everything I saw reminded me of Terena."

(50RT 8946.) Donald's sister lived there and she could provide child care. (50RT 8946.) Four years later, Donald was "still not in an occupation I would consider my career . . . ." (50RT 8941.) Donald was now taking community college classes, and he and his new wife, whom he married a year prior to his penalty retrial testimony, operated a coffee shop. (50RT 8942.) Donald's new wife and Regan were bonding. (50RT 8948.)

At the time of Donald's testimony, Regan was four-and-one-half-years old. (50RT 8940.) Regan would "have to go through life and not ever know who her mother is. She knows nothing about her mother . . . except for those things . . . I tell her . . . except for photos that I show her." (50RT 8942.) The only thing Regan actually knew about her mother was that "she is in Heaven now." (50RT 8943.) Donald was particularly affected by Terena's murder each year at the time of her death and on Regan's birthday. (50RT 8943.)

According to Donald, when he visited Terena's grave, "it really is empty for me." He explained:

> She was so happy. She always had a smile on her face. And she was perfect for me because I kind of have a tendency – I don't want to listen to people sometimes, but she had a way with me . . . that I would listen to her. And she was so kind and loving. And as far as having parts of her that didn't like people, that didn't exist in her. She just had a pure heart. And she was just happy to be around; she was fun to be around.

(50RT 8944.)

During cross-examination, and as amplified in the prosecutor's redirect examination, Donald explained, as already set out above in the guilt phase summary of evidence, the wrongful-death civil actions he brought on his and Regan's behalf, and the resulting settlement. (50RT 8950-8952.)

Terena was Donna Bryant's "baby" sister. Ms. Bryant lived in Seymour, Indiana. (50RT 8952-8953.) She was notified the morning after

Terena's murder that Terena had been killed, and she originally assumed Terena had died in a car accident. (50RT 8953-8954.) Ms. Bryant "threw down the phone, and . . . just kept yelling out 'my sister, not my sister.'" (50RT 8954.) Ms. Bryant "couldn't even comprehend it," and she called the Alameda detective to confirm her sister's death. (50RT 8954.) Bryant called her brother-in-law so he could tell her other sister, Robin. Initially, Ms. Bryant was not told Terena had been sexually assaulted. (50RT 8954-8955.)

> [N]one of us are the same [after Terena's murder]. Robin and I had . . . to go down and tell my parents at work. And that was the first, hardest part, because we got there, mom and dad walked in the door, and dad looked at, and he knew something was wrong. [¶] . . . [T]o tell your parents is . . . horrible. And we sat them down, and . . . we told them there had been an accident, that Terena was killed. [¶] . . . [W]e couldn't even use the word "murdered." I've just now been able to use that word.
>
> . . . [M]om jumped up, and . . . said, "No, I've got a letter for Terena. I'm mailing it today. I've got a letter to mail to her. It can't be." [¶] . . . [M]y dad looked at me and he . . . just . . . broke my heart. It [is] . . . the most horrible thing that you could ever tell anybody in the world. And then when we found out she had been raped . . . I had to look at my mom and tell her that.

(50RT 8955; see 50RT 8954.)

Ms. Bryant still reacted physically when she thought about Terena. "I was – like I am now, just sick. My stomach is in knots. I feel nauseous. To think that something so vile could be done to her just makes me so sick that I can't even . . . put it into words." (50RT 8958.) What Ms. Bryant missed the most was Terena's friendship: "[W]e were best friends. She . . . was a good person. She was easy to talk to. She [was] everything you'd want in a friend and a sister." (50RT 8956-8957.) Bryant explained the most difficult time of the year she had regarding Terena's death was Christmas since "there's something missing." "[I]t was just . . .

everybody's favorite time of year. We just always got video cameras out, and we made dinner, and we opened presents, and we spent the whole day together. And . . . when Terena moved out to California and she couldn't make it home, we'd make . . . videotapes, and we'd send messages to her . . . ." (50RT 8956.)

Ms. Bryant continued to feel unsafe and she remained angry. She had visited Terena's grave "just a couple of times," because she did not "want to think of that." (50RT 8956-8957.)

On the morning of January 19, 1996, Terena's mother, Carolene McGurer (Carolene), and Terena's father, Robert McGurer (Robert), were escorted to a room at work. Several friends, and Robin and Donna and their husbands were there. Initially, Carolene thought Terena and Donald had been in a plane crash. When the McGurers refused their daughters' requests to sit down, the daughters pushed them into chairs. Donna and Robin "got down on their knees and took [the couple's] hands, and they told us that Terena had been murdered the night before." Ms. McGurer threw down her eye glasses, and attempted to run out of the room, screaming, "It's just not my child. Not my girl. Not one of my kids. You don't murder my children." (50RT 8960-8961; see 50RT 8966.)

When Carolene later found out Terena had been sodomized, she felt "[s]ick. To know that somebody would hurt one of my children in that way hurt me, made me sick. All my children's lives, I protected them, never ever wanted them to get hurt. . . . [¶] And to this day, I just . . . get sick when I think that she was hurt, what she must have felt. She was so beautiful . . . ." (50RT 8961-8962.)

When the prosecutor asked Carolene if there was a particular time of year "which is more hurtful," she gave examples. (50RT 8962.) The first was the anniversary of Terena's death. The second was Terena's birthday, October 30, since "from the time she was real little, we always had a

Halloween birthday party, everybody in costume, sometimes 30, 35 children there. It was always such a big deal." (50RT 8963.) The third was Christmas. Finally, Ms. McGurer testified: "I miss her every day. There is not a day that goes by that I don't think about her. Mother's Day, she always made a big deal of Mother's Day, and Father's Day always from the time she was little." (50RT 8962-8963.)

What Carolene missed most about Terena was her smile and "[c]alling me buddy, saying 'I love you, little buddy.' When she was little and we used to go for a ride, she'd always said, 'Mommy, we'll always be buddies won't we?'" (50RT 8963.) Carolene went to Terena's grave "as often as I can. I take a rose because we always said one rose means I love you. . . . I want to dig her up. I want to hold her in my arms again and tell her I love her. I want to hold her just one more time." (50RT 8963.)

When Donna and Robin told Robert Terena had been murdered: "It was like the insides of me just died. . . . Why would anybody want to hurt our baby. She never hurt anybody. . . . [I]t was like . . . I died inside. There's nothing there. The pain was just excruciating. It just knotted me over." (50RT 8965-8966.) When Robert subsequently learned appellant had sodomized Terena: "I was so angry. . . . To realize that somebody did this to another human being is beyond my comprehension." (50RT 8966.) What Robert missed most was that Terena would come up behind him, put her arms around his neck, kiss him, "and say, 'I love you, daddy.' I'll never hear those words again." When Robert visited Terena's grave, "it was – like it happened yesterday. The pain, it all comes back. All I can see is just a piece of bronze laying there with my baby's name on it." (50RT 8967.)

After Terena's murder, the McGurers were forced to take six months off from work. "[T]here was nothing in our lives at [that] point . . . we didn't care about work, we didn't care about our bills, we didn't care about

anything." (50RT 8965.) The couple required counseling and Carolene was on medication for several months. Robert continued to be on medication, "probably always will be. I can't sleep at nights. I have to take medication to sleep, and that still do[es]n't keep me asleep all night. I wake up thinking about her and what she might have went through." (50RT 8966.)

2. Mitigation evidence

(1) Douglas Tucker, M.D.

Dr. Tucker specialized in forensic psychiatry with a subspecialty in "addictions" psychiatry. He testified that most substance abuse involves either "stimulants or uppers," or "downers," i.e., depressants. (51RT 9025-9031.) Methamphetamine is an upper. (51RT 9031.) "Addiction psychosis" is "a loss of touch with reality"; delusions, hallucinations, and thought disorder are basic symptoms of psychosis. (51RT 9034-9035.) The user may ingest, smoke, or inject meth. High-intensity meth use damages the brain, may quickly lead to psychosis, and results in lifestyle deterioration "as their life starts to center only on the drug." (51RT 9036.) Binge meth users are similar to high-intensity users. (51RT 9037.)

The consumption of a quarter-to-a-half gram of meth in 18 hours is a "substantial amount of meth."[17] (51RT 9038.) Where a substantial amount of meth is smoked or snorted over 18 hours, the effect on a person is, among other things, that they "become intensely sexual, become just actually generally intense," and "the sex drive can be a problem. People can go out to commit rapes or sexually inappropriate behaviors in public . .

[17] Mr. Ritchey testified he snorted or smoked about a half gram before Sarah arrived at appellant's Little Blue Boy motel room, and that during the time Sarah was there he used a gram of meth. (49RT 8798, 8802-8803.)

. ." (51RT 9038-9039.) Sometimes, a person who has been on a meth binge may start to look "pretty raunchy," but that is "quite variable." (51RT 9045.)

(2) Jane Doe

Ms. Doe was appellant's six-year-older, maternal cousin. While appellant had been in jail for Terena's murder, he initiated letter writing with Doe. They also had many telephone conversations. Appellant started calling Ms. Doe several times each week, and she was receiving daily letters from him. (51RT 9062-9066.) In those telephone calls and letters, appellant would talk about his three "beautiful little girls" and about "family." (51RT 9062.) When appellant talked with Doe about his daughters: "He was all excited . . . . Just he's talked about missing out on their lives, trying to raise them in the position that he is in." (51RT 9070.) Appellant had offered advice on various problems in Doe's life, which had helped Doe. (51RT 9071.)

Doe visited appellant in jail three times. Doe had not visited more frequently because of her busy professional and family life. Doe and appellant had stopped corresponding as frequently starting in March 1999 because of Doe's busy schedule. (51RT 9077-9078.)

Appellant sent Doe cards, photographs, and his drawings. Those included an Easter card, a birthday card, and drawings for Doe's son and daughter. (51RT 9071-9075.) Appellant told Doe he did not want to die, and he expressed concerns about the impact his execution would have on his mother, his very ill grandmother, and other family members. (51RT 9078-9079.)

(3) Kendra Gregory

Ms. Gregory and her two-year-old daughter began living with appellant's mother, Mary Lou Nadey, three months prior to her penalty

retrial testimony. (51RT 9149, 9157; 52RT 9229; see 52RT 9286 [Mrs. Nadey].) She met appellant in 1994 or 1995. Subsequently, Gregory moved to Redding where she was involved in two relationships. Ms. Gregory and appellant started to correspond and telephone each other. (51RT 9149-9162.) Gregory and appellant "were friends at first, and with time, our relationship has grown" (51RT 9150), so that they were now "[v]ery close friends" (51RT 9158).

They continued their friendship by mail once appellant was incarcerated. (51RT 9153, 9155, 9157.) Ms. Gregory had difficulties with her relationships, and appellant had offered advice. (51RT 9154, 9162.) During that correspondence, appellant also "talked about his girls a lot. [¶] . . . [¶] His children are his life." (51RT 9156.) During the four years prior to Ms. Gregory moving in with Mrs. Nadey, she and appellant wrote "thousands" of letters. (51RT 9157-9158.)

The next time they met in person was in March 1999, when Ms. Gregory testified on appellant's behalf at the first penalty trial. (51RT 9151.) During that proceeding, appellant's children had visited. According to Gregory: "He loves his children," and they "miss" and appear to love him. (51RT 9160.)

Since her October 1999, move into Mrs. Nadey's home, appellant would telephone Ms. Gregory every day she was not working. Gregory visited appellant every Sunday. (51RT 9158-9159.) During those visits, they "would talk about issues with his kids that would come up or what to do about them or if we could help . . . Just it's a life decision that . . . we try to make together and just do what's beneficial for the kids." (51RT 9159-5160.) Ms. Gregory had fallen "in love with who he is as an individual. [¶] . . . [¶] His . . . endeavors at trying to help me in my situations or just being there as a caring person . . . . The way he thinks, the way he is." (51RT 5159.)

On cross-examination, the prosecutor elicited from Ms. Gregory, that in one letter, appellant told her: "I just had an interesting thought. I really would have liked to see the look on your face if I had walked through visiting, dropped my pants, and say, well, babe, what you think?" (51RT 9167-9168.)

(4) John Karpe

Mr. Karpe met appellant in 1984, when they both were 16 or 17. They met at an elementary school, where Karpe had gone with "a couple of friends" to drink beer and party. Karpe and appellant became "pretty close friends," and they were "more of less inseparable" "for a good six, seven years." One of their favorite pastimes was fishing and sometimes they would cut school to do so. (51RT 9171-9173.) They also drank, "smoked some pot, things of that nature . . . ." They "dabble[d] in" meth. They used other illegal substances. (51RT 9173-9176.)

They did the "usual youth things," like getting into fights with others. (51RT 9174.) Karpe was "more aggressive," while appellant was more passive. (51RT 9174.) Appellant worked at a bakery, and he "was into decorating cakes . . . ." (51RT 9175.) Appellant would bake and decorate cakes to make extra money. (51RT 9175.)

Appellant moved to southern California, and he and Mr. Karpe lost touch (51RT 9176-9177.) Karpe had not known appellant was in prison in the latter part of 1985 and in 1986. (51RT 9186.)

Appellant returned to Hayward with Ann and their children. Karpe observed Ann under the influence of a controlled substance, which Karpe believed was meth. Appellant returned to southern California with Ann and their children, before he again returned to Hayward. (51RT 9182.) This time appellant was alone. He told Karpe he wanted to "get his life together," and obtain custody of his children. (51RT 9182-9183.) Appellant wanted to do this because he loved his children and he wanted to

remove them from Ann, characterizing that situation as unhealthy. (51RT 9183.)

Mr. Karpe had had problems with alcohol and controlled substances. He had stopped "the substance abuse but not the alcoholism." (51RT 9183.) Appellant wrote Karpe telling him what he believed Karpe was doing to himself and his family. (51RT 9183-9184.) When defense counsel Selvin asked if Karpe would miss appellant, Karpe responded: "Very much so." (51RT 9184.)

(5) Ronald Fisher

Appellant's younger, maternal cousin, Ronald Fisher, had been addicted to meth several years before. He was arrested and placed in a six-month rehabilitation program as a condition of probation. Once out of rehab, Fisher resumed using meth. (52RT 9189-9194.)

Mr. Fisher sought help from his family. Appellant wrote Fisher two or three times from Virginia, urging him not to use meth. Fisher knew appellant had been in and out of jail. In one letter, appellant explained to Fisher how much trouble he had gotten into using meth. Those letters were one reason Fisher overcame his meth addiction. (52RT 9190-9196.)

Appellant had returned to Hayward to live with his mother, and he had been at family gatherings with Fisher. (52RT 9191-9192, 9197.) Appellant and Fisher occasionally socialized although they were "not really that close." (52RT 9198.) Appellant was always talking about his children, saying he wished he had custody. At Christmas in 1995, Fisher observed appellant interact with his daughters who were visiting from Virginia. Appellant appeared to be a "loving father," and his daughters returned that love. (52RT 9191-9198.)

(6) Rev. Roy Plant

Appellant's great uncle, the Rev. Plant, had been a minister for 46 years, and was currently pastor at the Lighthouse in Waterford, which is approximately two-hours travel time from where appellant was incarcerated. As part of his duties, Rev. Plant visited incarcerated people, and while a pastor in eastern Oregon he had been involved in the ministry at the county jail. He had ministered to between 75 and 100 inmates. (52RT 9199-9204.)

Rev. Plant had very little contact with appellant until April 1996, when Plant's sister-in-law informed him appellant was in jail. She asked him to pray for appellant, and Rev. Plant put appellant's name on his church's prayer list. Rev. Plant wrote appellant, enclosing a gospel tract he typically sent to incarcerated persons. (52RT 9202-9203.)

With the help of the jail chaplain, Rev. Plant set up a schedule of weekly, one-hour visitation with appellant starting April 26, 1996. On the first visit, appellant was carrying the gospel tract Rev. Plant sent him. Appellant and Rev. Plant discussed Christianity, and the gospel tract in particular. (52RT 9204-9207.) In response to the last question in the tract, "what are you going to do with [the knowledge that we are born sinners, that Jesus Christ died for us on the cross, and that we have free will to accept or reject Christ]," appellant told Rev. Plant he wanted "to receive Jesus Christ." (52RT 9207; see 52RT 9204.)

Appellant completed a 28-day new-converts Bible study. Appellant continued to study the Bible and was accepted into Rev. Plant's church. Appellant "became very involved in the study of God's Word," and he wrote several compositions which he sent to Rev. Plant. (52RT 9211.) Rev. Plant believed they were "very good." (52RT 9212.) Rev. Plant put at least one of those essays into the weekly church bulletin. Appellant

requested and received a "water baptism" while incarcerated. Other inmates applauded afterwards. (52RT 9212-9216.)

Rev. Plant's visits with appellant continued until June 1998. Plant stopped visiting on a regular basis because he had knee replacement and heart bypass surgery. (52RT 9206, 9209-9210.)

(7) Giles Albert Nadey, Sr.

Appellant's father resided in Virginia, and had custody of appellant's three daughters, Rose, Lisa, and Krystal. Mr. Nadey made any important decisions concerning his granddaughters in consultation with his ex-wife, Mary Lou, and appellant. (52RT 9228-9229.)

Appellant had been born 33 years earlier, when the couple was living in San Leandro. (52RT 9230; see 52RT 9286-9287 [Mrs. Nadey].) The couple had a second son, Gregory, three years later, when the couple was living in Hayward. (52RT 9230, 9236; see 52RT 9286-9287 [Mrs. Nadey].)

While living in Hayward, Mr. Nadey worked at various law-enforcement-related jobs, including as a Hayward police officer. (52RT 9231.) He and Mrs. Nadey divorced when appellant was four, and Mr. Nadey moved to the Sacramento area, where he eventually worked for the Arden (American River) Fire Department in various positions. (52RT 9231- 9232; see 52RT 9287.) When appellant was six, he and his brother joined Mr. Nadey in the Sacramento area. (52RT 9233; see 52RT 9287-9288, 9290-9291 [Mrs. Nadey's testimony appellant was eight].) Mr. Nadey remarried, and then he and his second wife divorced three-to-four years later. (52RT 9233-9234.) During the school year, appellant and his brother would spend every other weekend with Mrs. Nadey. (52RT 9236; see 52RT 9291 [Mrs. Nadey].) During the summers appellant would stay with his mother for several weeks. (52RT 9236; see 52RT 9291 [Mrs. Nadey].)

Mr. Nadey was hired as the chief of a small fire department near Imperial Valley in southern California. (52RT 9236-9237.) Gregory moved with his father to southern California, but appellant did not, returning to live with his mother when he was 14. (52RT 9236, 9264; see 52RT 9291 [Mrs. Nadey].) Mr. Nadey and appellant spoke occasionally by telephone. (52RT 9237.) Appellant was still living with his mother, when around age 18, he got "in trouble," after he took his work vehicle and wrecked it. (52RT 9264-9265; see 52RT 9299 [Mrs. Nadey's testimony appellant moved to southern California at age 17].)

Appellant served a term at CDC in 1985 and 1986 for the Orange County residential burglaries. (52RT 9266-9267.) After appellant was released, he returned to live with his mother. (52RT 9267.) Subsequently, appellant and Ann moved to southern California. (52RT 9238, 9265.) Mr. Nadey met with appellant and Ann at their San Bernardino apartment. (52RT 9239.) At that point, his granddaughter Rose was two-years old. (52RT 9239.) Appellant told his father "he had been in and out of trouble, just he had been trying to support the family, a few times that he was caught . . . shoplifting." (52RT 9266.)

Mr. Nadey moved to Virginia in 1989. (52RT 9239.) He had assorted jobs. (52RT 9240-9241.) Mr. Nadey served as a volunteer fireman, involved in rescue operations. (52RT 9241.) In 1994, Mr. Nadey owned a 1978 station wagon. (52RT 9242.) The station wagon had "standard station wagon bench seats" which were approximately five feet in length. (52RT 9242.) While living in Virginia, Mr. Nadey divorced his third wife. (52RT 9242.)

Before moving to Virginia, Mr. Nadey had extended an open invitation to appellant to join him. Mr. Nadey told appellant he would make living arrangements for him and find him a job. (52RT 9268-9269.)

At that point appellant declined, saying that he and Ann were "going to try to make it work out." (52RT 9269.)

In about May 1994, appellant took up his father's earlier offer and went to live with him. (52RT 9242, 9244, 9269-9271.) Appellant told Mr. Nadey he was on probation, was having some problems, and wanted to get out of a bad environment and stabilize himself before he again got into trouble. (52RT 9242-9243, 9245, 9269-9270; see 52RT 9311 [Mrs. Nadey].) In Virginia, appellant had two jobs before he started work in construction, which was "an area that he was very adept at and enjoyed quite tremendously." (52RT 9248.)

At some point, after appellant's discussions with his parents and Ann, Rose and Lisa came to live with appellant and his father. (52RT 9246-9247.) Later, Ann brought Krystal to Virginia so that the family could be together. (52RT 9247.) Three weeks after they arrived, Ann left, saying she would return after "finishing up some affairs" in California. (52RT 9247-9248.) She never did. (52RT 9248.) According to Mr. Nadey, appellant was a [v]ery caring and loving father," and his three daughters "responded the same. They really love their father very much." (52RT 9249.)

On April 18, 1995, appellant was using his father's station wagon with Mr. Nadey's permission, since appellant "had some stuff that he needed to do that day . . . ." (52RT 9251; see 52RT 9274-9275 [appellant and Jeff King were going to a party at their employer's home].) A deputy sheriff went to Mr. Nadey's place of employment that evening and asked who had been driving the station wagon. (52RT 9251-9252.) A week later, appellant met with Ms. Sisson. (52RT 9252.) Afterward, appellant advised his father that after making arrangements for his daughters, he was to be taken into custody on a probation violation. (52RT 9253.) During the six-

to-eight weeks appellant was incarcerated in Virginia, Mr. Nadey took care of his granddaughters. (52RT 9254.)

Appellant told his father the sheriff's office had been looking for him because his "very close" friend, Jeff King (52RT 9251), "had been riding down the road and had shot out the car at a couple of birds in the tree" (52RT 9254). Appellant also told his father that "he was taking the blame for the situation, that he had been behind the wheel and it was Jeff who had done the actual firing out . . . of the car. But he didn't want Jeff to get in trouble because Jeff had never been in trouble before, had a wife and the child and the family, and he wanted to go ahead and take the rap for it" since "he was going down anyway for violation of probation . . . ." (52RT 9255; see 52RT 9312-9313 [Mrs. Nadey].) Mr. Nadey had never observed his son possess a weapon. (52RT 9256.)

With his both his own and borrowed money, appellant purchased a Greyhound ticket and returned to California. (52RT 9256-9257.) Appellant called Mr. Nadey, and told him he was in jail temporarily because the Orange County authorities "considered his time served in [the Virginia jail] as the jail time necessary for the violation sentence." (52RT 9257.) After being released from the Orange County Jail, appellant moved back to his mother's home in Alameda County. (52RT 9257, 9278; see 52RT 9313-9314 [Mrs. Nadey's testimony appellant was allowed to return to her home in 1995 on condition he complete probation and "get a job and himself together"].)

Appellant and his father talked by telephone after appellant was arrested for Terena's murder. (52RT 9280.) He told his father he had been falsely accused and that "all it is that he was the last person on the scene. [¶] . . . [¶] . . . [W]hen he left . . . everything was fine. He got the check from the lady he had been doing the work for and left." (52RT 9280.) Subsequently, appellant told his father "that there was DNA investigation

going, that there were several samples that had been sent to the lab and there were problems with some of those samples." (52RT 9280.) In a later conversation, appellant gave his father "numbers" on some of those samples, and that number "was somewhere around one out of 80,000." (52RT 9280; see 52RT 9281 ["could have been one in 3 billion"].)

While in custody for Terena's murder, appellant both corresponded with and telephoned his daughters. (52RT 9258.) Appellant telephoned at least every other week. (52RT 9258.) Appellant wrote his children "[o]n a regular basis[,]" sending them hand-drawn birthday, Christmas, and special occasion cards. (52RT 9259.) Appellant continued to be "a support factor with the girls." Appellant had input into his daughters' upbringing, "and he will continue to have input as long as he is around." (52RT 9261.) Appellant continued to be "a valuable part of" his daughters' lives. (52RT 9261.)

(8) Mary Lou Nadey

Mrs. Nadey had saved various documents from appellant's youth. These included appellant's baby book (Exh. F), a document showing appellant was enrolled in the "cradle" department at their church (Exh. G), a sample of appellant's artwork when he was "a few years old" (Exh. H), a Little League team photograph from when appellant played baseball in 1974 (Exh. I-1), an elementary school award for exceptional achievement while appellant was living with his father (Exh. I-2), and an elementary school award for sportsmanship and outstanding accomplishment in basketball from the same time period (Exh. I-3). (52RT 9289-9290, 9293-9294.)

When appellant and Greg first moved to Sacramento to live with their father, he and Mrs. Nadey had joint custody. Appellant stayed with Mrs. Nadey every other weekend during the school year, and for several weeks during the summer. When appellant was 14, Mr. Nadey called and asked

Mrs. Nadey to have appellant live with her. He threatened to place appellant in foster care if she would not consent. Mr. Nadey asked for the move because he did not want to deal with appellant's sneaking out at night, not obeying his curfew, and possible alcohol and drug use. (52RT 9291-9292.)

When appellant returned to live with his mother, he attended Arroyo High School. Appellant wrestled and played football. When appellant returned to live with Mrs. Nadey he was depressed. (52RT 9292-9295.) Appellant "was very artistic. He was into . . . cake decorating, and he also liked sports." (52RT 9295.) When appellant was 15 or 16, he got a job decorating cakes at a local super market. He also baked some specialty cakes on the side. (52RT 9295-9296; see Exh. I-5 [a picture of a wedding anniversary cake].)

Mrs. Nadey would drive appellant to and from school. While Mrs. Nadey assumed appellant was going to school, she later found out he was cutting classes. Appellant was transferred to a continuation school and completed his GED. (52RT 9296-9297.) Appellant dated while in high school, and Mrs. Nadey never observed appellant act violently toward a girlfriend of two years. (52RT 9297.) Mrs. Nadey never saw appellant use marijuana or meth, although on several occasions, appellant would stay up for several days and then sleep for the next several days. (52RT 9298.)

Not long after appellant completed his GED, he moved to southern California where he met Ann. Appellant told his mother he was very happy and that he and Ann were going to live as a couple. (52RT 9299-9300.)

Mrs. Nadey became aware that appellant had been sent to Folsom Prison when she received a letter from him from there, together with a visitation application. She never visited. While there, appellant was a minimum security inmate, serving in the prison's fire department. (52RT 9300-9302.)

Mrs. Nadey first met her granddaughter Rose when appellant and Ann brought her up to visit. Appellant loved Rose: "He cared for her, he fed her, he changed her, he played games with her." (52RT 9302-9303.) When Rose was about two years old, the couple had a second daughter, Lisa. When Lisa was almost a year old, the couple again visited Mrs. Nadey. Appellant was "a very caring person, very caring father. He loves his kids very much." Appellant, and not Ann, mostly took care of his two daughters, feeding and changing them. (52RT 9303-9305.) While in southern California, appellant was unable to find steady employment. He had a hard time getting and keeping jobs, since prior to being hired he would inform his prospective employer that he had a criminal record. (52RT 9307.)

Krystal was born in 1990. Several years after her birth, appellant and Ann brought Krystal to meet her grandmother. (52RT 9308.) Appellant never acted violently toward Ann or his daughters while they were visiting. (52RT 9309.) Ann did "not really" take care of her daughters and mostly watched television; appellant "was caring for them." Appellant "loves his daughters very much," and "[t]hey love him. Any time they have a chance to see him, they just want to run up and hug him." (52RT 9310.)

After appellant last returned to live with his mother, he shared a bedroom with Greg. Appellant was first employed by a temp agency and on weekends he worked with his uncle doing construction work. (52RT 9315.)

Mrs. Nadey arranged for her grandchildren to join her and appellant at her home for Christmas 1995. Appellant was "[v]ery loving. And the girls responded the same way. It was always hugs and kisses and loves." (52RT 9316.) Appellant planned to regain custody of his daughters and bring them back to the Bay Area to live. (52RT 9316; see 52RT 9317.)

When appellant's daughters testified at the first trial, they visited him in jail. "[T]hey had a great visit. They were just all 'I live you, I miss you daddy.'" (52RT 9319-9320.) Mrs. Nadey would bring her granddaughters to visit appellant, should the jury decide to give him LWOP. It would "break his daughters' hearts" if appellant was executed. (52RT 9321.)

Mrs. Nadey visited her son in jail twice a week. (52RT 9316.) They talked about "just everything. We talk about his girls. We talk about me. We talk about him. We talk about my mom, who is very ill. He is very concerned about her." (52RT 9317.) Appellant told his mother he "loves me all the time." (52RT 9317.) Appellant had given his mother "a lot of support to stay strong through all of this and to have faith and . . . believe in God and we'll get through this." (52RT 9317.) Appellant had given his daughters a drawing of Jesus with the verse, "'I am the good shepherd. The good shepherd giveth his life for the sheep.'" (52RT 9318.) He gave his mother a hand-painted handkerchief, and hand-made cards for Valentine's Day and her birthday. (52RT 9318.) Appellant had written on a birthday card:

> "Life is a mixture of sunshine and rain, laughter and teardrops, pleasure and pain, low tides and high tides, mountains and plains, triumphs, defeats, and losses and gains. But always in all ways God's guiding and leading, and He alone knows the things that we're most needing. And when He sends sorrow or some dreaded affliction, be assured that it comes with God's kind benediction. And if we accept it as a gift of His love, we'll be showered with blessings from Our Father above."

(52RT 9319.) Mrs. Nadey would lose "[p]retty much everything [if appellant was executed]. . . . [T]his is my first born son, and I love him a great deal. It would just break my heart to see somebody other than the hand of God killing him." (52RT 9321.)

Appellant and Greg had gone to the same schools. The two had gone to live with Mr. Nadey at the same time. Greg had never been in trouble with the law. (52RT 9339.)

Appellant "was cleaning himself up from drugs and was not drinking as much," when he worked for the carpet cleaning company. (52RT 9346.) Mrs. Nadey was unfamiliar with appellant's pornography collection of books, publications, and a video cassette. (52RT 9340-9343, 9345-9346.) Someone in Mrs. Nadey's household placed "900"-type telephone calls in November and December 1995, causing Mrs. Nadey to have "exorbitant phone bills." (52RT 9346; see 52RT 9344-9345.)

(9) Rose Nadey

Appellant's oldest daughter, 14-year-old Rose, was in the seventh grade. Appellant telephoned Rose and her siblings every week. Appellant and Rose would talk about how Rose was doing in school, and he would help her with her various classes. (52RT 9325-9326; see 52RT 9333-9334 [Lisa]; 52RT 9337 [Krystal].) Rose and appellant talked about her church involvement, and he told her, "you've got to have faith and trust in the Lord." (52RT 9326-9327; see 52RT 9334 [Lisa].) Rose and appellant exchanged letters. (52RT 9324-9327; see 52RT 9334 [Lisa].) Rose knew appellant loved her and she loved appellant. Rose wanted to continue to talk with appellant and exchange letters. (52RT 9327-9329; see 52RT 9334 [Lisa].)

(10) Lisa Nadey

Lisa was eleven and she was in the fifth grade. Lisa's testimony was very similar to that elicited from Rose. (52RT 9331-9332.)

(11) Krystal Nadey

Krystal was nine and she was in the fourth grade. She had last seen her father when she and her sisters testified during the first trial. She

regularly talked with appellant by telephone and he wrote letters to her. Appellant sent Krystal presents at Christmas and on her birthday. Krystal missed and loved appellant. (52RT 9336-9338.)

(12) James Park

Mr. Park had retired from the California Department of Corrections (CDC) after 31 years. Among other things, Park had been the director of inmate classification. (51RT 9087-9088.) The court qualified Park as an expert in the fields of inmate classification and adjustment to prison life. (51RT 9094.)

Mr. Park had reviewed appellant's CDC assignment and classifications record from when he served the two-year term in 1985 and 1986. (51RT 9105.) At that point, appellant had been classified as a level one prisoner, meaning he would be assigned to a forestry camp or in a minimum security unit attached to a higher level prison. (51RT 9110.) Park also examined records from the Alameda County Jail, including those regarding appellant's rule violations of crossing a yellow line (being in a prohibited area, i.e., talking to another inmate in front of the other inmate's cell), and having the razor in his legal box. (51RT 9106, 9120-9121.) Park had reviewed Deputy Rocha's testimony regarding the latter violation, and the prosecutor's opening statement at the previous trial. (51RT 9106-9107.)

Park conducted a 30-45-minute interview with appellant. (51RT 9108.) Appellant's attitude appeared to have been positive: "[H]e is willing to do the best he can to get along in prison if given [LWOP]." (51RT 9109.) If given LWOP, appellant would automatically be classified as a level four prisoner, meaning he would be a maximum security prisoner. (51RT 9109.) Those at level four have either been given LWOP, a very long term, or are considered a danger to other prisoners. (51RT 9114.) Level four (maximum security) prisons, are very secure, and movement is

more restricted than in lower level prisons. (51RT 9091, 9111-9112.) If, after 10 years, a level four inmate has a "perfect record and if they can burn off enough "points," they can be then be "considered" for level three status. (51RT 9129.) A level three prison has the same exterior and interior security as a level four prison. (51RT 9142-9143.)

Because appellant had sodomized Terena, he would have an additional "restricted" movement status. For example, he could not be alone with a female staff member. (51RT 9113.)

In his previous CDC incarceration, appellant had done "very well." (51RT 9110.) Mr. Park believed appellant would adjust well and would be a good and productive level four prisoner. Park based that opinion on appellant's age, that appellant had done well during his previous prison incarceration, and that appellant had done reasonably well while in jail. (51RT 9114-9116.) Appellant's jail violation of being in a prohibited area would be a "[h]ousekeeping offense" in prison. That appellant had possessed a razor did not impact on Park's opinion, since if appellant had not been housed in administrative segregation or in a security housing unit, he would be issued or would be able to buy a razor in prison. (51RT 9117-9118.) Mr. Park agreed inmate-made weapons are "a persistent problem" in level three and four prisons. (51RT 9139.)

Mr. Park opposed to the death penalty for two reasons. "Number one . . . it is not an effective tool. It does not deter other crimes of murder. It has no function in protecting society . . . to that extent." (51RT 9146-9147.)

> The second reason is that it doesn't do any good. However, when people see that a murderer has been sentenced to death, they feel . . . something has been done about our problem of violence. In fact, nothing has been done about the problem. Whatever the roots are, whatever the prevention methods and . . . all of the media attention that goes into death penalties and

> executions . . . diverts the public's attention from places they ought to be looking, ought to be concerned.

(51RT 9147.)

Mr. Park said there were various inmate gangs at CDC. "Some of the Caucasians have gangs. They have Nazi gangs. They have so-called Aryan brotherhood. There is a whole variety of gangs which don't appear in [appellant's] record . . . ." (51RT 9124.) Inmates often join gangs for self protection. A member of a particular prison gang might indicate his gang affiliation by tattooing specific tattoos on various parts of his body. Appellant has various tattoos, including a "double lightning bolt" on his right hand. (51RT 9124-9128.) Mr. Park was unfamiliar with "SS runes," which the trial court characterized as being like thunderbolts. (51RT 9124-9125.) There was no indication in appellant's prison records that he had ever been a gang member. (51RT 9143-9145.)

3. Prosecutor's rebuttal

(1) Deputy Borland

On the afternoon of November 6, 1998, Alameda County Sheriff's Deputy Borland transported 13 inmates from court to Oakland's North County Jail. As with all inmates classified as being in administrative segregation, inmate Gonzales was in waist chains and leg irons. While Deputy Borland was waiting to enter the jail, "someone made a loud comment," and Borland turned and saw a struggle between Gonzales and inmate MacArthur. Gonzales had MacArthur pinned on the floor of the van as he slashed MacArthur in a back and forth motion with a broken portion of a razor blade he held in his teeth. (53RT 9380-9386.) Gonzales caused MacArthur's facial area to be "extremely cut up," and to have "some slashes alongside of his neck . . . ." (53RT 9385.)

(2) 1991 Receiving stolen property conviction

The court took judicial notice of, and admitted into evidence, certified court documents showing that appellant was arrested on October 17, 1991, for receiving stolen property. (PR Exh. No. 51C.) He was convicted of misdemeanor receiving stolen property on November 6, 1991, and was sentenced to 45 days in county jail with 21 days credit for time served. Appellant failed to appear on November 15, 1991, to complete the remainder of that sentence. He was arrested on January 6, 1992, and served the remaining 24 days of his sentence. (53RT 9392, 9436.)

(3) Inspector Brosch

Pursuant to court order, on December 9, 1999, Alameda County District Attorney's Inspector Brosch obtained the telephone records for the Nadey residence for the months of November and December 1995. (53RT 9393-9397, 9405-9406.) Many telephone calls were made from the residence to sexually-oriented telephone numbers in Guyana, Hong Kong, and the United Kingdom. (53RT 9397-9402, 9408, see 54RT 9477; PR Exh. No. 52D.)

On December 14, 1999, Inspector Brosch telephoned some of those numbers, including two of the Guyana numbers.[18] (53RT 9397-9402, 9408; P.R. Exh. No. 53.) One of the Guyana numbers was to a chat room. In the chat room call, "[a] woman talks on the other end, and they discuss different types of sex, every kind of sex." (53RT 9408.) Brosch made a call to another Guyana number. The jury heard a recording of the start of that telephone call, up until a request for a credit card was made. (53RT

[18] When Inspector Brosch called the Hong Kong and United Kingdom telephone numbers, "those phone numbers weren't good anymore." (53RT 9407.)

9399-9404, 9408-9409; 54RT 9491-9492; see PR Exh. No. 53A.[19]) After the portion of the recording heard by the jury, that telephone call got "more graphic as to the content[.]" (53RT 9409.)

(4) Appellant's Boxing Day 1992 display of his penis to children

On December 26, 1992, 11-year-old Christopher Giles lived in a Costa Mesa shelter, which he shared, among others, with his family, and appellant and his family. Giles, his 12-year-old sister, and appellant and Ann were going to the movies. (53RT 9414-9416.) Giles and his sister were already in the car, when appellant and Ann approached. Giles and his sister "played games with" appellant by locking the car door so appellant and Ann could not get in the car. (53RT 9416, 9422.) Appellant "whipped out his [flaccid] dick," and "showed himself" to Giles and his sister by putting it up against the car window. (53RT 9417, 9428.) Appellant asked something to the effect, "'[W]hat do you think about this?'" (53RT 9429.) While appellant and Ann laughed, Giles "flip[ped] out," and turned away. Giles's sister "said it was disgusting." (53RT 9417, 9422.)

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[19] The part of the telephone call the jury heard was:

> Are your looking for some fun? Well, you've come to the right place. Welcome to the Sex Store, America's number 1 phone service that does it all. You can talk live one on one with sexy girls, your triple X rated fantasies and even be connected live to real horny sluts in your area who want to meet guys tonight. Just stay on the line. This (unintelligible) service is free except for normal international long distance rates. Uhmmm, that's right. You don't need a credit card to access all of the exciting services available at the Sex Store. Operators, no collect or credit cards accepted.

(Exh. 53A.)

Giles told his mother, and she called the police. Costa Mesa Police Detective Carver interviewed Giles on January 5, 1993. Not only did Giles discuss the circumstances of the indecent exposure, but Giles also related that on the same day, appellant asked Giles if he wanted to go to appellant's bedroom and look at some new boxer shorts. (53RT 9419, 9425-9427.) While in the bedroom, appellant took off his pants "in order to retrieve th[e] boxer shorts" from the closet. Appellant's penis was not erect. (53RT 9428-9429.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S *BATSON-WHEELER* MOTIONS MADE PRIOR TO THE GUILT TRIAL

Appellant, a Caucasian male (see AOB 125), contends the trial court committed *Wheeler-Batson* (*Batson v. Kentucky* (1986) 476 U.S. 79, 84-89; *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277) error (*Batson* error), when it sustained the prosecutor's preemptory challenges to five African-American female panelists during selection of the guilt phase jury. (AOB 123-160.) Appellant raises a few specific objections to the trial court's acceptance of the prosecutor's allegedly "sham" reasons masking his purposeful racial discrimination.[20] However, in the main, he asserts a comparative analysis by this Court of the challenged panelists, when contrasted to the same information for some seated jurors and the alternates, demonstrates purposeful discrimination. (AOB 124-126.) He

[20] A very substantial portion of voir dire of the guilt trial panelists dealt with the death penalty (that jury hung on penalty and appellant does not raise a *Batson* claim regarding the second penalty jury). The overwhelming majority of the prosecutor's reasons appellant now challenges went to the prosecutor's perception of whether the individual panelist might be less inclined towards voting for the death penalty than other panelists either already seated, or remaining in the jury panel.

claims the errors denied him equal protection, his right to due process, and his right to a fair and reliable trial under the United States Constitution's Eighth Amendment. (AOB 123 & fn. 6.) He asserts this matter must be remanded for a new unitary trial. (AOB 123.) Respondent disagrees. Substantial evidence supports the trial court's discretionary decisions to overrule appellant's *Batson* motions. A comparative analysis in this Court also does not establish purposeful discrimination.

A. Applicable Law

1. General Legal Standards

"A prosecutor's use of preemptory challenges to excuse prospective jurors on the basis of group bias, including on grounds of race or ethnicity, violates the right of a criminal defendant to trial by a representative cross-section of the community under article I, section 16 of the state Constitution. [Citations.] Under *Batson* . . . such practice also violates the defendant's right to equal protection under the Fourteenth Amendment. [Citations.]" (*People v. DeHoyos* (2013) 57 Cal.4th 79, 101 (*DeHoyos*); see *People v. Pearson* (2013) 56 Cal.4th 393, 421 (*Pearson*); *People v. Jones* (2011) 51 Cal.4th 346, 361-363 (*Jones*); *People v. Silva* (2001) 25 Cal.4th 345, 386 (*Silva*).) There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the moving party to demonstrate impermissible discrimination. (*People v. Griffin* (2004) 33 Cal.4th 536, 554 (*Griffin*), disapproved on other grounds in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32; *Purkett v. Elem* (1995) 514 U.S. 765, 768-769 (*Purkett*).) "The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*Jones*, *supra*, 51 Cal.4th at p. 360; see *Griffin*, *supra*, 33 Cal.4th at pp. 554-555.)

> The three-stage procedure of a *Batson/Wheeler* motion is now familiar. "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.] 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.] 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.]
>
> ". . . Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports [the trial court's] conclusions." [Citation.] "We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses." [Citation.] As long as the court "makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." [Citation.]

(*People v. Williams* (2013) 56 Cal.4th 630, 649-650 (*Williams*); see also *Pearson*, *supra*, 56 Cal.4th at p. 421.) "A prosecutor asked to explain his conduct must provide a clear and reasonably specific explanation of his legitimate reasons for exercising the challenges. [Citation]" (*DeHoyos*, *supra*, 57 Cal.4th at p. 102, internal quotations marks omitted.) "Where the prosecutor's stated reasons are both inherently plausible and supported by the record, the court need not question the prosecutor or make detailed findings." (*Silva*, *supra*, 25 Cal.4th at p. 385; *People v. Ervin* (2000) 22 Cal.4th 48, 74 (*Ervin*) [prosecution need offer only genuine, reasonably specific, race-neutral explanation related to case being tried].)

> At the third stage of the *Wheeler/Batson* inquiry, "the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." [Citation.] In assessing credibility, the court draws upon its contemporaneous observations of voir dire.

> It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]

(*People v. Lenix* (2008) 44 Cal.4th 602, 613, fn. omitted (*Lenix*).)

The prosecutor's reasons in support of the challenge need not be sufficient to justify a challenge for cause, and "even a trivial reason, if genuine and neutral will suffice. [Citation.] A prospective juror may be excused upon facial expressions, gestures, hunches, and even for arbitrary idiosyncratic reasons." (*Jones*, *supra*, 51 Cal.4th at p. 360, internal quotation marks deleted; see *Lenix*, *supr*a, 44 Cal.4th at p. 613; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122 (*Gutierrez*).) The prosecutor's explanation need not be "persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices." (*Purkett, supra,* 514 U.S. at p. 768; see *DeHoyos*, *supra*, 57 Cal.4th at p. 102 [""""A reason that makes no sense is nonetheless 'sincere and legitimate' as long as it does not deny equal protection""""].)

"In determining whether the prosecution's justification for a peremptory challenge is pretextual, the proper focus of the trial court is on the subjective genuineness of the race-neutral reasons given, not on the objective reasonableness of those reasons." (*People v. Fiu* (2008) 165 Cal.App.4th 360, 391; see *Jamerson v. Runnels* (9th Cir. 2013) 713 F.3d 1218, 1229 (*Jamerson*) ["The prosecutor need not establish with evidence on the record that her voir dire instincts are objectively correct; instead, the defendant must show that the prosecutor's reasons were not subjectively genuine"].) At this step, if the trial court finds "at least one race-neutral explanation for each questioned peremptory challenge, no abuse of discretion occur[s]." (*People v. Turner* (1994) 8 Cal.4th 137, 172 (*Turner*); see *Cook v. Lamarque* (9th Cir. 2010) 593 F.3d 810, 819 [where "the prosecutor gave four legitimate and two illegitimate grounds," and where

the "prosecutor's two primary motivations are quite persuasive and are unrefuted by the record," the trial court's "conclusion that valid grounds, and not race, motivated the strike, was not objectively unreasonable"].)

2. Comparative Analysis

The trial court did not conduct a comparative analysis when it considered and denied appellant's two *Batson* motions. (See AOB 124.) This case was tried before the United States Supreme Court held that such analysis is necessary. Neither the trial court, nor respective counsel were tasked with omniscience. Nevertheless, this Court must now take comparative analysis into consideration in determining if the trial court's rulings were supported by substantial evidence.

> Comparative juror analysis is evidence that, while subject to inherent limitations, must be considered when reviewing claims of error at *Wheeler/Batson*'s third stage when the defendant relies on such evidence and the record is adequate to permit the comparisons. In those circumstances, comparative juror analysis must be performed on appeal even when such an analysis was not conducted below.

(*Lenix*, *supra*, 44 Cal.4th at p. 607.) When the comparative analysis factors are raised for the first time on appeal, "such evidence will be considered in view of the deference accorded the trial court's ultimate finding of no discriminatory intent." (*Id.* at p. 623.)

> On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact. Even an inflection in the voice can make a difference in the meaning.

(*Id.* at p. 622; see *DeHoyos*, *supra*, 57 Cal.4th at p. 106 [""we are mindful that comparative analysis on a cold record has inherent limitations""]; *Jones*, *supra*, 51 Cal.4th at p. 364, fn. 2.)

An appellate transcript may show that panelists gave similar answers, but it will not convey the different ways in which those answers were given. "Yet those differences may legitimately impact the prosecutor's decision to strike or retain the prospective juror. When a comparative juror analysis is undertaken for the first time on appeal, the prosecutor is never given the opportunity to explain the differences he perceived in jurors who seemingly gave similar answers." (*Lenix*, *supra*, 44 Cal.4th at p. 623.)

While an advocate may be concerned about a particular answer, another answer may provide a reason to have greater confidence in the overall thinking and experience of that particular panelist. Advocates do not evaluate panelists based on a single answer. Likewise, reviewing courts should not do so. (*Lenix*, *supra*, 44 Cal.4th at p. 623.) Two panelists may give a similar answer on a given point, but "the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (*Id.* at pp. 623-624; see also *People v. Harris* (2013) 57 Cal.4th 804, 837.)

Comparative juror analysis is a form of circumstantial evidence to be used in addressing the third *Batson* prong, i.e., the decision whether the prosecutor's reasons are genuinely race neutral. (See *Jones*, *supra*, 52 Cal.4th at p. 364, fn. 2; *Lenix*, *supra*, 44 Cal.4th at p. 622.)

> Unlike direct evidence, circumstantial evidence does not directly prove the fact in question. Instead, circumstantial evidence may support a logical conclusion that the disputed fact is true. But information may often be open to more than one reasonable deduction. Thus, care must be taken not to accept one reasonable interpretation to the exclusion of other reasonable ones.

(*Lenix*, *supra*, 44 Cal.4th at p. 627.)

In accord with a reviewing court's traditional examination of circumstantial evidence, "if the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment. This same principle of appellate restraint applies when reviewing the circumstantial evidence supporting the trial court's factual findings in a *Wheeler/Batson* holding." (*Lenix*, *supra*, 44 Cal.4th at pp. 627-628.) When the reviewing court makes a comparative analysis for the first time on appeal, it may consider dissimilarities between the allegedly similarly-situated panelists, not mentioned by the prosecutor in justifying his challenges. (*Jones*, *supra*, 51 Cal.4th at 365-366.)

B. Proceedings in the Trial Court

1. Proceedings prior to the first *Batson* motion

The court denied appellant's motion "to pay jurors sufficiently and compensate them for lost income and otherwise remedy the situation[,]" arguing minorities are more likely than others to be excused on the basis of economic hardship. (4RT 773-774.) But, the court acceded to appellant's further request to identify those African-American panelists excused for hardship. (4RT 774; see, e.g., 4RT 780-781 (Burkett); 5RT 860 (Wilshire, Turner & Lucas), 864 (when unable to definitively characterize Mr. Brook's racial heritage after his hardship excusal, the court counts him as an African-American), 865-866 (Mr. Allen), 871-872 (Mr. Bacchues), 885-886 (Ms. Lewis), 896-897 (Rev. Smith).) While neither party identified how many African-Americans remained in the jury panel at the time of appellant's *Batson* motions, it appears at least two were identified during

voir dire.[21] (8RT 1460-1485 (Kenneth Taylor); 12RT 2506-2536 (Loretta Chandler).)

On Wednesday, January 20, 1999, after 78 prospective jurors had been selected, Mr. Giller agreed with the prosecutor's proposal to end further voir dire. (17RT 3682-3683.) After reading the remaining questionnaires, Mr. Giller opined the remaining panelists were "poorly beneficial to the defense—in fact that they're weighted more in favor of the prosecution." (17RT 3683.)

The jury and alternates were selected on Monday, January 25, and Tuesday, January 26, 1999. The first 12 prospective jurors were Karen Stoker (seat no. 1), Juror No. 2, James Mikus (seat no. 3), Paul Barrow (seat no. 4); Juror No. 5, Bonnie Barr (seat no. 6), Juror No. 7, Kevin Driscoll (seat no. 8), Timothy Hollister (seat no. 9), Juror No. 10; **Alice S.** (seat no. 11),[22] and Deborah Sims (seat no. 12). (18RT 3714-3715.)

The prosecutor challenged Ms. Stoker, who was replaced by George Arth. Appellant passed. The prosecutor used his second challenge to excuse **Alice S.** Fredrick Wolters replaced Ms. S. Appellant again passed. The prosecutor exercised his third challenge against James Mikus, who was replaced by Joseph Lucia. Again appellant passed. The prosecutor exercised his fourth challenge against Kevin Driscoll, who was replaced by Juror No. 8. The defense challenged Mr. Hollister, who was replaced by Cheryl Wells. (18RT 3716-3717.)

The prosecutor exercised his fifth challenge against Mr. Lucia, and he was replaced by **Victoria E**. The defense passed. The prosecutor exercised

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[21] The court also noted a prospective juror who worked at the Alameda County Family Support Division was African-American. (14RT 2963.)

[22] Initial bolding indicates the panelists appellant asserts were challenged because of their race.

his sixth challenge against **Ms. E.**, and she was replaced by Juror No. 3. Appellant "reserve[d] a motion." Appellant exercised his second challenge against Mr. Barrow, who was replaced by **Harriett D.** (18RT 3717-3718.)

The prosecutor exercised his seventh challenge against **Harriett D.**, at which time the defense "again reserve[d] a motion." Ms. D. was replaced by Jim Hiwano. Mr. Giller exercised appellant's third challenge against Mr. Wolters, who was replaced by Sharon Bautista. The prosecutor passed. (18RT 3718-3719.)

Appellant exercised his fourth challenge against Ms. Bautista, who was replaced by **Lorraine D.** The prosecutor exercised his eighth challenge against **Lorraine D.**, who was replaced by Juror No. 11. (18RT 3719.) The court heard appellant's first *Batson* motion.

2. First *Batson* motion

As the court summarized, the prosecutor excused: "[Alice S.], who was a black African female; [Victoria E.], who was from Nigeria, who was African-American; Ms. [Harriett D.], a black female juror . . . and Ms. [Lorraine D.]." (18RT 3720.) The defense complained the prosecutor had challenged "four blacks, although there is one black left [in the box, Ms. Wells]." (18RT 3720.) Because the prosecutor had used four of his eight challenges against African-American females, the court found appellant had established a prima facie case of purposeful racial discrimination. As set forth below, the prosecutor gave his reasons for challenging those four prospective jurors. When the court asked if Mr. Giller wanted to respond, he "[s]ubmitted." (18RT 3723.) The court denied the motion:

> . . . Well, I think – after hearing the district attorney's reasons, I think that these . . . excuses are facially and racially neutral. I don't believe that any of these jurors are excused because of their race, and there is justification and cause for the excuse of each juror. [¶] In the Court's opinion, there is no showing of any exclusion of these jurors because they were black females.

(18RT 3723.)

3. Proceedings prior to second *Batson* motion

Back in the presence of the jury panel, the defense exercised its fifth challenge against Mr. Arth, who was replaced by Mr. Bloomberg. The prosecutor passed. Appellant's sixth challenge was to Mr. Blomberg, who was replaced by Henry Yee. The prosecutor passed. Mr. Giller exercised the seventh defense challenge against Mr. Yee, who was replaced by Juror No. 1. The prosecutor passed. The defense exercised its eighth challenge against Ms. Wells. She was replaced by Juror No. 9. The prosecutor passed. The defense exercised its ninth challenge against Ms. Sims, and she was replaced by Victoria Leinweber. The prosecutor exercised his ninth challenge against Ms. Leinweber, and she was replaced by Doris C. The defense passed. (18RT 3723-3725; see 18RT 3746.)

The prosecutor's tenth challenge was to **Ms. C.**, who was replaced by Juror No. 12. Again the defense "reserve[d]" a motion. The defense used its tenth challenge against Mr. Hiwano, who was replaced by Donna Baird. The prosecutor passed. Appellant's eleventh challenge was to Ms. Baird, and she was replaced by Rogel Zapanta. The prosecutor passed. Mr. Giller exercised the twelfth defense challenge against Mr. Zapanta, who was replaced by Charles Koller. The prosecutor used his eleventh challenge to excuse Mr. Koller, and Mr. Koller was replaced with Juror No. 4. Mr. Giller used the defense's thirteenth challenge against Ms. Barr, who was replaced by Juror No. 6. Both parties passed. (18RT 3725-3728.)

The court selected five alternates. The first panelists called were Eugene Klimkosky, Alice Rey, and Alternates Nos. 3 through 5. The prosecutor passed. The defense exercised its first challenge against Mr. Klimkosky, and he was replaced by Lowell Hickey. After the prosecutor passed, Mr. Giller exercised the second defense challenge against Mr. Hickey, who was replaced with Gregory Haywood. The prosecutor

exercised his first challenge against Mr. Haywood, who was replaced by Ronald Lockie. The defense excused Mr. Lockie (third challenge), and he was replace with Todd Sotkienwicz. The prosecutor challenged Mr. Sotkienwicz (second challenge), who was replaced by Alternate No. 1. The defense exercised its fourth challenge against Ms. Re, who was replaced by Scott Hill. The prosecutor challenged Mr. Hill (third challenge), and he was replaced by Lisa Kennon as Alternate No. 2. The parties expressed their satisfaction with the alternates as constituted. (18RT 3728-3730.)

After the court excused the jury, it advised that prior to leaving the courtroom, Ms. Kennon told the court her mother-in-law had been beaten to death by an unknown person four days previous. (18RT 3739.) The court indicated it would excuse Ms. Kennon, believing she could not be a fair juror. (18RT 3741-3742; see 18RT 3744.) Appellant eventually sought, and court acceded to, summoning three of the remaining panelists in order to replace Ms. Kennon. (18RT 3742, 3745.) The court and counsel then addressed appellant's second *Batson* motion which dealt with Doris C. (18RT 3745-3746.)

4. Proceedings on appellant's second *Batson* motion

In light of the prosecutor's challenges to five African-American panelists (18RT 3746), Mr. Horowitz argued:

> African-Americans are lost from the jury pool during hardships . . . we ended up with a panel of 12 that, as far as I can see, none of the 12 are African-Americans.
>
> THE COURT: Except that you folks also excused Ms. Wells, number 12, a female African-American.
>
> MR. HOROWITZ: But that is . . . irrelevant.
>
> THE COURT: That may be. But . . . the inference you're leaving is that only the prosecution kicked all the black jurors off. That is not true.

(18RT 3746.)[23]

Following an interruption, Mr. Horowitz argued:

> I was indicating that the fact that we have not one African-American doesn't speak anything except that that was a clear-cut personal choice. [¶] But what is clear is that five out of 11 of the prosecution's challenges are African-Americans, and that is very telling. And -- or was it six out of six. That's the other way to look at it. Five out of six were challenged by the prosecution.
>
> . . . I think at that some point -- an intelligent prosecutor can make up reasons, but I think that's just an intelligence test. The record speaks for itself that there is an institutional bias here and a systematic exclusion of African-Americans.
>
> THE COURT: Well, I've already ruled on the first four, so I'm not going to revisit that. [¶] . . . I did indicate that it made a prima facie case. [¶] . . . [¶] . . . Mr. Anderson . . . what is the basis for excusing Ms. C[.]?

(18RT 3749-3750.) The court allowed the prosecutor to first address another aspect of "the same issue . . . ." (18RT 3750-3751.)

> MR. ANDERSON: [¶] . . . [¶] Mr. Horowitz so eloquently stated to the Court that due to the Court's position on hardships that lots of black jurors were excused. [¶] . . . [T]here was a tremendous amount of black jurors when they heard the facts of this case indicated they would always vote for the death penalty, and they likewise were excused for cause because . . . they were coming from the prosecution's point of view as to the penalty of death in this particular case. . . . [W]e have seen those noted for

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[23] The defense challenge to Ms. Wells was relevant. The prosecutor passed Ms. Wells several times. But for the defense challenge, Ms. Wells would have served on the jury. The prosecutor's failure to challenge Ms. Wells is a factor tending to show that his challenge to members of the same cognizable class was not pretextual. (*Pearson*, *supra*, 56 Cal.4th at p. 422; *People v. Clark* (2011) 52 Cal.4th 856, 906 (*Clark*); *Jones*, *supra*, 51 Cal.4th at pp. 362-363; *People v. Cornwell* (2005) 37 Cal.4th 50, 70 (*Cornwell*), disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) As noted, at least two and possibly more remaining panelists were African-American.

> the record, which of those jurors were African-American, who were pro-death penalty[24] would vote -- every time when they got to the penalty phase . . . to impose a death penalty.
>
> [¶] . . . [¶] Secondly . . . . the Court noticed that they excused Ms. Cheryl Wells, who was an African-American female. Ms. Wells was a dispatcher for the Berkeley Police Department and as such had some leanings towards law enforcement. Counsel obviously saw that. I saw that. I had her ranked as a very high juror as far as imposing the death penalty. That is the only reason why any challenges were exercised by the prosecutor, that as they are relative strengths or weaknesses regarding the penalty of death. Ms. Wells was very highly rated by me. They saw that. They chose to excuse her.
>
> One other thing, I noticed on the 13 challenges they used that ten of the 13 challenges by my record compilation system I had ranked as 10s or the highest possibility of people who would almost automatically impose the death penalty. They saw that. I saw that. And they knew their challenges as well as mine were being used to excuse people based upon what they would do in the penalty phase. It's got nothing to do with race.

(18RT 3751-3752.)

As more fully set out below, the prosecutor explained why he had challenged Ms. C. (18RT 3752-3753.) The court denied the second *Batson* motion.

> Okay. I'm not going to invite any more comments from the defense. [¶] First of all, this argument that the Court . . . excused black jurors because of hardship, I find that to be a specious argument, and I'll tell you why. Am I supposed to keep black jurors as jurors when they don't get paid and when they have to

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[24] Some African-American prospective jurors were excused either because they would vote for the death penalty in these factual circumstances (see, e.g., 10RT 1865-1866; 12RT 2471; 13RT 2619), or because they were opposed to the death penalty (see, e.g., 4RT 896-900, 904-907; 5RT 937-938; 6RT 1143-1144). Some were excused not only because of hardship, but because they opposed the death penalty. (See 4RT 780-781; 5RT 970, 977; 7RT 1231-1232; 8RT 1363-1364.)

> lose their jobs and when they suffer financially, but I'm allowed to let white jurors go because they are going to suffer financially? That doesn't make any sense at all to me. . . . If you don't get paid, notwithstanding the color of your skin, you're excused. Now, if black jurors fall into that category, so be it. So did a lot of white jurors . . . . But to suggest that black jurors should be kept on this panel, even though they are suffering a financial hardship, to me is reverse discrimination.
>
> The second thing is with respect to the last juror, Ms. C[.], the Court finds that the excuses as put forth by . . . the prosecution . . . are genuine and facially neutral. I will consider that as a Wheeler motion, and that will also denied for the reasons stated, and the record will so reflect.

(18RT 3753-3754.)[25]

C. Appellant's Efforts to Establish Equivocation in Opposition to the Death Penalty Do Not Undercut the Prosecutor's Race-Neutral Bases for his Peremptory Challenges

The trial court did not abuse its discretion in deciding the prosecutor's reasons for excusing the five African-American panelists were race-neutral.

Appellant argues globally – but with emphasis on Lorraine D. and Harriett D. – that the prosecution's challenges were pretextual, relying on the prospective jurors' opinions as to their placement on a scale of one to ten, with one being absolutely against the death penalty and ten being always in favor of it. (AOB 130-133.) True, the prosecutor was the one who asked most of the prospective jurors to rate themselves, but the record reflects the self-reported score was not a primary basis for any of his challenges. In fact, that record demonstrates the prosecutor looked beyond

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[25] The following morning, selection of Ms. Castillo as Alternate No. 2 was completed after both parties exhausted their challenges. (18RT 3759-3761.) However, Ms. Castillo was then excused by stipulation, leaving Alternate No. 2. (18RT 3762-3763.)

that number to the more narrative responses in the written and verbal questions to determine whether to challenge or pass a particular panelist.

Appellant argues the prosecutor's reasons for challenging Lorraine D., an eight, and Harriett D., a ten, were pretextual given his stated intent to determine jurors' relative strength or weakness as to the death penalty. Appellant notes that only Juror No. 1 had a similar "score" of eight, and Alternative No. 3 had a score of 10. (AOB 132.) Not so. As more fully discussed below, the prosecutor's challenges were based upon the respective panelist's narrative answers to the various questions.[26] In explaining his challenge to Harriett D., for example, the prosecutor said, "[G]ranted she said she was a ten philosophically, but on her questionnaire what she told us was the death penalty was a last resort." (18RT 3722) Further, through his own voir dire, Mr. Giller elicited Harriett D. was

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[26] As appellant's brief reflects, the jurors and alternates passed by the prosecution were, for the most part, in the middle range on the prosecutor's scale. Juror No. 1 was "[a]bout an eight." (15RT 3146.) Juror No. 2 was "probably a five." (15RT 3023.) Juror No. 3 was "[p]robably . . . somewhere between a six and a seven." (3RT 1106.) Juror No. 4 scored herself as a "six." (17RT 1165.) Juror No. 5 said: "I'd have to say I'm moderate. I'll take a five." (6RT 1038.) Juror No. 6 said: "I can't think of any other number but five." (15RT 3212.) Juror No. 7 said, "I'd have to put myself at a five." (8RT 1415.) Juror No. 8 answered: "Gosh, umm, somewhere in the middle range probably five to seven." (17RT 3649.) Juror No. 9 was "right in the middle, a five." (6RT 1060.) Juror No. 10 told the prosecutor, "I would say five." (7RT 1276.) Juror No. 11 was a "[s]ix." (12RT 2399.) Juror No. 12 "guess[ed he] would be a six." (11RT 2325.)

Alternate No. 1 was a five. (8RT 1546.) Alternate No. 3 was a 10. (8RT 1394.) Alternate No. 4 explained: "[N]either [a one or a 10], but in between. I don't know. Seven – it's on the high side – but not ten. [¶] Q. It's more than five but not ten? [¶] A. Yeah, right. [¶] Q. Seven, seven and a half, something like that? [¶] A. Yeah, fine." (8RT 1503.) Alternate No. 5 explained: "I feel I'm pretty even. [¶] . . . Yeah, I guess I'd be around a five." (9RT 1730.)

"really in the middle." (16RT 3348.) Similarly, as to Lorraine D., the prosecutor stated that he felt she was very weak on the death penalty citing his impression that she was of a "liberal ilk" and expressing his concern that during the penalty phase she would place great weight on the defendant's past life. (16RT 3348.)

A similar lack of reliance on the scale score is reflected in the record as to Alice S., who reported she was a seven, Doris C., who reported she was a six, and Virginia E., who characterized herself as a five.[27] In each case, the prosecutor pointed to statements on voir dire or in the questionnaires that caused him to doubt their willingness to impose the death penalty despite their stated score. (18RT 3721-3722.) The record thus establishes that, while the scale may have been a useful tool to launch or focus a discussion, it was not determinative of the prosecutor's satisfaction with a juror's ability to fairly consider the death penalty.

In addition to the theoretically pro-prosecution score, appellant points to various statements by the challenged prospective jurors that indicate some equivocation or contradiction that would arguably support an interpretation that they were willing to at least consider imposing the death penalty. What appellant fails to address is that his claim relates to peremptory challenges rather than challenges for cause. While equivocation of the type cited by appellant may be sufficient to overcome a

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[27] This lack of significance of the scale score alone is also shown in the scores of other non-African-American panelists challenged by the prosecution – e.g., Ms. Stoker said: "I'm going to be difficult and choose a five (12RT 2351); Mr. Luca said he would be a six (10RT 1986); Ms. Leinweber said she was "[s]omewhere in the five range" (9RT 1675); Mr. Koller agreed that he would be about a five (19RT 2744-2745); Mr. Haywood said, "I still think I'd put myself at about an eight" (15RT 3182-3183). Among the prospective, but prosecutorial challenged, alternates, Mr. Sotkiewicz characterized himself as a five (16RT 3398), and Mr. Hill opined that he was a seven (11RT 2188).

challenge for cause brought under *Witherspoon v. Illinois* (1968) 391 U.S. 510, or *Wainwright v. Witt* (1985) 469 U.S. 412, it does not undercut the race-neutral basis for a decision to excuse the prospective juror peremptorily. (*People v. Hoyos* (2007) 41 Cal.4th 872, 902 (*Hoyos*); *People v. Catlin* (2001) 26 Cal.4th 81, 118 (*Catlin*).) A prosecutor's decision to challenge a juror where he is concerned over their attitude on the death penalty is a race-neutral basis that will defeat a *Wheeler-Batson* challenge. (*People v. Blacksher* (2011) 52 Cal.4th 769, 802 (*Blacksher*) (juror's "ambivalent feelings" toward the death penalty and discomfort in role of deciding to impose it were race-neutral grounds supporting challenge); *People v. Ledesma* (2006) 39 Cal.4th 641, 678 (*Ledesma*) (juror's feelings on death penalty were neutral and he felt that life without parole was harshest sentence).)

As discussed in greater detail below, the record supports the prosecutor's stated basis for challenging each of the challenged panelists due to concerns over their willingness to impose the death penalty.

D. The Prosecutor's Challenges were Proper

1. Harriett D.

a. Background

The trial court began its examination of Ms. D.

> Q. . . . [B]efore we get into asking you a bunch of questions about penalty, I want to get over the first hurdle here. [¶] . . . [¶] I want you to forget about Mr. Nadey, forget about this case like you and I were just talking. [¶] . . . [¶] The question is—because I know you have some reservations here—are you the type of person that could ever vote to execute another human being? Could you do something like that?
>
> A. I believe like this: If . . . the system is set up and they have their reasons for doing whatever they do, just like getting parking tickets or anything else, you may not like it, but we're part of the society, and that's the way it's set up.

Q. Then you could do it? [¶] So I guess you're telling me that in the right case you could pick it as a penalty?

A. Yes.

(16RT 3327.)

The prosecutor honed in on the court's concern, starting his initial examination of Ms. D by asking her to "expand" on about her questionnaire statement that the death penalty should be the "last resort." She. responded:

A. Because we're speaking of life. [¶] Okay? [¶] Even though a life had been taken, we are still speaking of another life that still exists, and to be in the position to have to make a judgment as to whether a person will live or die, you want to try to be absolute as far as your decision without any remorse or any -- you can't have second thoughts, because once a person -- if they've been sentenced to death, once they die, you cannot bring them back. You cannot change your mind on that issue. So, therefore, a person must seriously take into consideration the consequences of the response of yes or no, death penalty or life sentence.

[¶] . . . [¶] Q. When you say you want to be absolute, are you talking in terms of, you know, gosh, is the guy really guilty or innocent or like that? Is it that kind of absolute whether he did it or not and maybe you're executing the wrong guy?

A. No. Does this particular sentence deserve this person to actually go to the death chamber, whatever.

(16RT 3335-3336.)

The prosecutor later asked Ms. D.:

Q. But is the fact situation as you now know it serious enough so that if you convicted the defendant of those crimes that we just mentioned to you, the death penalty would be an option for you because this crime is so terrible, so serious?

A. I have no problem with having to make that decision. It's not one that anyone I think with any decency wants to make, but if it has to be made –

THE COURT: Ms. D[.], nobody is going to argue with you about that. [¶] But what I think the district attorney is driving at is some people have a threshold or an expectation of the kind of case where the death penalty might be appropriate. You know, you've seen people read the newspaper – [¶] . . . [¶] and somebody will say, geeze, that guy ought to be executed. Somebody else will say I don't think that's so bad. Without telling us how you would vote on it, if he gets found guilty of, you know, assaulting this complete stranger, sodomizing her, cutting her throat and killing her, without telling us how you would vote, is this case serious enough that it lives up to your expectations as to the kind of case where the death penalty might be appropriate?

[Ms. D.] Yes.

THE COURT: Okay. That's what he wanted to know.

MR. ANDERSON: . . . Ms. D[.], on the questionnaire, also, the question was asked if the issue of whether California should retain the death penalty were on the ballot in this next election coming up, just flat out, should California have the death penalty, keep it, or should we dump it, how would you vote on that, and you put down you had an accident and therefore couldn't get to the polls. Supposing, hypothetically, the issue was just coming up, say in June --

A. I believe in it.

Q. Okay. Okay. On your questionnaire, also – and maybe you've already answered this, but I just want to check. The concluding question was asked "Is there any question that hasn't been covered that you think we should know about?" And you wrote "I don't like to see anyone die needlessly, but I have to deal with life and death situations from work, at the hospital for almost nineteen years." Can you explain what you mean by that?

A. I deal with life and death because of my job. We try very hard to maintain -- at least I do -- the quality of life and we try to serve those. However, sometimes circumstances are out of your hands. If we get a code, if a patient dies, we've tried to do our best to do our part, but once it's out of our hands, you know –

THE COURT: Let me ask you something, Ms. D[.] I know you're not a nurse, but you handle the calls and everything. You're sort of indirectly involved in the healing arts. Your job is to see that people don't die, and you do your very best to see that that doesn't happen. [¶] . . . [¶] Is there anything about . . . your work experiences or the facts that you're . . . like a health provider in a way that you're there to see that people don't die needlessly -- is there anything about your job and the fact that you spent 19 years trying to save people's lives, knowing there's a dead woman in this case -- [¶] . . . [¶] Anything about that you think might influence your ability to pick either the death penalty or life without parole in this case?

PROSPECTIVE JUROR: No.

[¶] . . . [¶] MR. ANDERSON: . . . Ms. D[.], when you said on the questionnaire "I don't want to see anyone die needlessly," you've obviously in some of your other answers been close to somebody who has died needlessly. You've had family members that have been victims of drive-by shootings, I think the question was, you know, where they randomly went and shot somebody and you lost a loved one. [¶] . . . [¶] Now, that is a needless killing. No question about it. . . . In a situation here in the courtroom, though, we are talking about penalty. I mean we are talking you go to trial, and if you're found guilty, you go to the penalty phase. And then the option is left up to the jury as to whether the death penalty should be given or it should not be given. [¶] . . . [¶] Do you equate that situation with somebody dying needlessly?

A. No.

(16RT 3338-3341.)

b. The prosecutor's stated reasons

The prosecutor explained: "[G]ranted [Ms. D.] said she was a ten philosophically, but on her questionnaire what she told us the death penalty was a last resort. When somebody tells me that, that tells me I'm going to have to sit there and . . . prove something beyond any possible shadow of a doubt. When they say it's a last resort, that means that they will do anything or think anything of getting away from it." (18RT 3722.)

c. Discussion

As an initial matter, respondent notes Ms. D. was in the group of challenges addressed as part of the first *Batson* motion. After the prosecutor gave his reasons for challenging Alice S., Victoria E., Harriet D. and Lorraine D., the court asked appellant's counsel if he wanted to be heard, at which point Mr. Giller submitted the matter. The court then found that the reasons given by the prosecutor were "facially and racially neutral" and that "there [was] justification and cause for the excuse of each juror." (18RT 3723.) While submitting the matter does not constitute a forfeiture of an objection, declining an opportunity to comment upon the prosecutor's proffered reasons can suggest opposing counsel finds them reasonable. (*Jones*, *supra*, 51 Cal.4th at p. 361.)

Despite Ms. D.'s self-report she was a 10 on the prosecutor's one-to-ten scale, the prosecutor would have had genuine concerns about keeping her on the jury. As noted, Mr. Giller elicited from Ms. D. that she was "really . . . in the middle . . . ." (16RT 3347-3348.) More importantly, Ms. D. wrote that the death penalty should be "[a]s the last resort." (Supp.CT, p. 36 (SCT).) Despite appellant's protestations that Harriett D.'s voir dire vitiated her written responses (see AOB 133-135), it was Ms. D.'s written remarks that caused the court to start its examination with the question whether she could ever personally vote to impose the death penalty. (16RT 3327.)

The prosecutor started his voir dire of Ms. D., by asking her to explain that comment. She responded that she had written that "[b]ecause we're speaking of a life." She further responded that even though the defendant has killed another he also constitutes a life, so "you want to try to be as absolute as possible as far as your decision without any remorse or any . . . second thoughts, because once a person . . . die[s y]ou cannot bring them back. You cannot change your mind . . . ." (16RT 3335.) This comment

was in keeping with Ms. D.'s written response to the questionnaire's "concluding question": "I don't like to see anyone die needlessly, but have to deal with life and death situations from working at the hospital for almost 19 years." (SCT 36.)

Despite the above colloquy and Ms. D.'s questionnaire responses, appellant contends Ms. D.'s voir dire vitiated any possible concerns the prosecutor may have had regarding her attitude toward the death penalty. (AOB 133-135.) The prosecutor was not required to ignore Ms. D.'s written answers and her oral elaboration on her "last resort" response. The prosecutor could well believe that Ms. D.'s responses indicated that she was at the very best, more hesitant than some others, including those remaining in the jury panel, to impose the death penalty. The prosecutor's concerns constituted a proper, race-neutral reason to challenge Ms. D. (See *Williams*, *supra*, 56 Cal.4th at p. 654 [challenge proper where panelist's comments "suggest some degree of ambivalence toward imposition of the death penalty"]; *id.* at pp. 655-657; *Jones*, *supra*, 51 Cal.4th at p. 365 [juror rated self as "only moderately in favor of the death penalty"]; *People v. Marshall* (2010) 48 Cal.4th 158, 176-177, 179-182 (*Marshall*) [that juror would hold prosecutor to higher standard of proof in murder cases is valid reason].)

d. Comparison to other jurors

(1) Juror No. 2

Appellant argues Harriett D.'s written and oral responses were "substantially the same" as Jurors No. 2 (AOB 136; see AOB 135-137) and No. 12 (AOB 137; see AOB 137-139). Not so. Juror No. 2's written and oral responses differed from those given by Ms. D. As noted, Ms. D. wrote the death penalty should be reserved as a "last resort" (SCT 36), and she was uncertain if she would vote to retain the death penalty (SCT 37). Juror

No. 2 wrote she "believe[d] in the death penalty but I would have to be certain that the guilty verdict was without question." (56CT 16366.) Juror No. 2 would hypothetically vote to retain the death penalty. (56CT 16367.)

As noted, Ms. D.'s written responses caused the court to change its normal voir dire, by immediately asking her if she could ever vote for the death penalty. (16RT 3327.) As also noted, when the prosecutor asked about this response, Ms. D. stated, among other things, that "[e]ven though a life had been taken, we are still speaking of another life that still exists . . . ." (16RT 3335.) During Mr. Giller's examination, Juror No. 2 expressed a "belie[f] in capital punishment." (15RT 3026; see 15RT 3027 [in favor of the death penalty], 15RT 3027 [death penalty "a just punishment"].) This record shows Juror No. 2 was hypothetically more disposed to vote for the death penalty than Ms. D.

In her questionnaire, Ms. D.: (1) expressed her hope that "justice will be served, and fair"; (2) indicated that possible pressures or possible physical or mental health issues could cause a person to commit a violent offense (SCT 29); and (3) that before DNA evidence should be accepted it must be established as being "factual in black and white as solid evidence" (SCT 32). On the other hand, Juror No. 2 expressed in her questionnaire that she believed: (1) the criminal justice system was "in general – fair and just" (56CT 16359); (2) the persons more likely to commit violent crimes are "[d]esperate individuals; drug related[;] hate crimes, crimes of passion" (56CT 16359); and (3) DNA evidence was "[a]ccurate" (56CT 16362).

Harriett D. was not otherwise similarly situated to Juror No. 2. While Ms. D.'s deceased uncle had been an Oakland police officer (SCT 28),

Juror No. 2's "significant other," was an Alameda County deputy sheriff.[28] (56CT 16353.) Juror No. 2 had been employed by the City of Alameda for eight years and she was the secretary to the city finance director. (56CT 16354-16355.) Juror No. 2 had previously worked as a secretary for the criminal investigations division of the Internal Revenue Service, and had previously sat on a criminal jury. (56CT 16358.)

While Ms. D. heard about the murder only in passing on television, and was unfamiliar with the crime scene (SCT 37), Juror No. 2 learned about the murder at her workplace prior to reading about it in the newspaper. She had talked to other city employees about the murder. While Juror No. 2 never expressed an opinion to co-workers about what should happen to the murderer, she "thought it was a horrible crime . . . ." (15RT 3024.) Juror No. 2 was familiar with location where Terena was murdered. (56CT 16367.)

In sum, given Juror No. 2's close relationship with her "significant other," her past employment with the Internal Revenue Service, and her employment with the City of Alameda, the prosecutor could reasonably suspect Juror No. 2 would be more sympathetic, and give more credibility, to law enforcement testimony. Moreover, Juror No. 2 wrote positive comments about DNA, while Harriett D.'s written comments suggested she might be more likely to buy into any possible specious defense challenge to that evidence. Finally, there is absolutely no indication Juror No. 2 would vote to impose the death penalty only as a "last resort."

(2) Juror No. 12

Appellant also contends Juror No. 12's responses to questions about the death penalty were "substantially the same" as Ms. D.'s opinions.

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[28] Juror no. 2's "significant other" had been the second bailiff in this case a week previous to her voir dire. (15RT 3025-3026.)

(AOB 137.) However, instead of writing that the death penalty should be the "last resort," Juror No. 12 wrote: "I believe DEATH PENALTY is warranted." (56CT 16557.) When asked by the prosecutor to elaborate, Juror No. 12 said: "I think it's a deterrent. That's why . . . I put down it's warranted. I don't know how to explain it, but like any other punishment, [while] the ultimate . . . deterrent, but it is a deterrent." (11RT 2313; see 11RT 2327 [when the defense attorney told him that deterrence was not a suitable consideration, Juror No. 12 agreed when the court asked if he believed that the death penalty serves a societal purpose].)

Juror No. 12 had further elaborated in the questionnaire regarding retaining the death penalty: "There are times in life, when all options to redeem and rehabilitate an individual has not worked. Death penalty should be retained as an option." (56CT 16558.) When the prosecutor asked him to amplify his written response, Juror No. 12 said: "[O]bviously, I have to listen to what the questions and answers are going to be. But I think in any situation if you are . . . presented with the situation where you have to make a decision and it's proven that there is no rehabilitation for the person of any kind, then [the death penalty] should be an option." (11RT 2320.) When the prosecutor told Juror No. 12 that rehabilitation is not a consideration, Juror No. 12 responded, "[I]f it's a first-degree murder where you have planned and carried out a heinous act, and there is some special circumstances, then . . . the death penalty . . . should be done." (11RT 2320.)

Juror No. 12 later elaborated when the prosecutor asked if he could actually render a death verdict:

> I'm actually more nervous sitting talking with you all here than in a situation like that arises, and I really mean that because . . . I was born Iran. [¶] . . . [¶] And it's an extremely brutal country, and I have seen a lot of brutality over there. [¶] That is not something that would deter me. When it comes to a decision, if

> it's a decision unanimous and we've looked at all the evidence, that is not something that I would have a problem with.

(11RT 2323.) The prosecutor could reasonably believe Juror No. 12 would be more inclined to vote to impose the death penalty than Ms. D.

Moreover, Juror No. 12 was not similarly situated with Ms. D. in other respects. Juror No. 12 had more of a scientific background, having graduated with a bachelor's degree in industrial technology; he had been an engineer for 12 years, including 10 years at his present position as an electrical manufacturing engineer. (56CT 16545-16546.) Unlike Ms. D., who "hoped" justice would be fair and be served, Juror No. 12 wrote: "It is the best system we have. It is somewhat flawed, but comparing it to the rest of the world, I believe it is fine." (56CT 16550.) Juror No. 12 owned a shotgun, also possibly suggesting to the prosecutor that he held a more conservative mind-set, and therefore, would be more likely to look at the facts and sentencing factors with more dispassion than Ms. D. (56CT 16552.)

Juror No. 12 explained he was "somewhat familiar with DNA through his wife (she is a microbiologist) . . . ." (56CT 16553.) Juror No. 12 knew DNA analysis was "a genetic tool used for including or excluding an individual."[29] At the same time, he believed "[a]ll evidence must be looked at very carefully. The 'experts' must testify to the validity of any evidence." (56CT 16553.) It would be reasonable for the prosecutor to believe Juror No. 12 would be more receptive to the prosecution's DNA evidence than would Ms. D, and, given his analytical training, less likely to

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[29] This knowledge would have made Juror No. 12 an attractive prospect given the planned testimony that appellant's DNA profile included him as one of one in 32 billion persons who possessed the same DNA markers.

accept any possible defense ploy to confuse the jury about the DNA evidence.

While Ms. D. had not answered the question asking whether a person's present personality was impacted by their upbringing (SCT 33), Juror No. 12 had written: "To an extent, yes. We are all the products of they way we were raised. But, this does not mean that we can blame all of our 'wrong doings' on our past." (56CT 16554.) This suggested Juror No. 12 would be less likely to mitigate appellant's commission of the forcible sodomy and murder based on childhood influences.

2. Lorraine D.

a. Background

In response to the questionnaire inquiry about her "general feelings regarding the death penalty," Ms. D. wrote: "I do not believe taking ones life is the answer, but each situation is different depends on the circumstances[.]" (SCT 55.) Prior to her examination, and based on her questionnaire responses, the court commented to counsel: "Lorraine D[.] is a maybe. [¶] . . . [¶] I have her down as a plus-minus, so I don't know if she will qualify." (13RT 2663; see SCT 40.) Deviating from its normal pattern of examination, the court asked Lorraine D.:

> Before I get into a bunch of questions about the penalties, I want you to get over the first hump here that we discussed. [¶] Forget about Mr. Nadey. Forget about this case. The question is like you and I were talking and I asked you this question. [¶] Are you the type of person that could ever vote to execute another human being? Could you do something like that?
>
> A. I could.
>
> Q. You think you can?
>
> A. Yeah.
>
> Q. The reason why I ask you that is your question about the death penalty. Here is what you said. You said "I do not

believe taking one's life is the answer but each situation is different. Depends on the circumstances."

A. (Nods head.)

Q. So can we assume that if you come to the conclusion that somebody deserved to be executed for what they did, you could select that as a penalty?

A. Mm-hm.

(13RT 2664-2665; see 13RT 2670; SCT 53.)

As with Harriett D., the prosecutor asked Lorraine D.:

Q. Okay. Let me get right to the death penalty issue. [¶] You were asked on the questionnaire "What are your general feelings regarding the death penalty?" [¶] And I'm going to quote your answer now. "I do not believe taking one's life is the answer. But each situation is different. Depends on the circumstances." [¶] Can you elaborate a little more on that, if you would?

A. Well, I don't feel that taking a person's life is always the answer. It depends on, I guess you would say, the nature of the -- of the crime, what they have done, how -- you know, *their upbringing, what caused them to come to this point in their life.*

Q. [¶] . . . [¶] My question to you is if you find the defendant guilty of first-degree murder and guilty of the sodomy and that the murder was done during the commission of the crime of sodomy, are those facts serious enough in your own mind that -- so that if you did find him guilty of those things, the death penalty would be a possibility for you? Is the case serious enough at that point?

A. I can't really answer to that like to say that the death penalty would do just for that type of crime. A lot more would have to be established.

THE COURT: I don't think that is what he is asking you, Ms. D[.] [¶] You know, some people will look at the newspaper and read about something that happened and – [¶] . . . [¶] . . . say to themselves, God, whoever did that should get the death penalty. [¶] Somebody else may read it, well, I don't think that case is serious enough for the death penalty. [¶] So we all have sort of a

threshold where we feel that somebody's conduct would in your mind, if he did that, make him eligible for the death penalty. That's what he is asking you.

So, if you find the defendant in this case guilty of assaulting Ms. Fermenick, sodomizing her, and cutting her throat, without telling us how you would vote, is that case serious enough in your own mind where the death penalty could be an option?

[Ms. D.]: It's serious.

(13RT 2672-2674, italics added.)

During Mr. Giller's questioning, Lorraine D. confirmed her husband was the executive director of a homeless shelter. (13RT 2683; see SCT 42.[30]) Ms. D. "help[ed] out there . . . on holidays and things like that[.]" (13RT 2683; see SCT 49 [regarding volunteer work, Ms. D. wrote: "Since my husband ran a Homeless Shelter I have cooked for certain Holidays for them"].)

b. Prosecutor's reasons

The prosecutor explained:

. . . Mrs. D[.] I thought was very weak on the death penalty. Her husband runs a homeless shelter, and people who do that are normally of a liberal ilk and a liberal bent.[[31]] And I'm a little worried on the slop-over bent on her being liberal when the defendant's family comes in. And I don't know what they are going to come up with, but I have a sneaking suspicion when we get into the penalty phase and where the defendant's past life has been, I've got a feeling that it might equate to things that will be very significant for her in the penalty phase.

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[30] The questionnaire asked: "Have you, any family member or close friend ever been involved with the mental health field or professions . . . ?" Lorraine D. responded affirmatively, explaining: "My husband has been working with the homeless and repeat drug abuser[s] teaching litarcy [*sic*] classes[.]" (SCT 52.)

[31] Ms. D.'s opinion about the death penalty was the same as that of her husband. (5RT 55.)

> Her sister also died of AIDS and crack and things like that, and that didn't seem to make a big impact on her. And there is a possibility of drug use in this case which would make her familiar with some sort of drug abuse and I don't want to take a chance when I have a ton of better jurors qualified coming up in the later rounds.

(18RT 3721-3722.)

c. Discussion

Lorraine D. was also part of the first *Batson* challenge where appellant, when asked if he wanted to be heard, simply submitted the matter. (18RT 3723.) As previously noted, while not dispositive, such action suggests that defense counsel found the stated race-neutral reasons to be reasonable. (*Jones*, *supra*, 51 Cal.4th at p. 361.)

As noted, Lorraine D. self reported as "somewhere around eight" on the prosecutor's one-to-ten scale. (13RT 2679.) Yet earlier, after reading Ms. D.'s written response regarding her "general feelings" on the death penalty, the court recognized prior to voir dire that Ms. D. would possibly not qualify as a prospective juror. (13RT 2663.) Given that written response, and the questioning of the court and the prosecutor, the prosecutor could properly conclude Ms. D. was "weak" on the death penalty since she did not believe that taking another's life was necessarily appropriate, and that in the prosecutor's judgment, he would prefer to wait and see the death penalty stance of those panelists yet to be called to the jury box. (*Turner*, *supra*, 8 Cal.4th at pp. 169-171; see *DeHoyos*, *supra*, 57 Cal.4th at p. 112 [challenged panelist's belief that "human life was the most precious, 'no matter what this person has done'"].)

Granted, unlike the employment of other panelists as "social workers" and similar professions, here the prosecutor's concern was premised in part on "guilt by association." Not only was Ms. D.'s husband the executive director of a homeless shelter, but he also taught "repeat drug abuser[s.]"

(SCT 52.) Ms. D. was involved in the shelter, at least to the extent she volunteered to cook for the shelter's clients on holidays. As noted, she shared her husband's opinions regarding the death penalty.

Finally, the prosecutor believed, based on the fact Ms. D.'s sister had been both a heroin and "crack" user, that: (1) given her demeanor, those circumstance did not seem to have had a "big" impact on her;[32] and (2) familiarity might impact on her reaction to testimony concerning drug abuse. Ms. D.'s oral answers about her sister could suggest to the prosecutor in assessing her demeanor that her sister's use and related death had not greatly impacted her. The second factor was the probability of evidence of use of meth during incidents to be presented in the penalty phase.[33] (Cf. *Lenix*, *supra*, 44 Cal.4th at p. 629 [prosecutor's "wariness" gang-related murder of challenged panelist's brother would inform panelist's penalty determination].)

d. Comparative analysis regarding Lorraine D.

Appellant argues Lorraine D.'s responses were "substantially similar" to those given by Jurors No. 3, 4, and 7, in respect to (1) attitudes concerning the death penalty, (2) having a "liberal bent," and (3) drug use, and therefore, the prosecutor's reasons were pretextual. (AOB 140.) The record shows to the contrary.

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[32] Ms. D. explained in her questionnaire: "My sister, who died of AIDS in 1996[.] She used heroin [sic] in the 70's and used crack in the 80-90's[.]" Asked what was the impact of this addiction on herself, her family, and her friends, she had written: "[T]rying, ups and downs[.]" Ms. D. believed that the use of drugs, generally, and specifically meth, was "stupid[.]" (SCT 53.)

[33] The prosecutor would have known that appellant and Mr. Ritchey had used a great deal of meth before and during the sexual assault on Sarah S.

As already noted, the court, itself, was concerned Lorraine D. might not qualify to serve as a juror. (13RT 2663.) On her questionnaire, Ms. D. indicated she did not "believe in taking ones life is the answer, but each situation is different depends on the circumstances." (SCT 55.) During voir dire, she elaborated: "Well, I don't believe that taking a person's life is always the answer. It depends on, I guess you would say, the nature of the crime, what they have done, *how . . . their upbringing . . . caused them to come to this point in their life*." (13RT 2672, italics added.) Ms. D. did not directly responded to the prosecutor's question whether the alleged circumstances of this crime would warrant the death penalty, saying "It's serious." (11RT 2674.) Ms. D. had also written she was "[n]ot sure" if the death penalty should continue to be the law. (SCT 56.)

(1) Comparison with Juror No. 3

Lorraine D. wrote that taking someone's life was not the answer (SCT 55), and during the prosecutor's voir dire, she responded: "I don't feel that taking a person's life is always the answer. It depends on . . . the nature of the . . . crime, what they have done, how . . . their upbringing, what caused them to come to this point in their life" (13RT 2672). Juror No. 3 wrote that "sometimes [the death penalty] needs to be used. I don't think it's a blanket cure for crime." (56CT 16385.) When the prosecutor asked Juror No. 3 to elaborate on his "blanket cure" comment, he responded: "I think it's all based on individual circumstances . . . . I don't think it's something that can be completely eliminated. . . . [¶] . . . [¶] . . . I don't think that . . . just because you've done something, that that automatically means that is what you are going to get. [¶] . . . [¶] . . . [I]t's based on individual crimes." (6RT 1100; see 56CT 1104 [he would vote to impose the death penalty "[i]f I feel that's appropriate"].) Unlike Ms. D.'s above uncertainty whether the death penalty should be retained, Juror No. 3 believed the death penalty should be retained, "Because sometimes it needs to be used. There needs to

be some ultimate penalty." (56CT 16386.) Ms. D. and Juror No. 3 were not similarly situated regarding their views on the death penalty. Among these things, Ms. D appeared to be more inclined to vote for LWOP, she specifically brought the murderer's upbringing into the calculation, and she was uncertain about retaining the death penalty. On the other hand, Juror No. 3 believed the death penalty was appropriate given the nature of the individual crime, and he believed in the use of the death penalty. The prosecutor could properly believe Juror No. 3 would be more inclined to vote for the death penalty than Ms. D.

Nor, was Juror No. 3 similarly situated to Ms. D. regarding her spouse's employment showing a "liberal bent." Juror No. 3 graduated with a psychology minor. But, Juror No. 3 was employed as a newspaper sales person. Juror No. 3 had no professional psychological training. (56CT 16373-16374.) Despite (but perhaps because of) his psychology classes, Juror No. 3 was "[n]ot sure [of his opinion regarding the use of alienists in criminal proceedings]. I mostly think that psychologists merely form opinions. No better than you or I." Juror No 3 explained, "A friend goes to [an alienist] because he felt he had problems. If he feels it helped, great." (56CT 16382.) Twenty-six-year-old Juror No. 3 still lived in his parents' home. (56CT 16371-16372.) Both he and his father were gun owners, Juror No. 3 owning an AR-15. Evidently, it was Juror No. 3's father who was a "believer in his right to keep and bear arms." (56CT 16380.) Juror No. 3 was not similarly situated to Ms. D. regarding having a possible liberal attitude which would be more conducive to voting for LWOP than death.

Nor, were Ms. D. and Juror No. 3 similarly situated regarding drug use. They both had past limited experience with marijuana (56CT 16383; SCT 53), and Juror No. 3's brother had "smoked pot for a short time"

(56CT 16383). But, Ms. D.'s sister had been both a heroin and crack addict (SCT 53).

Ms. D. had no opinion regarding the DNA evidence, because her "knowledge is limited." (SCT 51.) In contrast, Juror No. 3 believed DNA evidence "seems to work pretty well." (56CT 16381; see also 6RT 1106, 1108 [DNA "[j]ust seems to work"].) As part of his course of studies in psychology, Juror No. 3 took statistics courses which included "population studies." (6RT 1112.) The prosecutor could reasonably suspicion Juror No. 3 would be more likely to understand and accept the prosecution's DNA evidence despite any probable defense effort to confuse and suggest the various samples were improperly contaminated negating the effect of all of the DNA evidence.

(2) Comparison with Juror No. 4

Appellant asserts Ms. D. was similarly situated with Juror No. 4. (AOB 141.) Juror No. 4 was a substitute teacher, educating children from kindergarten to eighth grade. Before that, she had worked as a restaurant manager. (56CT 16392-16393.) While her new position as a substitute teacher may cause some concern, she had only taught for a short time, and her prior managerial experience would have reflected less of a "liberal bent" than certain social work-related vocations.

The tenor of Juror No. 4's views on the death penalty differed from that held by Ms. D. As noted, after reading her questionnaire, the court has been uncertain whether Ms. D. would qualify. (13RT 2663.) The court did not raise a similar concern about Juror No. 4.

Ms. D. did not believe taking the murderer's "life is the answer, but each situation is different depends on the circumstances." (SCT 55.) Juror No. 4 believed in the death penalty in "certain circumstances . . . depends on the case." (56CT 16404.) Juror No. 4 did not preface her beliefs that

the death penalty was called for under certain circumstances with the comment that executing a murderer was not the answer.

Ms. D. was not sure if she would vote to retain the death penalty. (SCT 56.) Juror No. 4 was also unsure if she would vote to retain the death penalty, but she further explained: "I believe in it in certain cases – I would have to be convinced that was the best option." (56CT 16405.) Ms. D. and Juror no. 4 were not similarly situated regarding their beliefs concerning imposition of the death penalty.

Akin to Ms. D., Juror No. 4 had briefly smoked marijuana, doing so in high school. (56CT 16402, SCT 53.) Unlike Ms. D. (SCT 53), drug abuse had not impacted Juror No. 4's life or the life of anyone close to her (56CT 16402). As the prosecutor's reasons indicate, he was concerned because the heroin and crack addiction and eventual death of Ms. D.'s sister did not appear to have "phased" her.

Juror No. 4 explained her understanding of DNA testing: "[A] saliva or blood sample is taken and tested to see whether or not there is an appropriate match." (56CT 16400.) She believed DNA evidence "is pretty accurate in my opinion." (56 CT 16400.) Lorraine D. had heard about DNA testing only because of "OJ Simpson case," and she had no opinion as to viability of DNA evidence because her "knowledge [was] limited." (SCT 51.)

Ms. D. and Juror No. 4 were not similarly situated in other respects. Juror No. 4's father was a captain in the Mountain View Police Department. (56CT 163893.) As Juror No. 4 was growing up, she extensively discussed his work with him, and as a result of that interaction, she believed she had a greater insight into the criminal justice system than did the "average citizen." (17RT 1166.) It was reasonable for the prosecutor to suspect that given that relationship, together with Juror No. 4's belief that the "criminal justice system is fair and very effective" (56CT

16397; cf. SCT 48 [Ms. D.'s opinion that the criminal justice system serves the purpose of punishing criminals]), Juror No. 4 would be more inclined to accept the prosecutor's DNA evidence, credit the law enforcement testimony to be elicited in the prosecutor's guilt phase case, and be more receptive to the aggravating factors' evidence (see *Bugliosi*, The Art of Prosecution (2004) Ch. III (Voir Dire), p. 73 (*Bugliosi)*).

(3) Comparison with Juror No. 7

Appellant again relies on Lorraine D.'s self-report she was an "8," and thus supposedly more inclined to vote for the death penalty than the self reports of Jurors No. 3 (6-7), 4 (6), and 7 (5), to argue the prosecutor's reasons for his challenge of Ms. D. were pretextual. As already noted, given the responses on her questionnaire, prior to voir dire the court was concerned Ms. D. would not qualify given her written response that she did not "believe taking one's life is the answer." (SCT 55.) Ms. D. had written she was uncertain whether she would vote to retain the death penalty, but she did not follow the written question's directive to explain her answer. (SCT 56.)

Juror No. 7 indicated she was unsure whether she would vote to retain the death penalty, but she explained: "I would probably vote in favor [of the death penalty], however [I] would read both sides carefully." (56CT 16462.) Juror No. 7 and Ms. D. do not appear to be similarly situated in regard to their attitudes toward the death penalty.

Unlike Ms. D., neither Juror No. 7's vocation nor the activities related to that vocation, appear to show a "liberal" bias. Juror No. 7 was retired. (56CT 16447.) While Juror No. 7 had obtained a received a bachelor's degree in child development (during which she took psychology courses), she had also obtained a masters degree to teach mathematics, and a doctorate in education. (56CT 16450, 16457.) She had not been a "social worker" type, rather she had been an educational administrator, serving as

the director of personnel for two school districts. Juror No. 7 was now ran a small business and occasionally served as a consultant to an executive search firm. (56CT 16449-16450; 8RT 1415-1416.)

Juror No. 7's sons, now in their 30-40's, had been detained for marijuana offenses when they were teenagers and had been placed on juvenile probation. (56CT 16447, 16455; 8RT 1420.) Juror No. 7 had "tried marijuana—years ago," and she believed "we should accept [its] legalization . . . ." (56CT 16459.) Again, this all pales in consideration to the addiction of Ms. D.'s sister. And, the prosecutor's concern had not been about the sister's addiction, and evident death resulting from that addiction, but rather by taking into account both Ms. D.'s answers and her demeanor during voir dire, that those circumstances had not appeared to "phase" Ms. D.

Most significantly, Juror No. 7 had taken the Fremont police's citizen police academy, and she had been a member of the Alameda County Grand Jury for two years serving as its foreperson one of those years. (56CT 16450, 16453-16454; 8RT 1416, 1418.) "Numerous criminal cases" were brought before the grand jury. (8RT 1417.) Juror No. 7 listed as friends an Alameda Superior Court judge and the deputy district attorney who had assisted the grand jury. (56CT 16452; cf. 8RT 1417 [the deputy district attorney had not been a "social friend," but she had "a lot of respect for him and the work he does"].) Juror No. 7 had "worked with various police officers as a school administrator involved in student discipline . . . ." (56CT 16453.) Her experiences as a school disciplinarian had led her "to respect the professional work done" by the police. (56CT 16454.) Juror No. 7 was on the list to serve as the Fremont Police representative on the school attendance (truancy) review board. (56CT 16455; 8RT 1418-1419.) The prosecutor could reasonably suspect Juror No. 7 would be inclined to

accept the prosecution's evidence, and be more dispassionate in determining penalty than would Ms. D.

3. Victoria E.

a. Background

When asked her general feelings about the death penalty, Ms. E. wrote: "I feel that if you kill another person intentionally you should be kill [*sic*] because the person that he or she kill do not have second chance." On the other hand, Ms. E. also wrote her views on the death penalty had changed over the last several years: "I understood that there are some people who are in prison for the crime that they did not commit and as such it will unfair for someone to die for the crime that he did not commit." (SCT 74.)

One of the court's initial questions of Ms. E., and the ensuing colloquy showed hesitation to impose the death penalty:

> [A]re you the type of person that could ever vote to execute another human being? Could you do something like that?
>
> A. Umm, *I do have mixed feeling about it* because, umm, in one sense, I think if they kill somebody, they should be killed but, when I, on the other hand, when I think about it again, if you kill that person, will it bring the other person back? [¶] So I kind of have mixed feelings about it. I don't have answer right now.
>
> Q. Well, is it reasonable for us to assume . . . because of your reservations about the death penalty that it really doesn't solve anything, that in this case it would not be an option for you?
>
> A. To me it will not solve the problem, but maybe some of the family, like the victim family, if there's a death penalty, maybe they might feel closure to it.
>
> [¶] . . . [¶] Q. But you'd have to do it.
>
> A. Yeah. But to me, I think I feel if it's life without possibility of parole --

Q. You'd be happy with that?

A. Yeah, *I'd be happier with that.*

Q. So the death penalty is not really an option for you?

A. I have to really look into the case before I would say whether I can choose that or not.

Q. Well, supposing in this case you were a juror . . . [¶] . . . [¶] . . . and you found Mr. Nadey guilty of the following conduct. You decide this is what he did: [¶] That the victim in this case was a stranger to him; that he assaulted her; that he forcibly sodomized her; then he cut her throat and killed her. [¶] Now, knowing that, supposing he's found guilty of that, is that crime so bad to you, that you would always pick the death penalty?

A. Umm, yes. But I don't . . . it would solve the problem. *I would prefer* [LWOP].

Q. Okay. So you're not really sure what you could do, right?

A. . . . [I]t would be hard for me. I look at different -- I look at the case. I say, yeah, the person should be killed but, then when I think about it, again, that person is dead. And the other one who you are killing – the other person, it doesn't really –

Q. Miss E[.], here's the problem that I have here. The defense lawyers, I think, are afraid that if you find him guilty of sodomizing this woman and cutting her throat, that you're going to pick the death penalty every time and execute him. I think the district attorney is concerned that you feel that the death penalty doesn't bring the victim back; so you prefer life without parole. So both of these lawyers here have a problem in trying to figure out whether or not you could keep both these penalties open because . . . one minute you're telling us the crime is so, so bad you'd pick the death penalty, but, on the other hand, life without parole might work. So my question is, are both those penalties available to you in this case, or because of your . . . reluctance or hesitation to decide -- whether you can keep both these penalties open?

A. I can keep them open.

Q. You could keep them open. You think you could pick either penalty?

A. Yeah.

THE COURT: Before I go through the voir dire, I want to ask both sides if they want to stipulate with Miss E[.], because I think you don't want to do that.

MR. HOROWITZ: Okay.

THE COURT: Then we'll go through it. [¶] Q. . . . [L]et's go back to the original question because I don't think you really answered that for me. Are you the type of person that could ever vote to execute another human being? Just forget about this case. [¶] Just in general -- like you and I were talking. And I said, Miss E[.], do you think you're the kind of person that could execute another person -- condemn him to death? [¶] Could you do that?

A. I *think* I can vote on it, yeah.

Q. You think you could?

A. Mm-hm.

(16RT 3278-3281, italics added; see also 16RT 3284, 3287-3289 [further examination during the prosecutor's voir dire].)

b. The prosecutor's stated reasons

The prosecutor explained:

She mentioned the death penalty does not bring back the victim. She vacillated between death and LWOP. [¶] . . . [A]s far as I'm concerned, a wild card. What she will do is anybody's guess. And I'm not going to take a chance on somebody like that when I have tons of better qualified jurors as far as imposing the death penalty coming up.

She is also a welfare worker, which equates, to my way of thinking, as being very liberal. And I *suspect* there's a language barrier there because we had a hard time getting to understand each other.

(18RT 3721-3722, italics added.)

c. Discussion

Victoria E. was also part of the first *Batson* challenge where appellant, when asked if he wanted to be heard, simply submitted the matter. (18RT 3723.) As previously noted, while not dispositive, such action suggests that counsel may have found that the prosecutor's stated race-neutral reasons were reasonable. (*Jones*, *supra*, 51 Cal.4th at p. 361.)

The prosecutor could reasonably be concerned about the above colloquy. Most apparent was Ms. E[.]'s comment that she would be "happier" imposing LWOP that the death penalty. That by itself was a very strong reason for the prosecutor to challenge her. (See *Blacksher*, *supra,* 52 Cal.4th at p. 802; *People v. Garcia* (2011) 52 Cal.4th 706, 780-781 (*Garcia*).) Moreover, Ms. E.'s comment the death penalty does not bring the victim back, is one reason used by death penalty opponents to argue for its repeal. Given Ms. E.'s statements about the death penalty, that it does not bring the victim back to life, "does not solve the problem," "innocent people" may be executed, and that she "thought" she could vote to impose the death penalty, the prosecutor could reasonably suspect that other panelists might be more disposed to return a death penalty verdict. (*Turner*, *supra*, 8 Cal.4th at p. 171; cf. *Blackshear*, *supra*, 52 Cal.4th at p. 802 [citing to *People v. Bolin* (1998) 18 Cal.4th 297, 317 for the proposition that a challenge to panelist "'express[ing] scruples about the death penalty' is proper'"].) The prosecutor affirmatively stated that he had other panelists in the wings he believed might be more inclined to favor the death penalty over LWOP, which is a valid race-neutral reason for a challenge.[34] (*Jones*, *supra*, 51 Cal.4th at p. 367.)

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[34] This would have been true of all of the panelists the prosecutor challenged.

The prosecutor's second reason was his concern that Ms. E.'s status as a welfare worker indicated a "liberal" bias, which he believed would make it more likely she would vote for LWOP. This is akin to the prosecutor's earlier-expressed concern about keeping Lorraine D. on the jury. (See, e.g., *Clark*, *supra*, 52 Cal.4th at pp. 907-908 ["peremptory challenges based on a juror's experience in counseling or social services is a proper race-neutral reason for excusal"].)

Appellant makes one specific complaint about the bona fides of the prosecutor's reasons, i.e., concern about his inability to communicate with Ms. E. The court established—for the sake of its own "curious[ity]"—that Ms. E. was from Nigeria, coming to the United States when she was 21. (16RT 3286-3287.) When the court specifically asked if Ms. E. attended English-speaking schools while in Nigeria, she responded she went "to Catholic school." (16RT 3287.) Ms. E.'s questionnaire indicates she received an associate degree following two years at the College of Alameda. (SCT 63.)

Again, the prosecutor's concern about communication goes to evaluation of demeanor. The record, including the court's "curiosity" question, suggests Ms. E. had some difficulty understanding and communicating in English—despite having been in the United States for 17 years, and being employed by Alameda County for the last 10 years. (16RT 3293; see SCT 60, 62, 67 ["I do feel that criminal justice system do make victim and families to go through lost of agony through long trial and appeals"], 70 [when asked her opinion of DNA evidence, Ms. E. wrote: "I do not have opinion since I do not know much about it"], 73 [regarding her opinion about people who use meth[] or other illegal drugs? she responded "I believe it their choice and they should be responsible for their action"].); see also, e.g., 16RT 3278 ["mixed feeling" & "I don't have answer right now"], 3281 ["two trial"], 3287 ["maybe there's argument"], 3288 ["it's

[sic] going to be killed"]; 3292 [when Ms. E. did not "understand" the prosecutor's one-to-ten scale, the court stepped in to explain it].) The prosecutor's concern was supported by the record and was a proper reason to exercise a preemptory challenge. (*Turner*, *supra*, 8 Cal.4th at p. 170 ["where a prosecutor's concern for a juror's ability to understand is supported by the record, it is a proper basis for challenge"].)

Moreover, defense counsel's very limited questioning of Ms. E. may have also alerted the prosecutor to the defense impression that Ms. E. would be more hesitant than other panelists to vote for the death penalty. (See 16RT 3293.) At the very least, a review of the comments made by the court during Ms. E.'s voir dire and the court's suggestion to stipulate to her excusal demonstrate that the prosecutor could properly believe that Ms. E. was, at best, a "wildcard," and that some of the remaining panelists would not demonstrate that characteristic.

d. Comparative analysis

Appellant attacks the prosecutor's reasons for excusing Victoria E., comparing her answers to those of six jurors and two alternates. (AOB 142-148.) As noted, the prosecutor explained he challenged Ms. E. because she: (1) stated the death penalty does not bring the victim back; (2) vacillated between LWOP and imposition of the death penalty, thus being a "wild card," where the prosecutor believed various remaining panelists would be more inclined to vote to impose the death penalty; (3) was employed as a "social worker" demonstrated a liberal bent; and (4) demonstrated a possible inability to understand and communicate with him. (18RT 3721-3722; cf. AOB 142-143.)

Appellant stresses those answers which would seem to indicate, in accord with Ms. E.'s written responses, that if someone is intentionally murdered, the murderer should be executed. (SCT 74; see AOB 143; 16RT 3278-3237, 3288). He ignores Ms. E.'s further written comments that

innocent people can sometimes be improperly convicted and it would "be unfair for someone to die for the crime he did not commit" (SCT 74; see 16RT 3278-3279, 3288-3289), and the court's decision to go directly to the question whether Ms. E. could personally vote for the death penalty (16RT 3277). (See AOB 143-144.) He ignores the court's comments that given Ms. E.'s answers, defense counsel might believe "you're going to pick the death penalty every time," while the prosecutor might be "concerned that you feel that the death penalty doesn't bring the victim back; so you prefer [LWOP]." (16RT 3280.) As with other prospective jurors, the fact that some of her answers may have been equivocal is fatal only to a challenge for cause under *Witt/Witherspoon*. It does not make appellant's argument.

Appellant claims Ms. E. was similarly situated to Jurors No. 2, 5, 6, 7, 9, and 10, and Alternates No. 1 and 5, who "also expressed some reservation regarding whether they were inclined to impose the death penalty or LWOP." (AOB 144; see AOB 146-147 [Ms. E.'s "so-called vacillation . . . is similar to and/or akin with the reservations and/or concerns expressed by" the above jurors and alternates], 147 [regarding the prosecutor's explanation Ms. E. was a "wild card," he asserts that when compared to Ms. E., the record "reflects that each one of those jurors had similar reservations and/or concerns with respect to imposing the death penalty"].)

None of the other jurors mentioned by appellant said they had "mixed feeling[s]," and "did not have an answer right now," to the court's question whether they could personally vote to impose the death penalty. (See 16RT 3278.) Appellant ignores that unlike the other jurors and alternates that he now compares Ms. E. to, only Ms. E. told the court she would be "happier" and "would prefer" voting to impose LWOP. (16RT 3279; see AOB 144-147 [comparison with Jurors No. 2, 5, 6, 7 & 10, & Alternates No. 1 & 5].) Appellant fails to mention that, before proceeding with further voir dire, the

court asked counsel if they would be willing to stipulate to excusing Ms. E. "because I think you don't want to" have to make the choice between voting to impose LWOP or the death penalty. Given the lack of a stipulation, the court continued with voir dire. (16RT 3280-3281.) None of the cited jurors and alternates had the same – much less constellation of— answers regarding their attitudes toward the death penalty as Ms. E.

Victoria E. also was not similarly situated to Jurors No. 2, 5, 6, 7, 9, and 10, and Alternates No. 1 and 5, in other respects. Among other things, Ms. E. did not know anyone involved in law enforcement (except for her husband and her brother-in-law's positions as security guards) or the criminal court system. (SCT 65-66; cf. 56CT 16353 & 16355 [Juror No. 2's significant other was a deputy sheriff and she had prior experience working with law enforcement], 16434 [Juror No. 6's neighbor was a captain in the Pleasanton Police], 16452-16454 [Juror No. 7's above noted involvement in the criminal justice system and her past favorable involvement with the police as a school administrator], 16492 [Juror No. 9's uncle was a retired peace officer], 16640 & 166643 [Alternate No. 5 had taken "multiple Administration of Justice classes," his roommate worked for the FBI, and he had six acquaintances who worked for the San Leandro Police Department].)

According to Ms. E., her husband had been involved with the police relating to "drunk driving and he was not drunk." (SCT 66, 68.) This comment demonstrates a possible hostility toward law enforcement (see *People v. Farnam* (2002) 28 Cal.4th 107, 138 (*Farnam*)), and was unlike the written answers provided by Jurors No. 2 (56CT 16359), 5 (56CT 16416), 6 (56CT 16435), 7 ("My experience has led me to respect the professional work done" [56CT 16454]), 9 (56CT 16493), and 10 (56CT 16512), and Alternates No. 1 (56CT 16569), and 5 (56CT 16644).

Ms. E. did not "have [an] opinion [regarding DNA evidence] since I do not know much about it." (SCT 70; cf. 56CT 16362 [per Juror No. 2, DNA "accurate"], 16419 [per Juror No. 5, DNA "valid way to determine if a specific person may be involved"], 16438 [per Juror No. 6, DNA "valid if chain of evidence maintained"], 16457 [per Juror No. 7, DNA "seems very reliable if one can depend on the odds"], 164956 [per Juror No. 9, DNA "is the most accurate method of determining blood type & who it belongs to"], 16572 [per Alternate No. 1, DNA evidence "sounds logical"], 16647 [Alternate No. 5 did not "know enough" to give an opinion on DNA evidence but had "heard 'bits and pieces' about how reliable it is"].)[35]

Unlike Ms. E., Jurors No. 2 and 9 had previously served on criminal juries, and Juror No. 7 was a past member and foreperson of the grand jury. (Compare SCT 66 with 56CT 16358 [No. 2], 16450-16454 [No. 7], 16492 [No. 9].) None of the other mentioned jurors and alternates had a defense voir dire consisting of only one full page of reporter's transcripts. (Compare 16RT 3293 with Jurors No. 2 [15RT 3023-3030 (6 pp.)], No. 5 [6RT 1039-1046 (6 pp.)], No. 6 [15RT 3213-3217 (4 pp.)], No. 7 [8RT 1415-1424 (9 pp.)], No. 9 [6RT 1061-1064 (3 pp.)] , No. 10 [7RT 1282-1286 (4 pp.)] , and Alternates No. 1 [8RT 1547-1551 (5 pp.)] and 5 [9RT 1731-1739 (5 pp.)]).

Appellant again argues, as he did regarding Lorraine D., that Ms. E. was no more "liberal" given her profession, than Juror No. 7. (AOB 147.) This supposed similarity was addressed above in the discussion regarding the dissimilar comparison between Lorraine D. and Juror No. 7. Suffice to say, unlike Ms. E.'s possible hostility toward law enforcement noted above, Juror No. 7, had, among other things, served as foreperson of the grand jury, and had very good working relationships with law enforcement when

[35] Juror No. 10 did not answer this question. (56CT 16515.)

she had served as a school disciplinarian. (56CT 16449-16450, 16452-16455; 8RT 1415-1419.)

4. Alice S.

a. Background

Again, instead of starting with its usual initial litany of questions for the various panelists, the court prefaced its examination of Alice S., by first asking her about two responses on her questionnaire. The first was Ms. S.'s response to the question about the impact of drugs on her family: "My brother was killed, drug related as far as I know." Ms. S. explained she had been "close" to that brother, who had been murdered five years before.[36] (17RT 3605; see SCT 91.)

The court then asked Ms. S., "[A]re you the type of person that could ever vote to execute another human being," to which she responded: "I'm not certain. [¶] . . . [¶] I'm not absolutely, positively sure." (17RT 3606.) Ms. S. was asked on her questionnaire: "'What are your general feelings regarding the death penalty?'" She wrote, "'I have really not thought about it until today. I guess I believe that in some cases it would be needed.'" As his first question, the prosecutor asked her to elaborate on her written response. Ms. S. said she had "not really thought about it until I was filling that question in. But I have thought about it since then. I think there are some crimes that are so brutal . . . there is no good comparisons that I think are appropriate." (17RT 3613-3614; see SCT 93.)

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[36] The prosecutor later established that the murderer had not been apprehended. While Ms. S. characterized her family as "pretty" close, she also explained she and her brother had "been separated as grown people a long time." When the prosecutor asked if Ms. S., "still fe[lt] kind of a loss for having lost a family member under those circumstances?" she responded: "Sure." (17RT 3619-3620.)

b. The prosecutor's reasons

The prosecutor explained:

> One, I had doubts whether she could personally impose a death penalty. When the Court asked her that question, are you the type of person who could personally impose the death penalty on anybody, there was a 15-second pause before she gave her answer.
>
> She works as a social worker for special education children. [¶] She is a very kind—liberal kind of a person. Her brother was murdered about five years ago, and it didn't seem to phase her one bit.
>
> She was never married. Therefore, I believe she has no family values that would help me out in the penalty phase. And I asked her if a minister's wife being murdered meant anything. She says it meant nothing to her, which would once again reflect upon my victim impact.

(18RT 3721.)

c. Discussion

Alice S. was also part of the first *Batson* challenge where appellant, when asked if he wanted to be heard, simply submitted the matter. (18RT 3723.) As previously noted, while not dispositive, such action suggests counsel may have found the stated race-neutral reasons to be reasonable. (*Jones*, *supra*, 51 Cal.4th at p. 361.)

Appellant challenges the prosecutor's stated concern that Ms. S. was unlikely to impose the death penalty by pointing to various statements that seemingly show support for, or at least a willingness to consider, the death penalty. (AOB 148-149.) While the existence of ambiguity may be sufficient to overcome a challenge for cause under *Witherspoon*, it does not undercut the race-neutral basis for a prosecutor's decision to excuse the prospective juror peremptorily. (*Hoyos*, *supra*, 41 Cal.4th at p. 902; *Catlin*, *supra*, 26 Cal.4th at p. 118.)

In addition to the specific statements noted above, the prosecutor observed that Ms. S. paused 15 seconds before answering the court's question whether she could personally impose the death penalty. Such hesitancy is also a valid reason for the challenge. (*Griffin*, *supra*, 33 Cal.4th at p. 557, fn. 6; *People v. Pride* (1992) 3 Cal.4th 195, 229-230 (*Pride*); *People v. Howard* (1992) 1 Cal.4th 1132, 1156 (*Howard*).)

> As we have observed in the past, a juror's decision whether to impose the death penalty has moral and normative underpinnings. [Citation.] A juror's philosophical position on capital punishment is directly relevant and may factor into penalty phase decision-making, but the same cannot be said of bias. A juror . . . is obligated to set aside all biases and view the evidence impartially. Moreover, even when jurors have expressed neutrality on the death penalty, "neither the prosecutor nor the trial court [i]s required to take the juror's answers at face value." [Citation.] If other statements or attitudes of the juror suggest that the juror as "reservations or scruples" about imposing the death penalty, this demonstrated reluctance is a race-neutral reason that can justify a preemptory challenge, even if it would not be sufficient to support a challenge for cause.

(*People v. Lomax* (2010) 49 Cal.4th 530, 572 (*Lomax)*.)

The cold record does not indicate that pause, but the defense did not challenge the prosecutor's characterization. (See *People v. Mai* (2013) 57 Cal.4th 986, 1053 (*Mai*) ["the prosecutor's demeanor observations, even if not explicitly confirmed by the record, are a permissible race-neutral ground for a peremptory challenge, especially when they were not disputed in the trial court"]; *Jones*, *supra*, 51 Cal.4th at p. 363 [no response from the defense could suggest defense counsel found the prosecutor's reasons credible].) Challenges based on demeanor, where accepted by the court, are proper.

> "'[R]ace-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether

> the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie "'particularly with a trial court's province,'" [citations], and we have stated that "in the absence of exceptional circumstances, we would defer to [the trial court]." [Citation.]'"

(*Jones*, *supra*, 51 Cal.4th at p. 361; see *id.* at p. 363.) The existence of such hesitation is supported by the nature of Ms. S.'s answer, that she was unsure if she could personally impose the death penalty.

The prosecutor's second reason was that Ms. S. was a social worker, working with special education children.[37] This, or a very similar reason, was among the factors the prosecutor used to challenge three of the other panelists appellant claims where challenged because of race (Victoria E., Lorraine D., and Doris C.). A prosecutor "can challenge a potential juror, whose occupation, in the prosecutor's subjective estimation, would not render him or her the best type of juror to sit on the case for which the jury is being selected." (*People v. Reynoso* (2003) 31 Cal.4th 903, 925 (*Reynoso*); see *DeHoyos*, *supra*, 57 Cal.4th at p. 110 [panelist's "educational background, interest, and experience in the field of psychology was a race-neutral reason"]; *Clark*, *supra*, 52 Cal.4th at pp. 907-908 [juror's experience in counseling or social services is race-neutral]; see *Bugliosi*, *supra*, Ch. III (Voir Dire), p. 74 ["Included are social service workers, all types of counselors (especially drug and alcohol . . . .), child

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[37] Ms. S. described herself as a self-employed "administrator," having worked in Oakland and Stockton for ten years. (SCT 81.) She had been a "mentor teacher" in special education. (SCT 82.) Ms. S. graduated college majoring in "Education/Social Science," and she had received a post-graduate degree in "social sciences." (SCT 81-82.)

welfare workers, and any other occupations dedicated to helping the down and out"].)

In fact, during voir dire of panelist Amy Greenberg,[38] who held a master's degree in counseling and worked for the Hunter's Point Foundation, Mr. Giller acknowledged, "Sounds like our kind of juror, actually." (7RT 1201.) Even the court later acknowledged during voir dire of the penalty retrial jury panel, being "a clinical social worker" was a reason why a panelist might not serve as a juror. (37RT 6417.)

The prosecutor's third reason for excusing Ms. S. dealt with her demeanor while talking about her brother's death, i.e., that it had not "phased" her. Again, the cold record does not clearly reflect Ms. S.'s demeanor while answering the questions asked by both the court and the prosecutor regarding her brother, but it does show that Ms. S.'s answers were rather cursory, supporting the prosecutor's impressions of her demeanor. (See *People v. Jordan* (2006) 146 Cal.App.4th 232, 255 [legitimate reasons include sudden impressions and gut feelings that suggest possible bias].)

The prosecutor's fourth reason was Ms. S. had never married. The questionnaire also reflects Ms. S. never had children. (SCT 79.) That a prospective juror is single and childless is a relevant factor when a prosecutor selects any jury. (See *Bugliosi*, *supra*, Ch. III (Voir Dire), p. 72.) Moreover, the voir dire revealed that Alice S. had not kept in close contact with her family. Here, the prosecutor's specific reason was that, given that unmarried status, Ms. S. might be less sympathetic to any victim impact testimony from Donald (concerning both he and Regan), and

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[38] Ms. Greenberg was excused for cause based on her unwillingness to consider the death penalty. (7RT 1201.)

Terena's parents and sisters, than would other prospective jurors. This also was a proper race-neutral reason for challenging Ms. S. (See *id.* at p. 63.)

Ms. S.'s answer that the fact that Terena had been a minister's wife meant nothing to her was again a reason based on the prosecutor's assessment of Ms. S.'s demeanor. It is reasonable for a prosecutor to believe this strict neutrality would make Ms. S. less sympathetic to voting for the death penalty than other panelists.

d. Comparative analysis

Appellant uses comparative analysis to attack some of the prosecutor's reasons for challenging Alice S. (AOB 148-154.) He argues the prosecutor's reasons were pretextual given Ms. S.'s self-report that she was a seven on the prosecutor's scale. (AOB 148.) As discussed in more detail above, that scale was not the be-all end-all of the prosecutor's decision whether to challenge a particular prospective juror.

Moreover, as with other panelists, Ms. S.'s questionnaire answers were not on all-fours with her numerical pick. On her questionnaire, Ms. S. responded in regard to her "general feelings" about the death penalty: "I guess I believe that in some cases it should be needed." (SCT 93; see also SCT 94.) Also, the prosecutor relied upon a demeanor factor not shown by the record, but not questioned by either the court or defense counsel, i.e., Ms. S. paused for 15 seconds before answering the court's question whether she could personally impose the death penalty. Even then, she responded, "I'm not certain," and "I'm not absolutely, positively sure." (17RT 3606.) Appellant's attempt to rehabilitate Ms. S.'s views on the death penalty by reference to other answers during voir dire (AOB 148-149), did not require the prosecutor to ignore his initial impression of Ms. S.'s ability to personally impose the death penalty. Ms. S.'s answers and demeanor demonstrated Ms. S.'s real concern about personally voting for death as opposed to LWOP. This combination shows Ms. S. was not

similarly situated with respect to the death penalty as seated jurors and alternates.

Appellant attacks as pretextual, the prosecutor's belief that Ms. S. was "liberal" and thus was not as inclined to vote for the death penalty as some of the other panelists. He claims that reason was pretextual since Ms. S. "is a self-employed administrator who had been educated and training in "special education." (AOB 149-150.) As already noted, Ms. S. was a past mentor teacher to other special education teachers (SCT 82; see SCT 90 [Ms. S. "worked with special people all my life"]). Ms. S. worked "with developmental disabled adults. I have worked with mental ill people also as a trainer." (SCT 90.) One of Ms. S.'s college majors was "social science," and her graduate degree was in "social sciences." (SCT 82.) The record does not refuted the prosecutor's reason for challenging Ms. S., i.e., that she "works as a social worker for special education" and that she appeared to be "very kind, liberal kind of person." (18RT 3721.)

(1) Juror No. 4

As already discussed in addressing appellant's comparative analysis argument regarding Lorraine D. and Victoria E., Jurors No. 4 and 7 were not similarly situated with Ms. S. Juror No. 4 had previously worked as a restaurant manager, and she had been a substitute teacher for only three months. (56CT 16392-16393.) Her degree had been in biology. She had learned about DNA in school, among other sources, and had "done some DNA testing" using the RFLP method. (17RT 1165, 1167.) She believed DNA evidence was "pretty accurate." (56CT 16393, 16400; see 11RT 1168 [based upon her own experience she believed DNA analysis was "99 percent accurate"].) Most relevant, as already noted, this young lady's father was a police captain who had been a police officer for 30 years (56CT 16389, 16393, 16399; 17RT 1166), and at home she had talked about his work. Based upon that fact, she believed she had more insight

into the criminal justice system than the average person. (17RT 1166.) Also, because of her own experiences and that of her father, she believed the criminal justice system was "fair and very effective." (56CT 16397.)

(2) Juror No. 7

Among the other differences noted above regarding appellant's comparison of her to Lorraine D. and Victoria E., were Juror No. 7's former and present jobs, her past connections with law enforcement and the courts, and her high regard for the police. Ms. S. was not similarly situated with Jurors No. 4 and 7.

(3) Juror No. 1

Appellant also claims the prosecutor's reasons for excusing Ms. S. were pretextual because he retained Juror No. 1, a rape victim. (AOB 151.) As already noted, the prosecutor's reason, i.e., that Ms. S. had not seemed "phased" by her brother's murder, went to her demeanor while answering the various questions about her brother. This characterization was not challenged by the defense, and was accepted by the court. Moreover, here, Juror No. 1 originally said her sitting in this case "could be a "problem" given the fact she had previously been raped. (15RT 3147; see 15RT 3147-3148 ["when someone forces themselves on somebody, I really find that a bad crime. [¶] . . . [¶] . . . it shouldn't be a death sentence, but it's a big violation"].) Juror No. 1 agreed that she would like to hear the evidence before deciding if appellant was guilty, or if that occurred, before deciding on penalty. (15RT 3148-3154.) The prosecutor could reasonably suspect that Juror No. 1 might be more inclined to vote for the death penalty than would Ms. S., given Juror No. 1's own misfortunate experience, the facts of this case, and the anticipated victim impact testimony.

Juror No. 1 was not otherwise similarly situated to Ms. S. In contrast to Ms. S., Juror No. 1's written feelings on the death penalty were that it

"should be used more often" (56CT 16347), although she amended that response during voir dire, saying she meant "if they're going to give somebody the death penalty, they should follow through . . . ." (15RT 3137; cf. 17RT 3036 [Ms. S. "not certain" and "not absolutely, positively sure" she could vote for the death penalty].) In discussing her past rape, Juror No. 1 said: "I think sometimes [it] is a better situation for [the murder victim because] they don't have to deal with living [and] remembering that." (15RT 3148; see also 15RT 3154 [victim of child molestation].)

Unlike Ms. S., a San Francisco police officer was a friend of Juror No. 1's husband, and a Burlingame police officer was her friend. (56CT 16339.) The prosecutor could reasonably suspect Juror No. 1 would be more inclined to positively consider the law enforcement evidence given her interactions with the above two police officers, and more inclined to vote for the death penalty given her own dual victimization.

(4) Juror 9 and Alternate No. 1

The prosecutor can properly take into consideration that Ms. S. had never married and had not raised any children (SCT 79-80). (See *Bugliosi*, *supra*, Ch. III (Voir Dire), pp. 63-65, 72 ["Marriage is one of the best indicators of conformity to the norms of the traditional society. That's why I like it as an indicator of a good prosecution juror"].) As the prosecutor explained, he believed that because of Ms. S.'s unmarried and childless status, she would not be as impacted as other prospective jurors by the prosecutor's victim impact evidence. Appellant compares Ms. S. to Juror No. 9, and Alternate No. 1, both fives, and both unmarried, to assert this reason was pretextual. (AOB 151-152.) The prosecutor had already expressed his concern about Ms. S.'s experience with her sister, and now dead brother (SCT 91), and, as already noted, she had grown away from that family, who had remained in North Carolina (17RT 3605, 3619-3620).

On the other hand, Juror No. 9 lived with a six-years-older male "friend." (56CT 16486-16487.) Juror No. 9 "had a family member who was mugged and robbed." (CT 16494.) In contrast to Ms. S., Juror No. 9's uncle was a retired police officer. (Compare SCT 84 with 56CT 16492.) Most importantly, Juror No. 9's attitudes about imposing the death penalty were much more sympathetic to the prosecution than to the defense.

Like Ms. S., Alternate No. 1 had never married, nor had children, and she, too, lived alone. (56CT 16562-16563.) However, the prosecutor could well believe that she and Ms. S. where not otherwise similarly situated. In contrast to Ms. S.'s "social worker," possibly liberal inclination, Alternate No. 1 was a bank vice president. (SCT 16564.) In addition to the stereotypic conservativeness of bankers (see 6 *Bailey and Fishman*, Criminal Trial Techniques (2009 West), ch. 39 (Jury Selection), § 39:49, p. 39-49), Alternate No. 1's father and brother owned firearms because "[t]hey like them." (SCT 16571.) As most any banker, Alternate No. 1 explained she was very attentive to details. (8RT 1548.)

A close friend of Alternate No. 1's sister "was kidnapped, raped, and murdered." (56CT 16570.) Alternate No. 1 thought she could divorce her feelings regarding that case from her deliberations in this case. (8RT 1550.) While Ms. S. had written that the death penalty "should be needed" in some cases (SCT 93), Alternate No. 1 had said, that while her views toward the death penalty had "softened somewhat," she was "generally pro death penalty" (56CT 16576).

Appellant correctly notes in regard to the prosecutor's final stated reason for challenging Ms. S., that he mistakenly attributed to himself the question whether the murder of a minister's wife "meant anything to her." (18RT 3721; see 17RT 3613-3620). Appellant overlooks that Mr. Horowitz asked Ms. S.: "Q. We are talking in this case about the killing and the sodomy affecting a minister's wife. ¶] Since you are active in you

church, does the fact that it is a minister's wife affect you differently than if she was the wife of somebody with a different occupation? [¶] A. No." (17RT 3621.) The validity of this reason cannot be characterized as pretextual simply because later the prosecutor mistakenly attributed the question to himself instead of Mr. Horowitz. (See *People v. Huggins* (2006) 38 Cal.4th 175, 231 (*Huggins*); *Jamerson*, *supra*, 713 F.3d at p. 1232, fn. 7.)

Assessing the prosecutor's reasons, the trial court did not abuse its discretion in determining that those reasons were race neutral. In this Court, appellant fails to show, using comparative analysis, the prosecutor's reasons were pretextual.

5. Doris C.

With the exception of appellant's argument the prosecutor improperly relied upon his belief that Doris C. possibly misled the court and counsel when comparing her answers on her questionnaire and her voir dire (AOB 158-159), appellant uses comparative analysis to contest the prosecutor's other reasons for challenging Ms. C. (AOB 154-159).

a. Background

On her questionnaire, Ms. C. reported she had been with the "Alameda County Welfare to Work Dept.[,] Social Service Agency" for nearly 28 years. (SCT 5.) She was now a supervising eligibility technician "for new medical eligibility." (SCT 5-6.) Among Ms. C.'s duties were to "solve problems with customers regarding benefits." (SCT 6.)

Additionally, Ms. C. had been asked the following questions and she had responded in writing:

(1) Question: "What are your feelings about the effectiveness of the criminal justice system?" Answer: "[U]nfair system at times – the rich go free and the poor are punished;"

(2) Question: "Do you have any experiences with crime and/or the police that have affected your view of the criminal justice system? If yes, please explain." Answer: "My grandson's father . . . was killed in his home by an Oakland Policeman, and no one has served time or been charged for this murder" (SCT 10);

(3) Question: "Have you or a family member or close friend ever been a **witness** to, a **victim** of any crime? If so please explain." Answer: "See #8 [the above question about experience with crime and the police] also my cousin was stabbed several times by her husband, but she survived" (SCT 11); and

(4) Question: "Have you, any family member or close friend ever been **accused of, arrested for, charged with or convicted of** any crime? If yes, please explain." Answer: "Yes, family members, theft and drug charges" (SCT 11).

Prior to Ms. C.'s voir dire, the court noted: "Wait. Before you bring her in, I have see[n] page[s] 7 and 8. [¶] (Brief pause.) [¶] She feels the criminal justice system is unfair. The rich go free and the poor are punished." (10RT 2077.)

Ms. C. had written, in response to the question asking her "general feeling regarding the death penalty": "If you do the crime – you should pay the price!" (SCT 17.) The prosecutor asked Ms. C. to elaborate:

> A. . . . I believe that if you go out and kill someone and you're found guilty, then death is a possibility for you, also. [¶] But, as I just stated, *the things in someone's life are, maybe, they were on drugs or something like that.* Then that would have an effect on their thinking. So at that point, they weren't doing it just for themselves.
>
> THE COURT: Well, Ms. C[.], let me interrupt you there. If you got to the penalty phase in this case – [¶] . . . [¶] -- there would be no issue as to whether he knew what he was doing. See, if you find him guilty of first-degree murder, any defenses he may have had -- like I didn't know what I was doing or I was under

the influence -- you would have resolved. [¶] . . . [¶] You understand what I'm saying?

PROSPECTIVE JUROR: That it would have already been taken care of.

THE COURT: It would have already been presented to you in the guilt phase, and you would have resolved that against him -- that he did know what he was doing; that if he was under the influence of drugs, it didn't affect his thinking process to the extent that it was a defense. [¶] So you would have resolved that against him already.

PROSPECTIVE JUROR: Okay. When I wrote that, really, I think if you take another's life, that you should expect that yours is taken, too. But I think before you do that, *it has to be really proven that you did it*.

[¶] . . . [¶] [MR. ANDERSON]: Q. When we get to the penalty phase, he is going to be sitting there as a convicted murderer and sodomite. No question of that. It's not going to be -- now we go into the penalty phase, he is a convicted murderer. That's it. There is no other issue to resolve at that point regarding guilt or innocence. [¶] You understand that?

A. Right. But I have an open mind enough to determine whether it should be death or life.

(10RT 2086-2089, italics added.)

The questionnaire also asked if the panelist "believe[d] that the manner in which a child is raised or treated **has** an impact on who they turn out be as adults?" Ms. C. responded: "Yes. It can determine their outlook on themselves and how they relate to others." (SCT 14.) During voir dire, Ms. C. explained the circumstances of the murder were not necessarily determinative as to penalty since "things in your childhood or life can – [¶] . . . [¶] cause you to do certain things. I understand that." (10RT 2084.) Later, Ms. C. explained: "[T]he things in someone's life are, maybe, they were on drugs or something like that. Then that would have an effect on their thinking." (10RT 2087.)

b. Prosecutor's reasons

The prosecutor explained:

> Now, getting back to Ms. C[.], one, she indicated . . . that things in childhood can cause problems later in life, ergo, penalty phase evidence that the defense might throw up in her face might be tending to sway her to their position rather than mine.
>
> Two, she works for the welfare department. That equates to me as being a liberal with a capital L . . . .
>
> Three, she has animosity towards the police department as indicated on page 8 of her questionnaire.
>
> Four, she has a rich-versus-poor attitude, similarly on page 8 of her questionnaire, which doesn't bode well for the witnesses I plan to call.
>
> Five, she misled us on the questionnaire, as far as I'm concerned.
>
> And, six, there were tons of better-qualified jurors more willing to impose the death penalty that were coming up later on, should I use that challenge. [¶] Sinker, hook, line, and everything else, case closed.

(18RT 3752-3753.)

c. Discussion

Appellant challenges the prosecutor's first reason, i.e., that Ms. C.'s written response that upbringing could have a determinative effect as to further actions would make her less included to vote for the death penalty. One question had asked if the panelist believed that upraising and treatment in childhood can impact how they will turn out. Ms. C. had responded: "Yes, it can determine their outlook on themselves and how they relate to others" (SCT 14). (AOB 155-157.) Ms. C. enlarged on that response when she told the court she would not determine appellant's penalty based solely on the circumstances of the murder: "I know that things in your childhood or life can – [¶] . . . [¶] – cause you to do certain things. I understand that."

(10RT 2084.) Ms. C.'s answers must be considered regarding the prosecutor belief, as noted above, that she was already "liberal[ly]" inclined.

Ms. C.'s comments about how childhood can explain adult criminal behavior, and well as how influences such as drugs can be mitigating, were valid concerns from which the prosecutor could reasonably suspect that Ms. C. would be less inclined than other possible jurors, to vote for the death penalty after hearing about appellant's youth and his methamphetamine involvement.

Appellant asserts the prosecutor's second reason for challenging Ms. C., that her employment with the county welfare department suggested she was "liberal" and less predisposed to voting for the death penalty, was pretextual. (AOB 157.) The prosecutor gave this basic reason, which, as noted above, is one well recognized, as one of the reasons he challenged not only Ms. C., but Alice S., Victoria E., and Harriett D.

The prosecutor's third reason was that on her questionnaire Ms. C. demonstrated possible animosity toward the police. Appellant does not appear to seriously challenge this reason. (See AOB 157-158.) That Ms. C.'s family members had been negatively involved with the criminal justice system was, standing alone, a proper reason for a challenge. (See *Griffin*, *supra*, 33 Cal.4th at p. 556; *Gutierrez*, *supra*, 28 Cal.4th at p. 1125.) That familial involvement, plus Ms. C.'s answer concerning her grandson's father, established she had a negative impression of the police. (See *Cornwell*, *supra*, 37 Cal.4th at p. 70.) This could negatively impact her reception of testimony from the various police officers and technician, the sheriff's criminalist, the DOJ DNA criminalist, and the district attorney inspector.

The prosecutor's fourth concern, that Ms. C. has a "rich versus poor" mentality, was also a valid reason for the challenge. As noted, the court

itself expressed concern with Ms. C.'s answer that the rich "go free," and the poor are "punished" under our criminal justice system. It appears the prosecutor's victim impact witnesses were at least of middle class status. The prosecutor could properly believe Ms. C. would be more sympathetic to appellant, than she would be when listening to the victim impact evidence, in making her penalty determination. (Cf. *Clark*, *supra*, 52 Cal.4th at p. 907 [panelist believed anyone could be "'hoodwinked' by corrupt attorneys"]; *Bugliosi*, *supra*, Ch. III, p. 64 ["Always look for people you think will identify with or like your witnesses"].)

Appellant challenges the prosecutor's reason that he believed Ms. C. had misled the court and counsel in her questionnaire. (AOB 158-159). As noted above, in arguing, the trial court did not abuse its discretion by rejecting appellant's *Batson* motion, while the record is unclear—since the prosecutor was not asked to explain—why he believed Ms. C. had been misleading, we note Ms. C.'s written response regarding her feelings about the death penalty were very different from some of her oral responses. Ms. C. wrote her feeling about the death penalty was: "If you do the crime—you should pay the price." (SCT 17.) However, when the prosecutor began his examination of Ms. C., asking her about that written response (10RT 2086), she now responded: "[D]eath is a possibility for you . . . . But as I just stated, the things in someone's life are, maybe, they were on drugs or something like that. Then that would have an effect on their thinking. So, at that point, they weren't doing it just for themselves." (10RT 2086.) Ms. C.'s general attitude toward the death penalty differed between her questionnaire (akin to a ten on the prosecutor's scale), and her more tentative answers during voir dire. (See 10RT 2083-2084, 2086-2087, 2089; cf. 10RT 2087 2083 ["I believe if you commit a crime—I believe in capital punishment—that you should die, also"].) Indeed, when Ms. C.'s answers are considered in toto, those answers were more in line with

"score" of five or less on the prosecutor's scale then even Ms. C.'s self evaluation that she would be a six. This was a race neutral justification for challenging Ms. C. (See *DeHoyos*, *supra*, 57 Cal.4th at pp. 105, 114; *People v. Cardenas* (2007) 155 Cal.App.4th 1468, 1475 ["the fact the prosecutor distrusts or finds the juror's responses not credible is a sufficiently race-neutral reason for using a preemptory challenge"].)

Moreover, Mr. Giller spent little time examining Ms. C. (10RT 2091-2092.)[39] In sum, the court's acceptance of the prosecutor's reasons as being race-neutral was supported by substantial evidence.

d. Comparative analysis

Appellant also uses comparative analysis, to claim the prosecutor's reasons were pretextual. (AOB 154-159.)

(1) Jurors 4 and 7

Appellant compares Doris C. with Juror No. 4, the young, newly-employed, substitute teacher, and Juror No. 7, the retired school administrator, to claim the prosecutor's reasons were pretextual. (AOB 157; see 56CT 16390, 16392.) As already discussed above, those jurors were not similarly situated to Ms. C. Ms. C. was not similarly situated with Juror No. 4, because among other things, Juror No. 4: (1) had spent her life interacting with her father, now a police captain; and (2) she was aware of DNA evidence given her college participation in DNA testing, specifically the RFLP method, which was one of the tests used by Mr. Myers to establish appellant's DNA profile. Also, as discussed above, Juror No. 7

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[39] The prosecutor's sixth reason was that there were "tons" of panelists still remaining who he believed would possibly be more sympathetic to the prosecution's penalty case. It goes without saying that after reviewing the questionnaires, and notes taken during voir dire, of the remaining panelists, the prosecutor was attempting to find jurors who would be sympathetic to the prosecutor's guilt and penalty evidence.

was not similarly situated to Ms. C., among those differences being her favorable interaction with prosecutors, and her favorable opinion of the law enforcement.

(2) Jurors 5 and 12, and Alternate No. 5

Appellant makes a comparative analysis argument regarding the prosecutor's fourth reason for excusing Ms. C., i.e. her rich-versus-poor written comments. (AOB 158.) As noted, unlike voir dire of any of the other prospective jurors, before Ms. C. was summoned for her voir dire examination, the court pointed out the above comment to counsel. (10RT 2077.)

Appellant now attempts to compare Ms. C.'s above specific answer with answers Jurors No. 5 and 12, and Alternate No. 5, gave to a different question. (AOB 158.) Even without going into other dissimilarities between Ms. C. and those jurors and alternate, there is a difference between what those jurors wrote regarding their opinion of the effectiveness of the criminal justice system, and the answers now used by appellant to support his argument the those jurors held the same view regarding that effectiveness. The answers of the above jurors and alternates which appellant now uses to assert their views were the same as Ms. C., were to another question: "Do you feel that in today's society, any particular group of people are more likely to commit violent crimes? If so, what?" Ms. C. had written, "No." (SCT 10.)

In response to the same question about the effectiveness of the criminal justice system, Juror No. 5 wrote, "Takes too long; overly deliberate – sometimes lacks focus on the issue by technical reasons to reach closure." (56CT 16419.) Juror No. 12 responded: "It is the best system we have. It is somewhat flawed[,] but comparing it to the rest of the world, I believe it is fine." (56CT 16550.) Those answers are completely different in content and form than Ms. C.'s rich versus poor attitude.

Alternate No. 5 responded to the effectiveness question: "Fairly effective. Not very equal in terms of social status or wealth." (56CT 16644.) Alternate No. 5's response about the effectiveness of the system was more akin to those given by Jurors No. 5 and 12. Unlike Ms. C., Alternate No. 5 believed our system is "fairly effective," and while acknowledging the unfortunate circumstance that the system can work better for the wealthy, Alternate No. 5 did not say that because of wealth, the guilty rich do free, nor did he say that the system—evidently regardless of guilt or innocence—punishes the poor.

(3) Comparative analysis regarding effects of childhood

Without specific analysis, appellant makes a cursory comparative analysis argument that Ms. C's answers regarding upbringing were the same as given by various other jurors and alternates to the same question. (AOB 155-157.)

Juror No. 1 had answered, "Sometimes." (56CT 16344.) However, when that written answer is considered in conjunction with Juror No. 1's answers during voir dire, Juror No. 1 did not give the impression she would unduly take upbringing into consideration in deciding penalty. (See 15RT 3135, 3148.) Even assuming that Juror No. 1's written answer demonstrated a belief akin to Ms. C.'s evident attitude about the possibility of lesser penalty culpability because of poor childhood, the two were not otherwise similarly situated. Among other things, unlike Ms. C., Juror No. 1: (1) had friends in law enforcement (56CT 16339); (2) wrote "I think [the criminal justice system is] not effective enough & many people get away w/ crimes" (56CT 16340; see 15RT 3156 ["sometimes people are in the jury that don't believe really in the criminal justice system, or they'll get pressured . . . by outside influences"]), which contrasted with Ms. C.'s rich versus poor attitude toward the criminal justice system; (3) did not display,

as had Ms. C., possible animosity toward the police (56CT 16340); and (4) was herself a rape victim who found sexual assault to be "a bad crime" (15RT 3147; see 15RT 3146-3148).

Juror No. 2 had answered: "Yes—abused children have a tendency to be [an] abuser." (56CT 16363.) However, Juror No. 2 never affirmatively indicated, as had Ms. C., that upbringing might impact her penalty decision. (See 15RT 3014, 3019, 3029.) Juror No. 2 was also not otherwise similarly situated to Ms. C. As already noted, chief among those differences were: (1) Juror No. 2's "significant other" was a sheriff's deputy who worked in the courts (56CT 16353, 16355; 15RT 3025); (2) she was a past IRS employee, supporting the criminal investigations division (56CT 16358); (3) she was an employee of the City of Alameda, and when coworkers had discussed the murder with her she had believed "it was a horrendous crime" (56CT 16354; 15RT 3024); and (4) she had previously served on a criminal jury (56CT 16358).

Juror No. 3 had answered: "Yes. I believe people are raised to become like their surroundings." (56CT 16382.) Juror No. 3 never affirmatively indicated her belief that a poor childhood would impact on her consideration of penalty. (See 6RT 1095, 1102.) Besides, Ms. C. was not otherwise similarly situated with Juror No. 3. Juror No. 3 had taken statistics courses in college, including addressing population studies, and thus would have an understanding of the profile frequency to which Mr. Myers would testify. (6RT 1112.) Most importantly, Juror No. 3 did not display the evident antagonism toward the police exhibited by Ms. C. (See 56CT 16378-16379.)

Juror No. 4 had written: "Yes, I believe that children treated wrongful or unfairly may be prone to act differently than those who were not in that type of situation. i.e.: learned examples." (56CT 16401.) However, again, Juror No. 4's answers during voir dire did not

affirmatively indicate that childhood would be an important mitigating factor. (See 17RT 1155.) Juror No. 4 was not otherwise situated with Ms. C. Unlike Ms. C.'s evident antagonism toward the police, Juror No. 4 was the daughter of the police captain, and she had discussed his work with him. (56CT 16393; 17RT 1166; see 17RT 1169.) Juror No. 4 had not displayed the same "rich versus poor" attitude toward the criminal justice system as had Ms. C., finding it "fair and effective." (56CT 16397.) As a biology major, Juror No. 4 had done RFLP DNA testing. (17RT 1165, 1167-1168.)

Juror No. 5 had observed: "Values taught or observed when growing up is what determines how a person will be as an adult." (56CT 16420.) Yet, as with the other jurors, Juror No. 5 did not affirmative make the connection during voir dire between upbringing and its possible impact on her penalty decision. (See 6RT 1026, 1034, 1042.) Nor, were No. 5 and Ms. C. otherwise similarly situated. Juror No. 5 was a senior manager at Apple. (56CT 16411.) Rather than displaying Ms. C.'s rich-versus-poor attitude toward the criminal justice system, Juror No. 5 believed it "takes too long; overly deliberate." (56 CT 16416.) Finally, prior to passing Juror No. 5 onto Mr. Horowitz, Juror No. 5 answered affirmatively to the prosecutor's question: "I get the feeling . . . by your answers and just watching your body language that you personally would not like to render a verdict of death on anybody, but you will; if you are chosen as a juror and the evidence was there, that you would and could return a verdict of death in this case or any other case. [¶] Would that be a fair statement of how you really feel?" (6RT 1039.)

Juror No. 6 answered: "Yes. Issues of self confidence." (56CT 16439.) But again, Juror No. 6 did not affirmatively tie his consideration of penalty to upbringing. (15RT 3200, 3208.) Also, Juror No. 6 was not otherwise similarly situated with Ms. C. Among those differences were

that Juror No. 6: (1) was a business planner with PacBell having a degree in civil engineering (56CT 16430-16431); (2) his neighbor was a police captain, although they had never talked about his "police work" (56CT 16434; 15RT 3214); and (3) when answering the question about his feelings about the effectiveness of the criminal justice system, he wrote that, "time to trial takes too long [--] lots of repeat offenders" (56CT 16435).

Juror No. 7 answered: "Yes – nurturing has an impact though it is not known exactly what makes some people from a very poor background a success." (56CT 16458.) Not only did Juror No. 7, a retired school administrator, implicitly bring the concept of "free will" into the equation about the impact of upbringing, but she did not affirmatively tie childhood trauma and upbringing to her possible penalty considerations. Juror No. 7 was also not otherwise similarly situated. Chief among those differences were, as already noted: (1) Juror No. 7's service on the grand jury, including as foreperson, and the favorable impression she developed towards prosecutors as a result of that service (56CT 16450, 16452, 16454; see 8RT 1417 [grand jury heard criminal cases]); (2) her involvement with the Fremont police, including volunteering to be the police representative on the local truancy board (56CT 16450, 16453, 16455; see 8RT 1418-1419); and (3) her experience a school administrator/disciplinarian (56CT 16450), where she had had frequent contacts with the police which had "led [her] to respect the professional work done" (56CT 16454; see 56CT 16453; 8RT 1419-1420).

Juror No. 8 answered: "Yes, how a child is treated or raised has a big impact on what kind of adults they become." (56RT 16477.) Juror No. 8 did not directly connected penalty with upbringing during voir dire. (17RT 3636, 3644.) She was not otherwise similarly situated with Ms. C. Most importantly, Juror No. 8 was a public safety dispatcher for the

Concord Police Department, a past dispatcher for the University of California at Berkeley Police Department, and she was a friend of a Contra Costa deputy district attorney and knew "too many [police] officers to name here." (56CT 16468-16469, 16471, 16473; 17RT 3650-3651). Unlike Ms. C., Juror No. 8 believed that "most people who work within the criminal justice system are going their best, with integrity and hard work." (56CT 16473.)

Juror 9 responded: "Yes, in most cases. If a child is raised in a criminal free & loving home, they will in turn have the same values." (56CT 16497.) Juror No. 9 did not affirmatively connect penalty mitigation with childhood during voir dire. She was not otherwise similarly situated with Ms. C. Among other differences: (1) Juror No. 9's uncle was a retired peace officer (56CT 16492); (2) she had previously served on a criminal jury (56CT 16492); (3) she believed the criminal justice system was a potential deterrent to others (56CT 16493); (4) she strongly believed in DNA evidence (56CT 16496); and (5) she believed "[if] a person takes another life intentionally, they don't deserve to live" (56CT 16500; cf. 6RT 1051-1052, 1055-1056, 1063 [could choose between both penalties].)

Juror No. 11 answered: "In part, yes. But you can't always tell whether the effective will be positive or negative." (56CT 16535.) Juror No. 11's written answer was more qualified than that of Ms. C., acknowledging that upbringing is one possible factor, but also noting that upbringing was not a conclusive determinative factor in how a person would turn out as an adult. Also, he did not affirmatively tie upbringing to selection of penalty. He was not similarly situated in other respects with Ms. C. Among those circumstances was that he was a retired manager at the Stanford Linear Accelerated Center. (56CT 16526.) He had previously served on a felony assault case. (56CT 16530.) Juror No. 11 owned two handguns. (56CT 16533.)

Juror No. 12 answered: "To an extent, yes. We are all products of the way we were raised. But, this does not mean that we can blame all of our "wrong doings on our past." (56CT 16554.) Juror No. 12's written answer was more qualified than that given by Ms. C., specifically acknowledging a person's free will. He did not affirmatively tie upbringing to consideration of penalty during his voir dire. (See 11RT 2314-2315.) Juror No. 12 was not similarly situated to Ms. C. in other respects, including: (1) he had a technology background as opposed to a "liberal" social worker-type occupation (56CT 16545-16546); (2) he had a very favorable view, like most of the other jurors, of the criminal justice system, as opposed to Ms. C.'s antagonist view of law enforcement (56CT 16550); and (3) unlike Ms. C.'s unfamiliarity with DNA evidence, he was "somewhat familiar with DNA" because of his microbiologist wife (56CT 16553).

Alternate No. 1 had answered: "Yes, I believe abused children turn into abusive adults. But I also believe that as adults the cycle can be broken." (56CT 16573.) Again, Alternate No. 1's answer was more qualified than that given Ms. C., acknowledging that a person has the choice to break the "cycle." Alternate No. 1 was not similarly situated to Ms. C. in other respects, including: (1) she was a banker, not a "liberal" social worker-type (56CT 16564-16565; 8RT 1547-1548); (2) she believed the criminal justice system was "fairly effective" (56CT 16569); and (3) a "close friend's sister was kidnapped, raped, and murdered" (56CT 16570; 8RT 1549-1550).

Comparative analysis using **Alternate No. 2** is misplaced. (See AOB 156.) As noted earlier, the prosecutor had already exercised his fifth, last alternate challenge prior to the seating of Alternate No. 2. (18RT 3760.)

Alternate No. 3's written response was, "no." (56CT 16610.) There was absolutely no similarity between Alternate No. 3 and Ms. C.'s beliefs

about the later impact of a poor upbringing. Nor, was there any discussion during Alternate No. 3' voir dire regarding the effect of upbringing on the later behavior of an adult. (8RT 1381-1401.)

Alternate No. 4 had answered: "as the twig is bent." (56CT 16629.) But, unlike with Ms. C., the possible impact of upbringing on adult behavior was not addressed during Alternate No. 4's voir dire. (See 8RT 1486-1508.) Alternate No. 4 was dissimilar to Ms. C. in several respects, including: (1) he was a retired physicist, with a strong background in statistics; (2) he had noted on his questionnaire that DNA is an excellent tool (56CT 16628; 8RT 1503, 1506); (3) he said in his questionnaire that the death penalty is an important deterrent (CT 16633; see 8RT 1504-1505); (4) he did not appear to be antagonistic towards law enforcement (56CT 16625); and (5) his cousin worked for the FBI and he had a friend in the San Jose Police Department (56CT 16624; 8RT 1505).

Alternate No. 5 had responded: "Yes. Environment plays a big role in who a person is." (56CT 16648.) The subject of upbringing and its later impact was addressed several times during voir dire. In the first, the court explained: "But mitigating factors can be something about the defendant, whatever. [¶] How he grew up, his environment, et cetera, et cetera." (9RT 1718.) In the second, the court asked Alternate No. 5: "Other jurors have said, well, that's a horrible crime – [¶] . . . [¶] – but as a juror, the State of California is going to be asking me to execute this guy . . . . [¶] . . . [¶] Before I make a decision like that, I want to know something about him, too. [¶] Things like you said, his environment, how he was raised, did his father beat the hell out of him – [¶] A. Yeah, exactly." (9RT 1713.) As already noted, during Alternate No. 5's discussion of where he stood on the prosecutor's scale, he saw "reasons, not necessarily reasons for actions, but I understand . . . how people could do certain things, commit crimes, the environment they grew up in, been beaten since they were a kid and drug

use . . . . [¶] And I see the opposite. We live in a free world . . . ." (9RT 1730.) Unlike Ms. C., Alternate No. 5 expressly acknowledged that a person has free will whether or not to commit a crime.

Alternate No. 5 was not similarly situated with Ms. C. in other respects, including: (1) his profession and educational background dealt with computers (56CT 16639-16640), not social work; (2) he did not appear to be antagonist towards law enforcement since he had previously taken Administration of Justice classes at a community college when he was contemplating becoming a police officer (56CT 16640, 16644; 17RT 1731), his room mate worked for the FBI, and he had numerous acquaintances who were San Leandro police officers (56CT 16643); (3) he owned several firearms (56CT 16646); and (4) he was in favor of the death penalty since "the whole reason why we have laws and punishment is to keep this world from anarchy, I guess" (9RT 1722).

In summary, as the above discussion establishes: (1) substantial evidence supports the trial court's denial of appellant's *Batson* motions; and (2) even using comparative analysis in this Court, appellant fails to establish the prosecutor's challenges to these panelists were based on racially-impermissible reasons.

II. THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING THE GUILT TRIAL WHEN HE INTRODUCED EVIDENCE WHICH INFORMED THE JURY THE DEFENSE HAD RETAINED A DNA EXPERT, AND WHEN HE ARGUED THAT EVIDENCE DURING HIS REBUTTAL SUMMATION; NOR DID THE TRIAL COURT ERR OR COMMIT MISCONDUCT WHEN IT ALLOWED THIS EVIDENCE AND ARGUMENT, AND WHEN IT DECLINED TO PERMIT THE DEFENSE TO REOPEN THEIR SUMMATION FOLLOWING RECEPTION OF A JUROR'S NOTE

Appellant makes a multi-faceted, sometimes summary, argument claiming the guilt trial jury's consideration of prosecution evidence, which established the defense had retained DNA expert Dr. Edward Blake, who

had access to all of Mr. Myers' notes and results, deprived him of a fair trial. He claims the prosecutor's misconduct and the trial court's errors and misconduct, "deprived [him] of due process and a fair trial, shifted the burden of proof to [him], deprived him of the presumption of evidence, violated his Fifth Amendment right to remain silent, undermined his rights to the effective assistance of counsel and to present a defense, and violated the attorney work-product privilege. (U.S. Const., amends. V, VI, VIII and XIV; Cal. Const., art. I, §§ 7, 15, 16 and 17; [§] 1054 et seq.; CCP § 2018.010 et. seq.)." (AOB 161.)

Specifically, appellant argues: (1) the prosecutor committed misconduct in seeking the admission of evidence that showed the defense had retained Dr. Blake, who had access to all of Mr. Myers' materials; (2) the trial court erred when it allowed that evidence; (3) the court erred when it failed to interrupt the final portion of the defense summation and disclose to defense counsel it had received a note from a juror asking whether the defense had the ability to call as a witness a defense DNA expert; (4) the court erred in failing to allow the defense to reopen their summation to address the juror note; (5) the court committed misconduct, showed bias, and gave a "de facto endorsement of the prosecutor's position" in its response to the jury note; (6) the court erred when it allowed the prosecutor to argue in rebuttal that the defense could have, but did not, call a defense DNA expert; and (7) the court committed misconduct and exhibited judicial bias when it refused to instruct immediately before the prosecutor's rebuttal argument that neither side was required to call all witnesses, instead of including that instruction in its later general charge to the jury.[40] (AOB 161-162.) Respondent disagrees.

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[40] Appellant contends: "Multiple rulings by the trial court each deprived appellant of due process and a fair trial, as did the prosecutor's (continued...)

Regarding the multiple claims of prosecutorial misconduct, and the several claims of judicial misconduct, appellant did not complain in the trial court on the grounds of misconduct, and where it would have been appropriate, failed to ask for a curative admonition. Instead, appellant raised objections either without stating the grounds, or stating other grounds which would not have alerted the trial court to the claims he now raises on appeal. Any claim of prosecutorial or judicial misconduct is forfeited.

(...continued)
misconduct. Even if this court were to determine that any one error alone did not result in a due process violation, taken together, or in any combinations, the due process deprivation resulting from the errors is unquestionable." (AOB 172.)

Appellant argues the alleged cumulative errors and misconduct: (1) denied him his right to due process and a fair trial (AOB 161, 172-174); (2) impermissibly shifted the burden of proof to him (AOB 161, 175-181); (3) denied him the presumption of innocence (AOB 161, 182-184); (4) violated his right against self incrimination (AOB 161, 185-187); (5) violated his state and federal rights to effective assistance of counsel (AOB 161, 189-197), and concomitantly, his right to prepare and present a defense (AOB 174-175); (6) violated his statutory discovery rights (AOB 161, 187-189); and (7) violated the attorney work-product privilege (AOB 161, 197-199).

He raised none of these specific grounds in the trial court. Those arguments should be forfeited. (*People v. Boyette* (2002) 29 Cal.4th 381, 424 (*Boyette*); see *People v. Williams* (2008) 43 Cal.4th 584, 620; *People v. Alvarez* (1996) 14 Cal.4th 155, 186 [confrontation] (*Alvarez*); *People v. Lucas* (1995) 12 Cal.4th 415, 462 (*Lucas*); *People v. Green* (1980) 27 Cal.3d 1, 22, fn. 8 (*Green*), overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 233-237, 241, and disapproved of on other grounds in *People v. Hall* (1986) 41Cal.3d 826, 824, fn. 3; cf. *Pearson*, *supra*, 56 Cal.4th at p. 425 [no forfeiture where "the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution"].)

Moreover, the prosecutor did not commit misconduct. The court did not abuse its discretion when it: (1) ruled admissible Mr. Myers' testimony and supporting documentation regarding Dr. Blake; (2) failed to interrupt the final portion of the defense summation to advise defense counsel of the contents of a jury note; (3) refused to allow the defense to reopen their summation; and (4) allowed the prosecutor argue about the defense's failure to call Dr. Blake. Nor, did the trial court commit misconduct when it briefly responded to the jury note, and when it denied appellant's request to instruct immediately before the prosecutor's rebuttal argument that neither side was required to call all possible witnesses.

A. General Standards

> "The object of a trial is to ascertain the facts and apply thereto the appropriate rules of law, in order that justice within the law shall be truly administered." [Citation.] To this end, "the court has a duty to see that justice is done and to bring out facts relevant to the jury's determination." [Citation.] The trial court has the statutory duty to control trial proceedings, including the introduction and exclusion of evidence. [Citation.] As provided in section 1044, it is "the duty of the judge to control all proceedings during trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved . . . ." [Citation.]

(*People v. Sturm* (2006) 37 Cal.4th 1218, 1234 (*Sturm*).)

Since appellant makes repeated claims of the prosecutorial misconduct, and also claims the trial court committed judicial misconduct on at least two occasions, we note:

> "A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation.] As the United States Supreme Court has explained, the prosecutor represents 'a sovereignty . . . whose interest . . . in a criminal prosecution is

> not that it shall win a case, but that justice shall be done.' [Citation.]"

(*People v. Hill* (1998) 17 Cal.4th 800, 820 (*Hill*).) "Prosecutors are given wide latitude in trying their cases. [Citation.]" (*People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1268 (*Caldwell*), internal quotation marks omitted.)

> """A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process." [Citation.] In other words, the misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury" [Citations.]'" [Citation.] A defendant's conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. [Citation.] Also, a claim of prosecutorial misconduct is not preserved for appeal if defendant fails to [timely] object and seek an admonition if an objection and jury admonition would have cured the injury. [Citation.]" [Citation.]

(*People v. Tully* (2012) 54 Cal.4th 952, 1009-1010, fn. omitted (*Tully*); see *Blacksher*, *supra*, 52 Cal.4th at p. 828, fn. 35; *Hill*, *supra*, 17 Cal.4th at p. 810; see also *Tully*, *supra*, 52 Cal.4th at p. 1010, fn. 25 [forfeiture rule applicable in capital cases]; *People v.Clair* (1992) 2 Cal.4th 629, 662 [same].)

As appellant points out in making his additional, sum-of-the-parts prosecutorial misconduct argument: "A prosecutor's conduct violates a defendant's federal constitutional right when it comprises a *pattern* so egregious that it infects '"the trial with unfairness as to make the resulting conviction a denial of due process." [Citation.]' [Citation.]" (*People v. Bennett* (2009) 45 Cal.4th 577, 594-595, italics added (*Bennett*); see AOB 176.) At no point did defense object on the grounds of prosecutorial

misconduct, much less request an admonition. Since the individual claims of misconduct are forfeited, so too should the claim of cumulative prejudice be forfeited.

Similarly, judicial misconduct must first be identified to the trial court and rulings had, otherwise, those claims, too, are forfeited. (*People v. Maciel* (2013) 57 Cal.4th 482, 539 (*Maciel*); *Blacksher*, *supra*, 52 Cal.4th at p. 825; see *Sturm*, *supra*, 37 Cal.4th at p. 1237.) In addressing claims of judicial misconduct on the merits, this Court's "role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to perfect, trial. [Citation.]" (*Blacksher*, *supra*, 52 Cal.4th at p. 824; accord, *Maciel*, *supra*, 57 Cal.4th at pp. 539-540.)

B. The Trial Court Properly Allowed Evidence Mr. Myers' Materials had been Supplied to a Defense DNA Expert

Appellant contends the prosecutor committed misconduct by proffering, and the trial court erred by allowing, evidence which showed the defense had retained Dr. Blake, and that Dr. Blake was privy to Mr. Myers' working papers and results. (See AOB 161, 173 [allowance of this "prejudicial" evidence in a capital case "rendered the trial fundamentally unfair"], 175 [that the prosecutor brought out that the defense expert had access to all of Mr. Myers' materials "in effect . . . forced the defense DNA expert . . . to 'de facto' testify for the prosecution to bolster the opinions of" Mr. Myers and thus violated appellant's "opportunity to prepare and present a defense"].)

1. Relevant circumstances

a. Pretrial proceedings

At a January 10, 1997, hearing before a magistrate, to set a preliminary hearing, the prosecutor advised he had finally received a DNA report from Criminalist Myers, a copy of which he had given to Mr. Giller. (1CT 127; see 1CT 122-123.) Mr. Giller requested a further continuance to:

> [T]alk to an expert and have the expert look at this report and also have it tested by my own expert. . . .
>
> THE COURT: So you anticipate then having it retested, which will take how long for that?
>
> MR. GILLER: Well, I don't know. I'll have to see what somebody else says. I mean it can't take as long as [the prosecution] too. [¶] Maybe if we could put this over a short period of time so that I can talk to somebody and find out . . . what kind of a time period I'm looking at.

(1CT 127.) The preliminary hearing was superseded by the March 19, 1997, indictment. (1CT 142, 144.)

On October 19, 1998, during a pretrial hearing to address appellant's in limine motions, the trial court noted "there's . . . an issue that's been raised or will be raised . . . by the defense in respect to the DNA tests that were taken in this case."[41] (1RT 6.) When the court asked what particular issues were to be addressed during the requested *Kelly-Frye* hearing (*People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013), the prosecutor responded that he and Mr. Giller:

> [W]orked the situation out where they hired Ed Blake, who is well know in this court, as their expert to go over Mr. Myers' lab

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[41] The Defense Challenge to DNA Evidence and Request for a *Kelly* Type Hearing (in limine motion no. 21) was filed on October 14, 1998. (3CT 597 et seq.) Dr. Blake was cited in that "challenge." (3CT 679.)

> work, et al., documentation, of course. And through much involved letter writing and things like that, because it's a state lab, Mr. Giller and I were finally able to get all of his work over to Mr. [*sic*] Blake. So I'm presuming that . . . all of work would include his methodology. . . .
>
> THE COURT: Well, it would be of interest for the court if . . . Dr. Blake doesn't take any issue with Dr. [*sic*] Myers' methodology, it sounds like a tempest in a teapot because it would be your own expert. [¶] Wouldn't it be fruitful to find out what Dr. Blake's position is with respect to Dr. Myers methodology and see whether or not that even would be an issue in this case? [¶] Is . . . Ed Blake going to be your expert?
>
> MR. HOROWITZ: He will be one of our experts, yes.
>
> THE COURT: Well, that's just a suggestion. [¶] What do you think about that?
>
> MR. GILLER: We'll think about that.

(1RT 11-12.) The court again inquired about Dr. Blake's opinion regarding Mr. Myer's "technique or methodology in arriving at his conclusions," asking defense counsel if Dr. Blake was going to prepare a report "for the defense so he can give it over to the prosecution so we call all examine it[?]" (1RT 13-15) Mr. Horowitz retorted that "if the prosecution would pay for the report, we will entertain it . . . ." (1RT 15.)

The court asked: "What is the anticipated fee for Dr. Blake's report? Not for his work, for . . . preparing a report? [¶] MR. GILLER: We haven't asked him for a report. Basically, we've just had him look at the materials they gave us." (1RT 15.) The court responded that if there was no issue regarding Mr. Myer's methodology, "[W]hy do we need a 402 hearing . . . ? So I would like to know what Dr. Blake says to whether or not there is in fact an issue." (1RT 16.) According to the defense, the information Mr. Myers had provided to Dr. Blake was insufficient "to make a scientific conclusion . . . whether Mr. Myers followed appropriate

techniques . . . . We have to ask questions [at the *Kelly-Frye* hearing] as directed by Dr. Blake with Mr. Myers on the stand . . . ." (1RT 16.)

At the conclusion of that hearing, the prosecutor requested "discovery at the earliest possible time for the defense witness list and any experts they plan on calling, plus we're requesting any report thus made." (1RT 21.) When the defense side stepped that request, the court indicated its belief such information "might be something that's important during jury selection." When the court asked if the defense was going to call any experts during the guilt phase, Mr. Horowitz responded: "Maybe Ed Blake." Mr. Giller added: I don't know. We don't know at this time." (1RT 22.)

When the defense said it was not going to ask Dr. Blake to prepare a report, the court again indicated such a report "would be helpful to the Court[.]" (1RT 23.) The defense responded it preferred to wait and see what evidence the prosecutor presented at the *Kelly-Frye* hearing. (1RT 23.) When the court said it understood the defense position was "if [Dr. Blake] doesn't write it down, than you don't have to turn it over[,]" Mr. Horowitz responded, "That is the law." (1RT 23.)

During an October 26, 1998, hearing, the prosecutor again inquired about defense discovery. (2RT 310-311.) Mr. Giller repeated that the defense had not decided what witnesses to call during the guilt phase, although he allowed the defense might call Dr. Blake. Mr. Giller assured the court, "that the very moment we've reached [a decision on whether to call Dr. Blake during the guilt phase], we will contact [the prosecutor], even if it's on a weekend, let him know." (2RT 312.) The court responded:

> We haven't even started picking the jury in this case . . . . But somewhere along the line, you are going to have to make a decision. [¶] But I think it's fair to assume that Dr. Blake is a potential witness in the guilt phase because the DNA evidence in this case is probably the most crucial evidence of any of this

> stuff, and he would probably be the only person that could throw some light on the DNA, and he is probably the most likely person you would intend to call.
>
> That brings the other issue up. Has Dr. Blake written a report for you, Mr. Giller?
>
> MR. GILLER: No, nor have I asked him for one, nor do we need one.

(2RT 313.)

The court ruled it would require the defense to put on testimony challenging the statistical analyses underlying both the RFLP and PCR DNA testing at the *Kelly-Frye* hearing. The court believed, "Dr. Blake is going to do that." (2RT 315-316; see 2RT 355-356.) The defense asked to have Dr. Blake present during Mr. Myers' testimony at the *Kelly-Frye* hearing. The court refused unless the defense could point to specific evidence showing Mr. Myers erred in making his analyses. (2RT 316-317.) The prosecutor pointed out that the DNA laboratory had released "all of the stuff that Mr. Myers did. He gave it to Dr. Blake . . . ." (2RT 317.) Mr. Horowitz disagreed. (2RT 319-320.)

On October 29, 1998, the court concluded "that [since] the third prong of the *Kelly-Frye* test is case specific" (2RT 349), a hearing was necessary to address that particular issue (2RT 350-351). The court again denied the defense request to have "our expert[,]" Dr. Blake present during that hearing (2RT 351-352), but allowed the defense to consult with Dr. Blake to see, given his reception of **all** of Mr. Myers' materials, if "he is going to take issue with the methodology used in this particular case" (2RT 355).

At a November 2, 1998, hearing the court asked each side to estimate how long their respective guilt phase cases would take. The prosecutor again asked for discovery: "[I]f counsel thinks it's going to be a week [for the defense guilt phase testimony], they certainly have an idea who they are

going to be calling. [¶] Why have I not been provided with that information?" (3RT 442.) Mr. Giller responded, "I assure [the prosecutor] and promise him that the minute we have decided that we are going to call certain witnesses, I will tell him." (3RT 443.)

Later during that hearing, Mr. Horowitz said the defense had consulted the DNA expert, "and we'll be putting the [*Kelly-Frye*] hearing on without the expert." (3RT 445.) The prosecutor filed with the court an October 29, 1998, letter from Mr. Myers to the prosecutor. (3RT 456-457; see 3CT 758.) In that letter, Myers had advised the prosecutor:

> As part of continuing discovery in this case, we are supplying the following items. All items are photocopies unless otherwise specified. This material should serve as the record for the technical work that has been performed on this case.
>
> [¶] . . . [¶] One complete copy of this discovery is enclosed for your records. A second copy for the defense will be released directly to Dr. Edward Blake, as per your September 2nd, 1997, correspondence. . . . [¶] Per a request by Dr. Blake, I will also release directly to him additional copies of the following items from January 22, 1998, discovery . . . .

(3RT 457; see also 3RT 480; 3CT 758.)

At the beginning of the November 3, 1998, *Kelly-Frye* hearing, when Mr. Horowitz asserted there were a "massive number of mistakes made in the case" (3RT 489), the court inquired:

> Are you going to have an expert that is going to come in and say that there's been a massive number of mistakes, or is this hyperbole?
>
> MR. HOROWITZ: I think he's admitted the mistakes.
>
> [¶] . . . [¶] THE COURT: . . . If you have any evidence that there's been some mistakes in this case, and you're telling us that you do, then turn that information over to the district attorney because he has a witness on the stand right now who is testifying to this information.

[¶] . . . [¶] MR. HOROWITZ: By this afternoon, if I'm allowed to conduct an examination, it would be clear to all.

MR. ANDERSON: That begs the question.

THE COURT: That does beg the question. . . .

MR. ANDERSON: I want my discovery, Your Honor.

MR. HOROWITZ: All right. Then I would suggest that Mr. Anderson call our consulting experts, Ed Blake and Kim Kruglick – [¶] . . . [¶] - and talk to them.

THE COURT: The question is – the third prong – I'll read this to you again. We are not going to turn this into a goat show. "The proponent must establish that the correct scientific procedures were used in this particular case." We have testimony from a person who is qualified as an expert that the correct scientific procedures were used in the particular case. Now, if you have somebody that is going to come in here and tell me that the correct scientific procedures were not used in this case, then I'd like to know who that person is.

MR. HOROWITZ: It will be Ed Blake . . . if this examination reveals what I believe it will.

MR. ANDERSON: Then I'm demanding the report from Mr. Blake stating such.

THE COURT: Do you have a report from Mr. Blake?

MR. HOROWITZ: No, Your Honor. But I'm sure that when . . . you've heard this witness's testimony, which we will then of course give to Mr. Blake, as I indicated before . . . .

THE COURT: No, we are not going to put this over for three or four days for Mr. Blake. . . . [¶] . . . [¶] He has everything that Mr. Myers [has]—Is that true?

[MR. MYERS]: Yes, that's correct.

(3RT 489-492.)

At that point, the prosecutor entered into evidence an August 27, 1997, letter from Mr. Giller requesting the prosecutor's assistance to ensure

Dr. Blake received all of Mr. Myers' materials, and a letter from the prosecutor to Mr. Myers asking him to turn over the materials to Dr. Blake. (3RT 492-493; see 3CT 762 & Ct.'s Exh. No. VI.)

When the prosecutor again complained about the lack of discovery, Mr. Horowitz responded: "Call Kim Kruglick [an attorney who apparently possessed DNA expertise] and see if he's willing to talk to you." (3RT 493-494; see 3RT 586.) The court believed: "It's stonewalling, and you're defying what the spirit of discovery is in this case." (3RT 496.)[42]

The defense did not answer when the court inquired on December 9, 1998, whether counsel had decided on the defense's guilt phase witnesses. (9RT 1682.)

On January 20, 1999, six days before the prosecutor gave his opening statement and called his first witness, Mr. Horowitz gave the court and prosecutor "a partial – or what's up-to-date but hopefully will increase with other witnesses – but as far as we have today, this is our [guilt phase] witness list." (17RT 3687; see 17RT 3688-3689; compare AOB 164 ["Prior to trial, pursuant to [] § 1054, the defense provided the prosecution with a witness list"] with § 1054.7].) Mr. Horowitz said he would work the following weekend to "supplement it[.]" (17RT 3688.) That list did not include Dr. Blake.

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[42] The trial court denied appellant's *Kelly-Frye* motion on November 9, 1998: "The evidence will come in subject to cross-examination by the defense . . . ." (4RT 595-596.)

b. Trial

During his opening statement, made before the presentation of the prosecutor's case-in-chief, Mr. Giller remarked: "And all of the evidence in this case includes whatever evidence Mr. Anderson chooses to present. And he gave you the names of the witnesses and basically what they will say. But it also includes the cross-examination of those witnesses and listening to what they have to say." (18RT 3790.) Later, Mr. Giller specifically addressed the anticipated DNA evidence.

> [T]he district attorney has gone over the evidence that he is going to rely on in this case. And he talks about the DNA evidence. And, again, we discussed that on voir dire and I asked you listen to whoever he presents that is going to tell you what DNA is and what DNA is all about and decide whether the DNA tests were conducted properly, whether there was a proper chain of evidence, whether or not the person conducting the DNA tests followed the standards and the procedures or whether he made mistakes or deviated from these procedures and see whether or not that might affect your thinking as to whether that evidence is reliable and valuable.
>
> And, again, in analyzing that, again, I ask you to be fair and impartial. Don't just automatically accept what . . . Mr. Myers is the person he's indicated is going to be the witness. Don't just automatically accept it because he says so. You are here as jurors to weigh and evaluate that evidence.
>
> You know, it's interesting. A number of you – an amazing number of you, actually – have heard about DNA because so many of you apparently watched the OJ case and heard about DNA through the OJ case. And many of you had said, well, we feel or I feel that that is . . . accurate.
>
> But, again, if you really watched that case carefully, you saw that there could be lots of errors in DNA. There can be contamination. They didn't follow the procedures; there can be problems. [¶] So listen to that DNA evidence as it's presented and how it was done and see what you think. You decide yourself whether that is evidence, is accurate, and whether that's something you want to rely on completely.

> [¶] . . . [¶] Mr. Anderson talked about one in three billion – I think he said, or 30 billion. I don't remember what the fantastic number was that he indicated, that the statistics will show. But listen carefully to what database was used to arrive at those statistics and see whether that makes sense to you because you are the judges of the facts of this case.
>
> So basically what I'm asking you to do is wait until you've heard all of the evidence in this case. Listen to what each witness has to say. There are going to be things that will be brought out through these witnesses on cross-examination and listen to that and weigh it and then decide in your own minds whether Mr. Anderson has proven this case to you beyond a reasonable doubt.

(18RT 3793-3795.)

Mr. Myers started his testimony on the morning of Monday, February 8, 1999. (23RT 4457.) Among other things, Mr. Myers explained that in addition to RFLP DNA testing, he also did PCR DNA testing (which allows the criminalist to look at smaller amounts of DNA, including degraded DNA). (23RT 4497.) Using PCR test results, Myers found the sperm fractions for the rectal swab and jeans stain were all consistent with coming from a single donor, and appellant matched that donor profile. (23RT 4498.)

Mr. Myers testified that when he did PCR testing on a vulva swab, there: (1) was an incomplete separation of the sperm and non-sperm fractions; and (2) were very few sperm and "a lot more non-sperm cells." (2RT 4498.) The PCR testing showed the sperm fraction "had mostly one predominant type, and there were some results consistent with the non-sperm type." "[I]n the non-sperm fraction you got mostly a type consistent with the victim . . . as well as some additional types consistent with some carry over of the sperm." (23RT 4498.) Both the sperm and nonsperm fractions from the vulva DNA "showed an additional donor that was not consistent with any of the people involved. This additional donor was a

very minor donor and was only clearly detected at a few loci. But there was an additional donor to the vulva swab. Again . . . not the major donor. There still was one sperm faction major donor, and it was consistent with Mr. Nadey." (23RT 4499-4500.) Without objection, Mr. Myers testified he could have tested the other vulva swab to see if the additional DNA was something cellular or sperm, "but I always try and maintain evidence for defense testing, and so I did not consume that other vulva swab." (23RT 4502)

Mr. Myers also did a third DNA test, short tandem repeat (STR). Prior to allowing Mr. Myers to discuss STR testing, the court inquired: "[A]ll that information was provided to the defense in this case? [¶] . . . [¶] [Mr. Myers]: Yes." (23RT 4507.) Mr. Myers explained the results of the STR test indicated appellant was "the major donor to the sperm fraction of the vulva swab." (23RT 4508.) Without objection, the prosecutor asked Mr. Myers:

> [D]id you consume all of the evidence which was sent to you for DNA testing?
>
> A. No. In each case -- so for the rectal swabs, the vulva swab, the pants stains -- I make sure to leave evidence for retesting by the defense, if at all possible. And in this case for every sample, there was, I believe, at least half of what was present when I received the evidence was maintained for potential defense retesting, because really the best way to take care of any risk of sample mixup is to retest the evidence. And so we always try and gear towards having that available for the defense.
>
> Q. So if the defense for Mr. Nadey wished to hire another lab to do their own independent testing, there is enough evidence remaining so that they can do that?
>
> A. Yes. And there are labs throughout the . . . country that are capable of recreating every test that we performed in this case that could be hired.

(23RT 4509.)

The prosecutor then inquired:

Q. Did you as a matter of fact provide your entire work notes --

MR. HOROWITZ: Objection. Irrelevant.

THE COURT: Overruled.

MR. ANDERSON: Q. -- entire work notes and copies of everything you did in this case to a man described as Dr. Edward Blake, who was hired by the defense in this case?

MR. HOROWITZ: Your Honor, that is an improper question. I'd ask that it be stricken.

THE COURT: Overruled. Go ahead. You can answer that.

THE WITNESS: Yes. Copies of all of my notes were provided to Dr. Blake of Forensic Science Associates. It's a private forensic firm in Richmond, California. He also came over to our lab and took his own photographs of photos in my notes.

MR. ANDERSON: Q. In fact, was there correspondence both via the telephone and via the mail with respect to Dr. Blake to you regarding defense testing in this case?

A. There was correspondence regarding what notes he wanted to see. So, for instance, he called to ask to come over and photograph the photographs in my file because he felt the photocopies –

MR. GILLER: I would object.

THE COURT: Calling for opinion and conclusion. Sustained.

MR. ANDERSON: I'd like to have marked . . . [¶] . . . [¶] -- a one-page letter dated August 3rd, 1998, from the Forensic Science Associates, signed by Edward T. Blake.

MR. HOROWITZ: Your Honor, isn't this hearsay and the subject of the last objection and irrelevant?

MR. ANDERSON: It's not being offered for the truth, Your Honor. It's being offered to show the availability of this evidence was there and this was documentary proof that these

two experts conversed with each other, and the rest, inferences can be drawn therefrom.

THE COURT: . . . The objection is overruled.

(Whereupon, A LETTER AUTHORED BY DR. EDWARD BLAKE was marked as People's Exhibit No. 51 for identification.)[43]

MR. ANDERSON: Q. Mr. Myers, I'm going to . . . ask you if you recognize that particular document?

A. Yes. This is a copy of a letter I received from Dr. Blake requesting additional pieces of discovery.

Q. And did you provide him with that which he sought with respect to your file?

A. Yes, I did.

(23RT 4509-4511.)

2. Discussion

Appellant asserts the prosecutor committed misconduct and violated his above-noted rights when he elicited the above testimony from Mr. Myers and sought the introduction of Dr. Blake's letter, which showed appellant had secured the services of a DNA consultant, who had consulted with, and examined the documentation supplied by, Mr. Myers. He further contends the court's allowance of that evidence, and the prosecutor's rebuttal argument based on that evidence, violated his above-specified rights and constituted reversible error. (AOB 161-162, 172-173.)

Appellant did not assert in the trial court that the prosecutor's proffer of this evidence constituted prosecutorial misconduct; nor, did appellant request a curative instruction. Although appellant objected that the prosecutor had posed an "improper question" at the point the prosecutor

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[43] The court admitted the letter. (See 26RT 4888-4889.)

asked Mr. Myers if he had turned over his documentary work to Dr. Blake, that objection was insufficient to preserve a claim of prosecutorial misconduct, since it did not advise the court of the basis for the "improper question" objection; nor did appellant request a curative admonition. Therefore, a claim of prosecutorial misconduct in regard to the prosecutor's questions of Mr. Myers, and the introduction of Dr. Blake's letter, is forfeited. (See *Boyette*, *supra*, 29 Cal.4th at p. 424; *Green*, *supra*, 27 Cal.3d at pp. 22, fn. 8, 27.)

We note the court sustained appellant's "general" objection when Myers started to indicate his belief why Dr. Blake wanted to photograph Myers' photographs. The court itself supplied the bases for sustaining the objection, i.e., speculation and conclusion. (23RT 4510.) Appellant otherwise based his objections on grounds of (1) relevance; (2) that the fact that Mr. Myers turned over all of his materials to Dr. Blake who had been retained as by the defense "was an improper question;" and (3) regarding the actual admission of Dr. Blake's letter to Myers, hearsay, "the same grounds" as previously raised, and relevancy.

Appellant did not base his objections on the grounds now raised, i.e., that introduction of the challenged evidence: (1) was a denial of due process and a fair trial; (2) impermissibly shifted the burden of proof and denied him the presumption of innocence; (3) violated his right to remain silent; (4) interfered with his right to counsel and to present a defense; or (5) violated the attorney work-product privilege. Appellant's challenge to the admission of Mr. Myers' testimony and Dr. Blake's letter on those grounds is also forfeited. (See, e.g., *Boyette*, *supra*, 29 Cal.4th at p. 424 [various constitutional grounds]; *Bennett*, *supra*, 45 Cal.4th at p. 595 [work product]; *People v. Zamudio* (2008) 43 Cal.4th 327, 353-355 (*Zamudio*) [constitutional claims including effective assistance of counsel, denial of rights to a fair trial and due process, and claim of work-product-privilege

violation forfeited]; *People v. Bennett* (1998) 17 Cal.4th 1044, 1119 [claims of denial of due process and the right to a reliable guilt determination in a capital case forfeited]; *Green, supra*, 27 Cal.3d at p. 22 & fn. 8.)

Turning to the merits of appellant's prosecutorial misconduct claim, we note that the trial court allowed this evidence over objection; therefore the prosecutor's actions did not constitute misconduct. (See *People v. Foster* (2010) 50 Cal.4th 1301, 1356; *Marshall, supra*, 48 Cal.4th at p. 199; *People v. Hawthorne* (2009) 46 Cal.4th 67, 93, disapproved in other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-643, see also *Silva, supra*, 25 Cal.4th at p. 373 [no misconduct where court has not been called upon to address the propriety of the prosecutor's actions]). Also, appellant fails to explain how in proffering this evidence, the prosecutor used "'deceptive or reprehensible methods to attempt to persuade either the court or the jury'" which were "'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process'" (*Silva, supra*, 25 Cal.4th at p. 373).

Assuming the prosecutor's proffer of this evidence constituted misconduct, this Court must determine if "whether on the whole record the harm resulted in a miscarriage of justice within the meaning of the Constitution. [Citations.]" (*Green, supra*, 27 Cal.3d at p. 34.) Given the other admissible evidence, inter alia, that the defense had the ability to retest a sufficient portion of the DNA evidence, that in argument the prosecutor can comment on the failure of the defense to call relevant witnesses, the strength of the DNA evidence, and the other evidence connecting appellant with the murder (including that he was the last one to see Terena alive, someone had placed 900 calls from the rectory [akin to the multiple sexually-oriented calls placed from appellant's residence to Guyana, Hong Kong, and the United Kingdom within two months of the murder], appellant's inculpatory admissions during his statement to

Sergeant Taranto, the fact that the master bedroom was not carpeted, that Regan had been left in the car for many hours, that Terena's wallet—where she would have kept the driver's license which number was required on the work order—and her folded copy of the work order were found on or near the master bed where the sodomy and stabbing took place), appellant cannot demonstrate that it is reasonably probable a different result would have occurred in the absence of the alleged prosecutorial misconduct.

The trial court would have understood that appellant's objections to this testimony and documentary evidence were on relevancy grounds, and, as to the actual letter from Dr. Blake, an additional ground of hearsay. "A trial court has broad discretion in determining relevancy, but it cannot admit evidence that is irrelevant or inadmissible under constitutional or state law. [Citation.]" (*Blacksher*, *supra*, 52 Cal.4th at p. 819; see *Lucas*, *supra*, 12 Cal.4th at p. 466.) This Court "reviews any ruling by the trial court as to the admissibility of evidence for abuse of discretion. [Citation]." (*Alvarez*, *supra*, 14 Cal.4th at p. 201.)

"[E]xcept as otherwise provided by statute, 'all relevant evidence is admissible [citation]; that 'relevant evidence' is all evidence 'including evidence relevant to the credibility of a witness . . . having any tendency in reasons to prove or disprove any disputed fact that is of consequence in the determination of the action' [citation] . . . ." (*Green*, *supra*, 27 Cal.3d at p. 19; see *People v. Riggs* (2008) 44 Cal.4th 248, 289-290 (*Riggs*).) "'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.' [Citation.]" (*Blacksher*, *supra*, 52 Cal.4th at p. 821; see *Marshall*, *supra*, 48 Cal.4th at p. 194 ["'The "routine application of state evidentiary law does not implicate [a] defendant's constitutional rights"'"].)

Evidence relevant to the issue of witness credibility includes, among other things, "'the existence of a bias, interest, or other motive' for his

testimony," as well as "a witness 'attitude toward the action' or 'toward the giving of testimony.' [Citation.]" (*Green*, *supra*, 27 Cal.3d at pp. 19-20; see Evid. Code, § 780, subds. (b) ["character of his testimony"], (e) ["His character for honesty or veracity or their opposites"]; (i) ["The existence or nonexistence of any fact testified to by him"].)

From the defense opening statement, the court and the jury were aware the defense would challenge Mr. Myers' competence during cross examination. Evidence the defense had an expert who had interacted with Mr. Myers by letter and telephone, and who had reviewed all of Mr. Myers' written materials, was relevant, since, among other things, if the defendant did not present its own expert (and the defendant had not included a DNA expert on its witness list), that lack tended to show Mr. Myers had competently performed his DNA analyses and that he was not a liar. (See *People v. Bolden* (2002) 29 Cal.4th 515, 552-553 ["the jury could properly consider the information that the defense had hired [an expert] to observe the [prosecution] testing"].)

In *Foster*, *supra*, 50 Cal.4th 1301, the prosecutor elicited: (1) the prosecution criminalist had preserved a portion of the relevant stains so that a defense expert could retest; and (2) the criminalist had released that evidence for defense retesting. (50 Cal.4th at p. 1356.) This Court found that questioning was proper.

> Inquiries concerning defense retesting were relevant in light of [defense expert] Dr. Mueller's testimony questioning [the prosecution lab's] proficiency. The prosecutor's questions suggested only what was implied by the evidence—that the defense did not possess any contrary serological evidence. *Nor did the prosecutor's focus upon the absence of contrary evidence insinuate that the defendant bore the burden of offering evidence of his innocence.* In addition, the prosecutor's questions . . . clearly sought to elicit relevant evidence. [Citation.]

(*Ibid.*, italics added.)

In *Zamudio*, *supra*, 43 Cal.4th 327, the prosecution criminalist testified she had not performed additional tests to determine whether a small spot of blood taken from the defendant's ring was human or animal, because that additional testing would have used up the blood sample. (43 Cal.4th at pp. 351-352.) When the prosecutor asked the criminalist why she was concerned about using up the blood sample, she explained she wanted to retain some of the sample in case the defense decided to conduct additional testing. (*Id.* at p. 352.) When the prosecutor next inquired whether there was enough blood to retest the sample, the criminalist responded that the evidence had been released to a defense laboratory. The defendant objected, arguing that since the appointment of a defense expert had been had been confidential, the jury should not be told a defense laboratory had had been appointed, since "'if I don't put any defense evidence on, the jury will come to the conclusion that the defense lab's analysis does not help the defense case." (*Ibid.*) The criminalist also testified she had turned over clothing items to the defense lab and those items had not yet been returned. (*Ibid.*) Over objection, on redirect examination the criminalist testified that she had not only turned the evidence over to the defense lab, but she turned over her own results to the defense. (*Ibid.*)

On appeal, that defendant claimed this testimony deprived him his Sixth Amendment right to effective assistance of counsel and denied his right to a fair trial and to due process. (*Zamudio*, *supra*, 43 Cal.4th at p. 353.) This Court concluded the defendant's constitutionally-based assertions were forfeited since he did not raise those grounds in the trial court: "[D]efendant 'may not argue on appeal that [constitutional provisions] required exclusion of the evidence for reasons other than those articulated in his . . . argument' at trial. [Citation.]" (*Ibid.*) Appellant has forfeited any of his now raised grounds concerning Mr. Myers testimony

concerning Dr. Blake. The trial court properly admitted that evidence over appellant's relevancy objections, since that evidence went to Mr. Myers' credibility and competency.

When appellant made his hearsay objection to the letter from Dr. Blake, the prosecutor stated he sought its admission for the non-hearsay purposes of showing – as Mr. Myers had already testified – that the DNA was available for retesting by the defense, and that Myers and Dr. Blake had conversed about the DNA evidence. "Hearsay evidence is evidence of a *statement* that was made other than by a witness while testifying at the hearing and *that is offered to prove the truth of the matter stated.* [Citation.]" (*Zamudio*, *supra*, 43 Cal.4th at p. 350, italics added, internal quotation marks deleted; see *id.* at p. 351, fn. 10; *Alvarez*, *supra*, 14 Cal.4th at p. 203.) "An out-of-court statement is properly admitted if a nonhearsay purpose for admitting the statement is identified, and the nonhearsay purpose is relevant to an issue in dispute. [Citations.]" (*Turner*, *supra*, 8 Cal.4th at p. 189.) The prosecutor did not offer the letter for the truth of what Dr. Blake said in the letter, but rather to corroborate Mr. Myers' testimony that (1) he had turned over his results and notes to Dr. Blake, and (2) earlier testimony that the evidence could be retested. The court properly overruled appellant's hearsay objection. (See *Green*, *supra*, 27 Cal.3d at p. 23, fn. 9; see also *Alvarez*, *supra*, 14 Cal.4th at p. 203 [determination whether evidence is admissible hearsay is reviewed under the abuse of discretion standard].)

Even assuming this evidence would have been more properly produced during the prosecutor's rebuttal examination of Mr. Myers to address the defense cross-examination challenging Mr. Myers' competency and credibility, the court has the discretion to alter the order of proof. (*People v. Tafoya* (2007) 42 Cal.4th 147, 176; *People v. Contreras* (1989) 210 Cal.App.3d 450, 456.) That aside, appellant sustained no prejudice

when this information was elicited during direct examination, since the prosecutor could properly have introduced this evidence during his redirect examination. Appellant cannot demonstrate the court's allowance of Myers' testimony regarding Dr. Blake and the supporting documentary evidence (the letter), were an abuse of discretion.

To the extent this Court considers appellant's claim that the allowance of this evidence (and the prosecutor's rebuttal summation based on that evidence), impermissibly interfered with his right to effective assistance of counsel and to present a defense, we acknowledge that "[t]he state and federal Constitutions guarantee the defendant a meaningful opportunity to present a defense." (*Lucas*, *supra*, 12 Cal.4th at p. 456.) Again, appellant did not object to the prosecutor's proffer of this evidence (or the later prosecution argument based on this evidence) as an improper attempt to circumscribe his right to effective counsel and to present a defense. Appellant's present claim based on that ground is forfeited. (*Zamudio*, *supra*, 43 Cal.4th at p. 353; *Boyette*, *supra*, 29 Cal.4th at p. 424.) Also, the admission of this evidence did not impermissibly impact on appellant's right to effective assistance of counsel and to present a defense. (See *Zamudio*, *supra*, 43 Cal.4th at p. 353.)

Appellant further claims the introduction of this evidence—and/or the prosecutor's later rebuttal argument—violated the discovery statutes and/or the work product privilege (see AOB 161, 187-189, 197-199), are forfeited. (*Zamudio*, *supra*, 43 Cal.4th at p. 354.) Moreover, the claim lacks merit. Section 1054.6, dealing with discovery, provides: "Neither the defendant nor the prosecutor is required to disclose any materials or information which are work product as defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure, or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States." Section 2018.030, subdivision (a), of

the Code of Civil Procedure provides: "A *writing* that reflects an *attorney's impressions*, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." (Italics added.)

The inclusion of the reference to section 2018.030, subdivision (a), of Civil Code of Procedure in section 1054.6 ""expressly limits the definition of 'work product' in criminal cases to 'core' work product, that is any writing reflecting '*an attorney's impressions*, conclusions, opinions, or legal research or theories.'" [Citation.]" (*Zamudio*, *supra*, 43 Cal.4th at p. 355, italics added); accord *People v. Scott* (2011) 52 Cal.4th 452, 489 (*Scott*).) In *Zamudio*, the criminalist's testimony that she had sent her results and the sample to the defense lab did not constitute a violation of the work-product privilege. (*Zamudio*, *supra*, 43 Cal.4th at p. 355; see *People v. Smith* (2007) 40 Cal.4th 483, 515.) Here, Mr. Myers testified to his interactions with Dr. Blake. That testimony did not constitute a writing. Second, Dr. Blake's letter itself was not made in the course of communication between defense counsel and Dr. Blake. It did not reflected defense counsel's impressions, conclusions, opinion, legal research, or theories. Neither introduction of Mr. Myers' testimony or Dr. Blake's letter violated the discovery statutes, nor was it an improper attempt to violate the attorney work product privilege. Since there was no violation of the work-product privilege regarding the prosecutor's questions and evidence – and later during argument – there is no merit to appellant's claim this evidence and argument denied him a fair trial and the assistance of counsel. (*Scott*, *supra*, 52 Cal.4th at p. 489.)

Appellant also claims this evidence impermissibly shifted the burden of proof to him. The prosecutor only brought before the jury the fact that the defense had retained an expert, who had full access to Mr. Myers' report and work notes. Neither the reception of this evidence nor the prosecutor's argument based on this evidence shifted the burden of proof to

appellant. The prosecutor did not state or imply "that defendant *had a duty* to produce evidence." (*Bennett*, *supra*, 45 Cal.4th at p. 596, italics added; see *People v. Young* (2005) 34 Cal.4th 1149, 1195-1196 (*Young*).)

In *Bennett*, this Court pointed out that the jury was instructed that the prosecutor bears the burden of proof and that it is presumed that the jury followed that instruction. (45 Cal.4th at p. 596.) This jury was instructed that the defendant "is presumed to be innocent until the contrary is proven," and that "[t]his presumption of innocence places upon the People the burden or proving him guilty beyond a reasonable doubt." (27RT 5191.) In addition, the court gave CALJIC No. 2.11, which instructed the jury that "[n]either side is required to call as witnesses . . . who may appear to have some knowledge of these events. [¶] Neither side is required to produce all objects or documents mentioned or suggested by the evidence." (27RT 5186.) Again, it is presumed the jury followed the court's instructions. (*Bennett*, *supra*, 45 Cal.4th at p. 596.) Instruction with CALJIC No. 2.11, together with the court's instructions on the presumption of innocence, reasonable doubt, and burden of proof were sufficient to inform the jury that the prosecutor's evidence and argument sought only to point out that appellant did not call a logical witness, i.e., Dr. Blake, and not that the burden of proof had now shifted to appellant. (See *People v. Daniels* (1991) 52 Cal.3d 815, 872-873 (*Daniels*).)

Assuming the court erred in allowing the now-challenged testimony and evidence, it is not reasonably probable a different result would have occurred. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1133 [applying *Watson* [*People v. Watson* (1956) 46 Cal.2d 818, 836] standard].) Mr. Myers testified, without objection, that he had saved sufficient portions of the DNA testing so that the defense could retest it if they desired, and that the defense would have been able to retest the evidence. The only further evidence adduced was the fact that the defense had actually obtained an

expert, and that expert had had access to all of Mr. Myers' notes and results. If that evidence had been excluded, the jury would still have known that the materials were available for, and could be, retested. The prosecutor could have used that evidence to argue that the defense had failed to call a logical witness to rebut Mr. Myers' testimony. Given that such argument could be properly based on the non-objected testimony elicited from Mr. Myers, combined with the above noted factors concerning the other evidence in the case, appellant fails to demonstrate that absent this additional evidence it was reasonably probable he would have been acquitted. (See *Green*, *supra*, 27 Cal.3d at p. 27.)

C. The Court Did Not Err or Commit Misconduct in Responding to the Jury Note, in Not Interrupting the Defense Summation to Disclose the Note to Defense Counsel, and in Refusing to Allow the Defense to Reopen their Summation

Appellant contends the court erred – "[c]ompounding the above errors, and comprising reversible error in their own right"—because it: (1) failed to interrupt the final portion of the defense summation to advise defense counsel of the contents of a jury note; (2) improperly responded to the jury note; and (3) improperly refused to allow the defense to reopen their summation to respond to the note. (AOB 161-162; see AOB 162 [court's response to the jury note "constituted judicial bias and a de factor endorsement of the prosecution's position"]; 172 ["due process violation wherein the court abdicated its responsibility . . . which implicated due process rights"]; 172-173 [court's response to jury note and allowing prosecutor to respond to note "equate[d] the prosecutor with the judge"].) Respondent disagrees.

1. Relevant proceedings

The prosecutor gave his guilt-phase summation between 10:00 and 11:00 a.m., on February 16, 1999. (3CT 869; 27RT 4900-4946.) Prior to

argument, the court reminded the jury that argument was not evidence. (27RT 4898.) This caveat was repeated, and enlarged on, by the prosecutor at the beginning of his summation:

> The judge has indicated what the attorneys say to you in closing argument is not evidence. And I have to remind you of that again because you are going to hear a lot of claims made during this closing argument today and probably into tomorrow. Some may be reasonable, some may be unreasonable, but they are mere words of argument. They are not evidence. The only evidence, as the Court has explained to you and I will tell you now, came from that witness stand and any other tangible items of evidence which you can see, touch or feel. [¶] Please remember that what the attorneys say is not evidence.

(27RT 4900.)

The prosecutor argued: "I'm not going to beat a dead horse to death about DNA, but the RFLP on the rectal swabs and the jeans comes back to the defendant one in 32 billion with a B." (27RT 4903-4904.) Later, the prosecutor returned to a discussion of the DNA evidence: "We've had about a three-and-a-half days of testimony on that, and you know what the results were. [¶] . . . [T]he RFLP DNA on the rectal swabs and [Terena's] jeans, one in 32 billion. The PCR DNA has Nadey's semen as the major donor on the other swabs." (27RT 4940.)

The prosecutor then speculated about the contents of the defense summation:

> Now, I know you're going to hear the defense challenge the results of the DNA expert and the computer is faulty, the FBI databases are bad and so forth. He goes on and on. . . . [¶] But just remember when Mr. Horowitz screams contamination and all the other things he is probably going to scream about, the swabs and the blood were received by Sharon Smith on 1-22, as were the jeans. The testing on the jeans was done to see if semen . . . was present, and if it was, that's all her role in this thing, to determine the presence of semen.

(27RT 4941.) The prosecutor reminded the jury that during the time Myers was doing preliminary DNA testing of the various swabs taken from Terena's body, Smith retained the jeans, and that she had subsequently worked on the jeans on January 30, 1996, after Myers had done preliminary DNA testing on other samples. The prosecutor argued the evidence showed Myers found appellant was the donor "of the semen on the swabs" taken from Terena, "then and only then" did Myers obtain the cutouts that Smith had done of Terena's jeans. The prosecutor recalled his examination of Myers where Myers had testified that the only way to contaminate a "sperm fraction" would be to add sperm. (27RT 4941-4942.)

Without objection, the prosecutor then posed a rhetorical question: "Now, did you hear anyone for the defense testify to disprove Mr. Myers' findings or results? [¶] Not one. Not one. [¶] Here we have the uncontroverted testimony and unquestioned expert in the field of DNA . . . . [¶] . . . [¶] He tells us that Nadey's sperm is on the rectal swabs and the jeans of Terena. [¶] And so the defendant's profile on the six RFLP markers . . . is one in 32 billion. [¶] Now, that's what I would call proof of this case beyond a reasonable doubt." (27RT 4942-4943.) After briefly discussing the defense case, and appellant's possible motive for murder, the prosecutor concluded his summation. (27RT 4946.)

Mr. Horowitz, who had also conducted Mr. Myers' cross-examination, presented appellant's summation beginning at 11:20 a.m., after the morning recess. Mr. Horowitz concluded his summation for the day at 4:00 p.m. (3CT 869; 27RT 4946-5050.) The followed day (Feb. 17), Mr. Horowitz resumed his summation at 9:30 a.m. (3CT 884; 27RT 5053.) Mr. Horowitz interrupted his summation for the morning recess, which lasted for 14 minutes, between 10:55 and 11:09 a.m. (3CT 884.) Mr. Horowitz concluded his summation around 11:40 a.m. (3CT 884.)

A very substantial portion of Mr. Horowitz's summation challenged the prosecution's DNA evidence. For example, Mr. Horowitz argued: "Now there is no question in this case that the DNA includes a finding, a concession, an agreement, and admission by the prosecution that there is DNA of somebody other than Donald . . . Terena, or Giles Nadey in this case." (27RT 4950.) Mr. Horowitz argued the samples used for DNA testing were contaminated. (47RT 5005-5006.)

Mr. Horowitz argued sheriff's criminalist Smith was not only predisposed to finding results consistent with the prosecution theory of the case (27RT 4980 see 27RT 4980-4982 [when she did not find sperm on a rectal slide "she went and made another one and found sperm"], 5011-5012, 5014-5017), but she or someone else had possibly misused an alleged second vial of appellant's blood. (27RT 4982-4987; see 27RT 4986 [the "nefarious" third possibility that "[s]ome took the extra vial and used it to contaminate evidence and didn't want people to know"].) Mr. Horowitz argued Ms. Smith had "truthful[ness] issue[s]" (27RT 4982; see 27RT 4987-4992; 5001 [Smith "covering up"]), and had "been sloppy with her work and thus contaminated the heck out of these samples" (27RT 4968; see 27RT 4968-4976, 4992-4995, 5006-5014, 5080-5081, 5118). Mr. Horowitz argued the rectal swab from Terena did not contain appellant's sperm, and in fact, "nobody's sperm is in the rectal sample." (27RT 4951; see 27RT 4668, 5001.)

Mr. Horowitz argued Criminalist Myers was also predisposed to making certain findings since he worked for the state Department of Justice (27RT 5023, 5041-5042, 5062, 5068-5069), and because Ms. Smith had sent him Terena's rectal swabs with a note that semen had been detected (27RT 4980). Mr. Horowitz questioned Myers' professional competence to do DNA testing. (27RT 5061-5067, 5069-5070, 5074, 5082-5087.) He directly challenged Mr. Myer's credibility: "The problem in this case for

the prosecution . . . end[s] with Steve Myers. And I'm going to show you that Steve Myers is not truthful with you. He was not truthful. He misrepresented things to you. And I'm going to show you how, and it's not going to be close." (27RT 4967; see 27RT 5024, 5090-5093.) Mr. Horowitz challenged the accuracy of the DNA results of the appellant's blood sample, done by Myers. (27RT 5024-5050, 5054-5061, 5071-5074.) Because of Myers' alleged bias and incompetence and the alleged contamination, Mr. Horowitz asked the jury "to totally disregard the RFLP results . . . ." (27RT 5076; see 27RT 5083, 5088 [contamination], 5096, 5100, 5103-5104, 5107-5108, 5113.) He also asked the jury to reject the PCR results. (See 27RT 5096, 5116.)

Mr. Horowitz repeatedly spoke of the DNA of "Mr. Unknown." (See 27RT 4951 [in every PCR DNA test performed by Myers on the vulva *and rectal swabs* "this [second] guy shows up" (italics added)], 4955 [responding to the prosecutor's theory how the third DNA got in the samples: "Mr. Anderson needs to explain this DNA of Mr. Unknown, and the way he tries to do it is by saying that" appellant indirectly "transferred some stuff from another guy"], 4956, 4958, 5024-5025, 5032, 5088, 5090, 5097-5102, 5110-5111, 5115-5117.) Mr. Horowitz finished his summation at 11:40. (3CT 884; 5120.)

Prior to taking the noon recess, the court advised counsel and the jury: "Juror Number 7[[44]] handed me a question, and I can tell Juror No. 7 that I do believe that that question will be answered for you this afternoon." (27RT 5120; see 3CT 884.) After excusing the jury for lunch, the court and Mr. Horowitz discussed the note. (3CT 884; 27RT 5121.) The note asked:

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[44] As noted in the *Batson* argument, *supra*, Juror No. 7, among other things, had once been the foreperson of the grand jury. (See 56CT 16450, 17453-16454; 8RT 1416, 1418.)

"Does the defense have access to a DNA expert which it could have had as a defense witness, or is there a limitation on funds to prevent this?" (Exh. No. XXV; see 27RT 5121.)

Mr. Horowitz argued the prosecutor should not be allowed to address the note in his rebuttal argument: "It's impermissible for him to talk about our access to labs or funding. It's not in evidence." (27RT 5121.) The court disagreed:

> Wrong. It certainly is.
>
> MR. HOROWITZ: Well, first of all, the truth is we have limited funding.
>
> THE COURT: Mr. Horowitz, wait a minute. Don't give me that snow job. You've got an expert in this case. We know his name. We know there's a letter there. [¶] And he has a right to comment on the fact that the defense didn't call a particular witness. [¶] So that's the law. I'll give you the citation if you want. [¶] . . . [¶] Now, don't tell me, Mr. Horowitz. I'm not the jury. Don't tell me that you didn't have an expert.
>
> MR. HOROWITZ: Well, I object to any comments in closing which implies what the funding is or is not –
>
> THE COURT: It's not an issue of funding. He is not going to argue about funding. The question is whether or not you had a defense expert.
>
> MR. HOROWITZ: Well, then he can say that the defense apparently –
>
> THE COURT: He can say whatever he wants. You can't tell him what he is going to say. If he says something, you don't like it, object.
>
> MR. HOROWITZ: I object now. I object now and ask that he be limiting to saying that the defense hired Ed Blake to review some records and that's it, because that's all that's in evidence.
>
> THE COURT: No.

MR. HOROWITZ: . . . I ask that we call Mr. Giller as a witness to explain the funding issue.

THE COURT: We are not going to turn this into a circus. Your objection is overruled. The DA can argue the way he wants. . . .

[¶] . . . [¶] MR. HOROWITZ: That note was read after I was done with my argument, and that means that Mr. Anderson has the ability to address a specific concern of a juror when I didn't. [¶] So I'd ask to be allowed to reopen for just the limited purpose of explaining to the juror my point of view about hiring the expert because otherwise it's an unfair advantage.

THE COURT: Mr. Horowitz, you argued for five hours and 15 minutes. If you didn't see fit to cover that issue in your argument, you're not going to deal with it now. Denied.

(27RT 5121-5123.)

Mr. Giller believed the court's refusal was:

[O]utrageous. [¶] . . . [¶] . . . [B]ecause the note came after he finished his argument. You bring it up. There was no need. And the juror called attention to it, and Mr. Anderson is going to be able to argue it without our being able to make any response.

[¶] . . . [¶] THE COURT: Wait a minute, Mr. Giller. I'm not going to tell Mr. Horowitz how to argue his case. He argued for five hours and 15 minutes. He didn't see fit to cover that issue. That is not my problem. [¶] That doesn't mean that the district attorney cannot argue it in his closing argument. You should have anticipated – you've been around the courthouse for a long time. This should not come as a surprise to you. . . . [¶] . . . [W]e didn't just get off the wagon. . . . [¶] But we are not going to reopen the argument. We are going to let the district attorney argue. [¶] We are going to instruct this jury today, and it's over.

(27RT 5123-5124.) The court took the noon recess. (3CT 884; 27RT 5124.)

That afternoon, the defense claimed the court received the note "*before* [Mr. Horowitz's] final argument." (27RT 5125, italics added.) The court responded: "Wrong. [¶] . . . [¶] What happened was when the juror came down from the recess, she handed a note to my clerk[who]

handed the note to me. And Mr. Horowitz was in the *middle of his final phase* of his argument." (27RT 5125, italics added.) When Mr. Giller further contested the time frame, the court responded: "This was . . . the recess this morning. He was winding down his argument." (27RT 5126-5127.) Mr. Giller argued Mr. Horowitz would not "have been the least concerned if you had interrupted his argument to show him the note . . . ." Mr. Horowitz "asked to reopen so he could address it . . . in probably two, three minutes." (27RT 5127.) The court again rejected the defense request to reopen its summation, again noting Mr. Horowitz had engaged in a long summation and further remarked:

> [I]t's in the record that there was a defense expert in this case. It was addressed by Mr. Myers. [¶] Right? [¶] I can't believe that the defense in this case would not anticipate the fact that the district attorney would address that issue in his argument. I'm not here to orchestrate the defense argument . . . . You're free to argue anything the record shows. If you left something out, I don't think it's my responsibility to let you reopen because you left something out of your argument. [¶] . . . [¶] And maybe you wouldn't take umbrage if I interrupted your . . . argument to this jury. But this is . . . a simple question whether or not the defense had a defense witness. It's in the record.
>
> It was never alluded to by [the] defense in their argument. You . . . guys pick and choose whatever you think is important to your case. If you saw fit not to address this issue, I don't think its incumbent upon the Court to tell you that this is something you should address. . . .

(27RT 5127-5128.)

The prosecutor interjected he had been "ready to argue [the case] this morning had [Mr. Horowitz] finished. [¶] And that reference to Mr. Ed Blake is on page 4508 . . . . And I've been prepared for this issue the whole time since they told me Ed Blake wasn't going to testify. So . . . them saying I get an unfair advantage is absolute garbage." (27RT 5128.)

Mr. Giller responded:

> [T]he juror before the arguments were concluded specifically gave you a note and on a particular issue she wanted addressed. [¶] . . . [¶] . . . [W]hat difference [does] it make[] to take two more minutes and –
>
> THE COURT: The difference is the orderly presentation of this trial. . . . [Y]ou may laugh, Mr. Giller . . . but you guys have spent five hours and 15 minutes arguing in this case. Now, a juror has a question. Now you didn't address it, so now you want to . . . reopen. [¶] Now supposing the juror asks another question? Are we supposed to reopen again?
>
> MR. GILLER: No.
>
> THE COURT: The point is what difference does it make, because the district attorney is gong to argue it anyway.

(27RT 5128-5129.)

Mr. Giller argued "it would not be undue consumption of time to respond to that question. And then Mr. Anderson still is free to go on to his heart's desire in dealing with the issue." (27RT 5129.) Mr. Giller noted "it's not unheard of in the course of trial to reopen . . . ." (27RT 5130.) The court agreed:

> I know it's not unheard of. But I sound like a broken record. [¶] There was plenty of time allotted to the defense to argue this case. If for whatever reason the defense didn't anticipate that maybe the prosecutor was going to argue the fact that you guys had a defense witness and you didn't call him, to me, that is so elementary in this case . . . that I felt that you deliberately left that out because you didn't want to touch that issue.
>
> But you should know that this is coming. We've had a DNA hearing in this case. There is reference to Ed Blake as being the defense witness. [¶] We've had . . . the testimony by Mr. Myers where he kept part of the samples to turn those over to . . . your witness, if your witness was so inclined. That's all in the record.
>
> Now you didn't argue it. . . . And so I'm not going to let you reopen. That's the way it is. [¶] Somewhere along the line, we have to draw the line here.

(27RT 5130; see 27RT 5133.)

When it was clear the court would not change its ruling, Mr. Horowitz requested as "a compromise position," the court read prior to the prosecutor's summation, CALJIC No. 2.11 that "[n]ot everybody has to call every witness." The court denied the request, indicating, "[t]hat is going to be read." (27RT 5131.) Mr. Horowitz argued such an immediate response to the jury note was called for:

> [S]o that [the questioning juror] doesn't feel that a question to a Judge is delegated to the prosecutor.
>
> [¶] . . . [¶] THE COURT: I don't think that's the case. . . . [¶] We are going to go ahead now with this trial. The jury had that issue. I'm sure there is a lot of other jurors that may have the same issue. And this is like a ping pong match. Once you've made your argument, you went on. It's completed. You covered everything you wanted to cover. This came up. That's obvious that the district attorney is going to address it in his closing argument. [¶] . . . You know that is going to happen. You guys have tried cases in this courthouse for years. You should have known that. So we are not going to go back, piddle around with this again. This is crucial for the prosecution. It's crucial for the defense. We spent all this time analyzing the DNA. You've made your point. [¶] Now, the district attorney has a right to rebut it if he sees fit, and then it's for the jury to decide. But you had the opportunity.

(27RT 5131-5133.)

2. General applicable law

"'A trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice.' [Citations]." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 951; see also § 1044.) "In exercising its discretion under section 1044, a trial court must be impartial and must assure that a defendant is afforded a fair trial. [Citation.] When there is no patent abuse of discretion, a trial court's

determinations under section 1044 must be upheld on appeal. [Citation.]" (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1334.)

3. The court's decision not to interrupt the conclusion of the defense summation, and refusal to allow the defense to reopen its summation, were not misconduct or other error

Appellant now contends for the first time that the court's failure to interrupt the final portion of the defense summation and disclose the jury note to Mr. Horowitz, its refusal to allow the defense to reopen its summation for a "two or three minutes" response to the jury note, and its failure to immediately instruct, prior to the prosecutor's rebuttal argument, that the parties were not obligated to all witnesses, among other things, impermissibly shifted the burden of proof. (AOB 178-180 & fn. 10.) Respondent disagrees. The court properly exercised its discretion when it did not interrupt the final portion of the defense summation, and when it refused to allow the defense to reopen their summation.

Even aside from the traditional reticence to interpret summation (see Levenson, Cal. Criminal Procedure (The Rutter Group 2012) § 23.45, p, 23-49-23-50), "[t]he presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time . . . ." (*Herring v. New York* (1975) 422 U.S. 853, 862; see *People v. Edwards* (2013) 57 Cal.4th 658, 743 (*Edwards*); *People v. Fairchild* (1967) 254 Cal.App.2d 831, 841 ["the time limited for argument is in the trial judge's discretion and his determination of the proper allotment will seldom be disturbed on appeal"]; *People v. Nails* (1963) 214 Cal.App.2d 689, 698 ["A trial judge has discretionary power to restrict argument within reasonable limits"].) This Court should evaluation the court's decision not to interrupt the defense summation—which Mr. Giller argued after the fact that Mr. Horowitz would have wanted—and not to allow appellant to reopen his summation under an

abuse of discretion standard. (Cf. *People v. Gaines* (1966) 247 Cal.App.2d 141, 148 [trial court had discretion whether to allow reopening of argument after argument by both sides had concluded].)

As the court noted, defense counsel was well aware of the admitted prosecution evidence regarding Dr. Blake and the prosecutor's comment regarding that evidence during the prosecutor's summation. The prosecutor had posed a rhetorical question during his summation: "Now, did you hear anyone for the defense testify to disprove Mr. Myers' findings or results? [¶] Not one. Not one. [¶] Here we have the uncontroverted testimony and unquestioned expert in the field of DNA . . . ." (27RT 4942-4943.)

As the court pointed out, the defense ignored this issue during their summation. Given the court's views as to the competence of the defense counsel, the trial court properly drew the reasonable inference that, as a matter of tactics, the defense deliberately failed to address the prosecution evidence and summation regarding Dr. Blake during its summation. The court's consideration of that fact, and along with court's power to control the proceedings, were valid reasons why the court properly exercised its discretion not to interrupt the defense summation, and then later, to refuse to allow the defense to reopen its guilt-phase summation. (See *People v. Monterroso* (2004) 34 Cal.4th 743, 779 ["The decision to grant or deny a motion to reopen, even to reopen the penalty phase of a capital prosecution, remains in the discretion of the trial court"] (*Monterroso*).) The court's decision not to interrupt the defense summation, and not to allow the defense to reopen that summation in these circumstances was a proper exercise of discretion under both the court's inherent power to control the proceedings and section 1044.

Even assuming the court abused its discretion by not allowing the defense to reopen its summation to address the jury note, appellant cannot

demonstrate these actions—or the court's earlier response to the jury note—were so prejudicial as to denied him a fair trial. Appellant:

> [M]ust establish prejudice. "'[O]ur role . . . is not to determine whether the trial court's conduct left something to be desired, or even whether some comments would have better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair trial, as opposed to a perfect, trial.'" [Citation.] We make that determination on a case-by-case basis, examining the context of the court's comments and the circumstances under which they occurred. [Citation.] Thus, the propriety and prejudicial effect of a particular comment are judged by both its content and the circumstances surrounding it. [Citation.]

(*People v. Abel* (2012) 53 Cal.4th 891, 914; see *People v. Guerra* (2006) 37 Cal.4th 1067, 1111 (*Guerra*), disapproved on other grounds in *People v. Rundle* (2009) 43 Cal.4th 76, 151.) If this Court decides the court's immediate actions regarding the jury note and its failure to allow the defense to reopen constitutes error, it remains the fact that the trial court's actions did not deny appellant a fair trial.

4. The court's response to the jury did not constitute misconduct

We note (and again as relevant below in addressing appellant's claim that the court should have given CALJIC No. 2.11 immediately before the prosecutor started his rebuttal argument), that the court instructed as part of its "concluding instructions": "I have not intended by anything I have said or done or by any question that I have may have asked or by any ruling I may have made to intimate or suggestion what you should find to be the facts or that I believe or disbelieve any witness. If anything I have done or said has seemed to so indicate, you will disregard it and your own conclusion." (27RT 5197.) Even assuming that somehow one or more jurors may have initially concluded that the court's response to the note showed judicial "endorsement" of the prosecutor's case, "[d]efendant offers

no reason to believe the jury failed to follow th[e above] instruction." (*Monterroso*, *supra*, 34 Cal.4th at p. 784; see *People v. Cook* (2006) 39 Cal.4th 566, 598.)

Appellant asserts the court directly "informed the jury that the 'question will be answered for you this afternoon' *by the prosecution*." (AOB 162, italics added.) While that may have been a reasonable inference, that is not what the court said to the jury. The court said: "Juror Number 7 handed me a question, and I can tell Juror No. 7 that I do believe that that question will be answered for you this afternoon." (27RT 5120.)

The trial court did not abuse its inherent or statutory authority to conduct the trial by giving this simple, responsive answer to Juror No. 7 before excusing the jury for lunch. Common courtesy mandated a response. While appellant does not suggest what the court should have instead told Juror No. 7, the only other possible answer would have been for the court to apologize to Juror No. 7, and tell her it could not answer her question.

Moreover, when viewed from the court's prospective at the time it addressed Juror No. 7, the court could reasonably contemplate that the question would be addressed during the prosecutor's rebuttal summation. The trial court's phrasing of its answer to Juror No. 7, did not, in any, constitute a judicial "endorsement" of the prosecutor's later argument.

Even assuming the court erred by telling Juror No. 7 that it believed that her question would be addressed that afternoon, appellant cannot demonstrate these actions denied him a fair trial.

D. The Trial Court Did Not Abuse Its Discretion by Refusing to Give CALJIC No. 2.11 Immediately Prior to the Prosecutor's Rebuttal Argument

Appellant argues the court's refusal to instruct with CALJIC No. 2.11 immediately before the prosecutor's rebuttal argument also "constituted

judicial bias and a de facto endorsement of the prosecution's position." (AOB 162.) Respondent disagrees.

When, after the noon recess, the court would not change its ruling refusing to allow the defense to reopen their summation, Mr. Horowitz requested the court give CALJIC No. 2.11, which instructs the jury that "[n]ot everybody has to call every witness." The court responded: "That's going to be read." Mr. Horowitz then requested that the instruction be given before the prosecutor's rebuttal argument, arguing CALJIC No. 2.11, would be "in response to [Juror No. 7's] question . . . [so that] she doesn't feel that a question to a Judge is delegated to the prosecutor." (27RT 5131.)

Appellant argues for the first time on appeal, that the court's refusal improperly shifted the burden of proof to him making the trial "fundamentally unfair." (AOB 180-181 & fn. 11.) Respondent disagrees. The court already knew it would instruct the jury later that afternoon after the prosecutor completed his rebuttal summation, and that CALJIC No. 2.11 would given as part of that charge.

When it did instruct the jury, the court preliminarily advised the jury that it was dividing up the instructions, and that the "first part are the introductory instructions . . . that deal with the way you are to evaluate the evidence, give you some tips, includes how you should evaluate the evidence, you are the decider of what took place in this case." (27RT 5180-5181.) The court informed the jury, among other things: (1) "[D]o not single out any particular sentence or any individual point or instruction and ignore the others. Consider the instructions as a whole and each in light of all the others. The order in which the instructions are given has no significance in their relative importance" (27RT 5182-5183; see *People v. Sanders* (1990) 51 Cal.3d 471, 519); (2) "Statements made by the attorneys during the trial are not evidence" (27RT 5183); (3) "You must decide all

questions of fact in this case from the evidence received in this trial and not from any other source" (27RT 5183); (4) "Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events. [¶] Neither side is required to produce all objects or documents mentioned or suggested by the evidence" (27RT 5186); (5) "Every person who testifies under oath 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 to prove or disprove the truthfulness 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 has testified; [¶] . . . [¶] The character and quality of that testimony; [¶] The demeanor and manner of the witness while testifying; [¶] The existence or nonexistence of any 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" (27RT 5186-5187); (6) "A defendant in a criminal trial has a constitutional right not to be compelled to testify" (27RT 5188); (7) "In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and [] upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. [¶] No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against him on any such essential element" (27RT 5188-5189); and (8) "A defendant in a criminal action is presumed to be innocent until the contrary is proved. And in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not

guilty. The presumption of innocence places upon the People of proving him guilty beyond a reasonable doubt" (27RT 5191).

As noted, CALJIC No. 2.11 was included in the later jury charge, given after the prosecutor's rebuttal summation. First, the court did not error in refusing to give the instruction prior to the prosecutor's argument because, as the court realized, giving the instruction then would have been duplicative of the inclusion of CALJIC No. 2.11 in the court's later charge to the jury. (See *People v. Gurule* (2002) 28 Cal.4th 557, 659 [court not required to give duplicative instructions] (*Gurule*).) More importantly, giving CALJIC No. 2.11 in the general charge, when the court was instructing the jury about how they were to evaluate the evidence, put the instruction into proper context, and did not single out the instruction for special emphasis. Jurors are presumed to be "able to correlate, follow, and understand" the applicable instructions. (*People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1190.) Instead of appearing to caution the jury to subject the prosecutor's rebuttal argument regarding the defense's failure to call logical witnesses to special scrutiny, the court's instructions made clear to the jury that appellant had no obligation to present evidence. (See *Lucas*, *supra*, 12 Cal.4th at pp. 483-484.)

In making his argument of judicial error and misconduct, appellant relies on *People v. Serrato* (1973) 9 Cal.3d 753, 766-767 (*Serrato*), disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1. (AOB 178-180 & fn. 10.) As appellant acknowledges (AOB 179), *Serrato*, a prosecution for possession of a fire bomb, dealt with instructional error, and not the claims he now asserts. In that case, the defendant objected to the court's off-the-cuff remarks made before formal instruction, that "'fundamentally [the sole issue is] whether there is enough of an explanation given by the defense case with reference to these particular contraband items. Is it enough for you as citizens, to feel

satisfied? [¶] . . . If you think the explanation given isn't sufficient, you perhaps may find the contrary conclusion.'" (*Serrato*, *supra*, 9 Cal.3d at p. 766.) There this Court concluded "[t]he thrust of the court's statement was to reverse the burden of proof on the only contested factual issue in the case." (*Ibid.*) The Court found this express, burden-shifting instruction was a violation of due process. (*Id.* at pp. 766-767.) That did not happen here. Neither the prosecutor nor the court expressly or implicitly told the jury that: (1) the DNA evidence was the only factual issue before it; or (2) that the defense had the burden to establish that Mr. Myers' results were erroneous, and if not, the jury was to return a guilty verdict.

E. The Prosecutor's Rebuttal Argument was Proper

Appellant argues the prosecutor committed misconduct when he "improperly" argued the defense "did not call the expert because the expert would have supported the prosecution's position." (AOB 161; see AOB 175.) More particularly, appellant claims the prosecutor improperly "both stated and/or implied that [he] had a duty to produce evidence"—given the prosecutor's argument concerning the defense failure to call Dr. Blake as a witness. (AOB 176; see AOB 177-178.) Respondent disagrees.

1. Relevant portions of the prosecutor's rebuttal argument

The prosecutor gave his rebuttal argument between 1:40 and 2:40 p.m. (3CT 884; 27RT 5133-5180.) As before, the prosecutor prefaced his rebuttal argument with the admonition "not to forget the fact that what attorneys say to you is not evidence in this case." (27RT 5133.)

In beginning his response to the defense summation regarding sheriff's criminalist Smith, the prosecutor argued: "Now, Mr. Horowitz really doesn't like . . . Sharon Smith at all. In fact, Mr. Horowitz, the self-anointed DNA expert, the self-anointed criminalistic expert, the self-anointed computer expert, errs a little too much in his own background

check on people." (27RT 5144.) After reading a portion of Mr. Horowitz's cross-examination of Smith concerning, inter alia, her results on earlier proficiency tests, the prosecutor asserted that Mr. Horowitz "makes the bald assertion that Sharon Smith lied, she contaminated the rectal swabs with Nadey's blood, and at one point in time, quote, 'there was lots of blood being moved around by this infamous woman. Swabs, whole blood, slides were open together and hence contamination.'" (27RT 5145-5146.)

The prosecutor continued:

> Let's put this contamination defense garbage to bed once and for all. [¶] Now, Mr. Horowitz made another attempt to spin a tail from actual evidence. [¶] Remember his first question to Steve Myers on cross-examination? [¶] This was his first question out of his mouth to Steve Myers.
>
> "QUESTION: Mr. Myers, science, kind of a crude expression, but have you ever heard of the expression garbage in and garbage out?
>
> ANSWER: I heard it in the Simpson trial."

(27RT 9148.)

The prosecutor then quoted some of Mr. Horowitz's argument "regarding the DNA [evidence], and I'll put this dead horse to sleep once and for all." (27RT 5149):

> Here are some of the things he said to you: [¶] "I have a problem accepting RFLP." [¶] Well, that is not his prerogative. [¶] Another quote, "The only person catching these mistakes is me." [¶] Quote, "I'm telling you that the RFLP results are not real and that you were bamboozled."
>
> I think you get the idea. He is arguing to you. He is not doing that as an attorney. He is testifying as if he were the expert. . . . Like they say, a little knowledge is a dangerous thing. [¶] He is saying things to you as if they were proven facts, and yet he's admitted they are just his theories.

(27RT 5149-5150.)

Subsequently, without objection the prosecutor addressed the fact the defense had not called a DNA expert:

> Now, the defense makes all of these allegations regarding DNA: It's contaminated. It's got poor databases. It's got faulty machines. Myers only has a master's degree [*sic*] and on and on and on. [¶] But what do we know? . . . [¶] One thing we do know is that they have hired their own expert. [¶] Remember the testimony. [¶] One, Dr. Edward Blake, and he has access to all of Steve Myers' work, including his notes and the evidence. If Myers is wrong in anything he has done, then they certainly would have picked up on it and retested the evidence to exclude Mr. Nadey. [¶] Wouldn't they? Isn't that that?
>
> Why then didn't we see any defense expert here to say that Steve Myers was wrong or to show by their own expert, the famous Dr. Blake . . . to say that Myers is wrong and that we've got the wrong guy; Nadey is excluded? [¶] And you all know the answer to that. . . . They can't.

(27RT 5151-5152.)

After quoting some of Mr. Myers' testimony about how, among other things, he saved a portion of the samples to allow for defense retesting (27RT 5152-5153), and the fact—brought out in both Mr. Myer's testimony and the letter from Dr. Blake to Mr. Myers—that Myers had provided Dr. Blake with his entire work notes (27RT 5154 -5155), the prosecutor argued:

> They have all of this evidence . . . each and every page, documentation, and we get a D. Crim., not just some master [*sic*], and we don't see him. And for five and a half hours Mr. Horowitz is railing on the People's contaminated evidence, on the faulty databases, calling my case garbage in and garbage out, when they've got a D. Crim. sitting there who has examined this and we don't see him. [¶] "Oh, my . . . ." [¶] Why not? Why don't we see this expert? [¶] What attorneys say isn't evidence.

(27RT 5151.)

Later, returning to the lack of a defense expert, the prosecutor argued:

> I'm telling you why they refused to hire Ed Blake to come to court and testify. [¶] One, he found no errors in Steve Myers'

> work, his methods, his samples, his statistical date or his results; and, [¶] Two, they did not retest because then there would have been a second finger of DNA evidence of guilt pointing at Mr. Nadey. [¶] That's why they didn't do it.

(27RT 5159.) Finally, as part of his concluding remarks, the prosecutor argued:

> The DNA is one in 32 billion. Rectal swabs and jeans. [¶] If you don't like it, call your own defense expert to do it. But, whoops, they didn't want to do that, and they don't want to retest it because they know Myers is correct, and they don't want another DNA finger of guilt pointing their way. [¶] We have the now uncontroverted testimony of Steven Myers when they have hired an expert and refused to call him. That makes his testimony uncontroverted.

(27RT 5178.)

2. Discussion

Appellant claims the prosecutor's rebuttal argument not only "constituted misconduct," but it "shifted the burden of proof" to him. (AOB 175; see AOB 178-179.) He did not object to this alleged misconduct, much less request a curative admonition; nor did he apprise the trial court that he believed the prosecutor's argument was burden-shifting. These claims should be forfeited. (See *Lucas*, *supra*, 12 Cal.4th at pp. 473, 475.)

But there was no misconduct. Generally, in closing argument, "[p]rosecutors have wide latitude to discuss and draw [reasonable] inferences [or deductions] from the evidence at trial. [Citations.]" (*Lucas*, *supra*, 12 Cal.4th at p. 473; see *Blacksher*, *supra*, 52 Cal.4th at p. 829.) Specifically, "[t]he prosecution is entitled to comment on the state of the evidence, including the lack of conflicting [DNA] evidence. [Citation.]" (*People v. Kaurish* (1990) 52 Cal.3d 648, 680 [there serological evidence]; see *People v. Wash* (1993) 6 Cal.4th 215, 263 ["prosecutorial comment

upon a defendant's failure 'to introduce evidence or call logical witnesses' is not improper" where defendant failed to present expert psychiatric testimony to support claim of depression and suicidal thoughts].) "Whether the inferences drawn by the prosecutor [are] reasonable [is] a question for the jury to decide. [Citation.]" (*Lucas*, *supra*, 12 Cal.4th at p. 474.) Moreover, the court told the jury, and as the prosecutor repeated, that the statements of counsel in argument are not evidence. (*Lucas*, *supra*, 12 Cal.4th at p. 474.)

Appellant's claim that the prosecutor's discussion of the failure to call Dr. Blake was an improper comment on his right to remain silent should be forfeited since counsel did not object on that ground in the trial court, "so that [the court] could consider the interest at stake and make a fully informed ruling." (*Blacksher*, *supra*, 52 Cal.4th at p. 829; see *Riggs*, *supra*, 44 Cal.4th at p. 317; *People v. Fierro* (1991) 1 Cal.4th 173, 213 (*Fierro*).)

Addressing the merits, regarding possible *Griffin* error (*Griffin v. California* (1965) 380 U.S. 380 [prosecutor cannot comment directly or indirectly on a defendant's failure to testify]), this Court has concluded the *Griffin* prohibition:

> "'[D]oes not extend to comments on the state of the evidence or on the failure of the defense to . . . call logical witnesses.' [Citation.] [¶] . . . [¶] The prosecutor's . . . comments did not refer to the defendant's failure to testify, but to the failure of the defense to call witnesses to contradict testimony of the prosecution witnesses or to offer any evidence in opposition to the prosecutor's case. *Griffin*[ ] does not prohibit the prosecution from emphasizing the defense's failure to call logically anticipated witnesses or the absence of evidence controverting the prosecution's evidence. [Citations.]

(*People v. Mitcham* (1992) 1 Cal.4th 1027, 1051 (*Mitcham*); see also *Bennett*, *supra*, 45 Cal.4th at p. 596; *Young*, *supra*, 34 Cal.4th at pp. 1195-1196; *Fierro*, *supra*, 1 Cal.4th at p. 213; *Daniels*, *supra*, 52 Cal.3d at p. 873 [prosecutor's argument that the defense could not say it was not the

defendant's blood in bloodstains "seems to be a comment on the failure of the defense to present scientific evidence analyzing the blood"].)

Appellant contends that in arguing appellant's failure to call Dr. Blake, the prosecutor violated his right to due process, specifically, by allegedly seeking to shift the burden of proof, or the presumption of innocence, or the right to remain silent. (Cf. AOB 172, 178-179, 181-184.) "A prosecutor's conduct violates the due process clause of the Fourteenth Amendment to the United States Constitution when the prosecutor's misconduct renders the trial 'fundamentally unfair.' [Citation.] 'Improper argument by a prosecutor reaches this threshold of fundamental unfairness if it is "so egregious as to create a reasonable probability that the outcome was changed." [Citation.] A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Caldwell*, *supra*, 212 Cal.App.4th at p. 1274.) Here, there is no reasonable likelihood the jury would have understood the prosecutor's comments to point out to the jury that appellant had not testified, or to argue that appellant now had the burden of proof in establishing his innocence. (See *Clair*, *supra*, 2 Cal.4th at pp. 662-663.)

Appellant's reliance on *Bennett*, *supra*, 45 Cal.4th 577, is misplaced. He claims that here, as opposed to what occurred in *Bennett*, the prosecutor's argument "both stated and/or implied that [he] had to duty to produce evidence." (AOB 176.) As already noted, there was no such argument, and in fact, the jury was instructed that the prosecutor bore the burden of proof as to the elements of the charges and the special circumstance.

F. No Cumulative Due Process Violation

As noted, appellant argues the cumulative effect of the prosecutor's introduction of the evidence pertaining to Dr. Blake, and prosecution rebuttal summation argument regarding the failure to call a defense expert,

denied him due process, shifted the burden of proof to him, deprived him of the presumption of innocence, violated his right to remain silent, "undermined his rights to effective assistance of counsel and to present a defense," and violated his attorney work-product privilege. (AOB 161.) He argues the court's erroneous rulings regarding the jury note "deprived him of all the above constitutional and statutory rights as noted above." (AOB 162.)

In the main, appellant forfeited these claims by not raising them in the trial court. Moreover, the trial court properly exercised its discretion in allowing the Blake evidence. Nor, did the trial court abuse its inherent and statutory discretion in answering the jury note as it did, in declining to allow the defense to reopen their summation, and in declining to give CALJIC No. 2.11 before the prosecutor's rebuttal argument. While appellant may not have had a "perfect" trial, he cannot demonstrate that he was denied a fair trial.

III. DR. ROGERS' GUILT TRIAL TESTIMONY ABOUT TERENA'S AUTOPSY DID NOT VIOLATE APPELLANT'S RIGHT TO CONFRONTATION

Appellant contends the prosecutor's use of a pathologist, Dr. Rogers, other than the pathologist who conducted Terena's autopsy, Dr. Herrmann, to explain and opine on that autopsy, violated his Sixth Amendment right to confrontation. (AOB 201; see AOB 205 [improper use of Dr. Herrmann's "testimonial statement"], 205-207, 211-225.) As part of this claim, appellant now challenges the prosecutor's use of DNA evidence which was obtained from samples collected by Dr. Herrmann from Terena's body during the autopsy.[45] (AOB 222, 228-230.) Respondent disagrees.

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[45] Appellant now argues: "[T]he defense was unable to cross-examine to test the process by which the DNA materials were extracted from the body of Terena Fermenick. This evidence became critical to the (continued...)

A. Relevant Proceedings

During the December 9, 1998, voir dire hearing, the prosecutor reported:

> I think I informally told Mr. Giller and Horowitz the other day that Dr. Herrmann would probably be on vacation. [¶] . . . [¶] He is not coming back until February 2, so I left word with him at [the Institute of Forensic Sciences] to help me out with this thing, and they have evidently given the matter to Dr. Thomas Rogers, and he will be the one testifying. He is going to go over the records and photos and things like that.

(9RT 1681.)[46] The prosecutor said he would make Dr. Rogers "available" to defense counsel. (9RT 1682.)

On January 20, 1999, the court indicated:

> Now, that brings to mind . . . [t]he issue of whether or not the pathologist is going to testify that a bowel movement is an

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(...continued)
DNA analysis, and the failure to be able to cross-examine was imperative in light of the later determined contamination and cross-contamination of the DNA and the presence of an unidentified third donor." (AOB 222-223.) Certainly, in consultation with Dr. Blake, by the time of trial the defense would have decided how it planned to challenge that DNA evidence. That attack focused on the alleged contamination of the DNA evidence by Ms. Smith and/or Mr. Myers.

[46] In making his subclaim that Dr. Herrmann was not legally unavailable (AOB 207-210), appellant stresses Dr. Herrmann was scheduled to return from his vacation on February 2, 1999, and the prosecutor did not complete his case-in-chief until February 10, 1999 (AOB 208, fns. 13 & 14). We acknowledge this Court has held that a pre-*Crawford* confrontation claim is not forfeited by failing to make a confrontation objection in the trial court. (*Edwards*, *supra*, 57 Cal.4th at pp. 704-705; *Pearson*, *supra*, 56 Cal.4th at pp. 461-462; see AOB 225-226.) However, if, indeed, there had been a special need by the defense for Dr. Herrmann's testimony, appellant could have sought a delay in the pathology testimony until February 2, or later. Alternatively, they could have called Dr. Herrmann during their case. The defense did neither. (Cf. *Williams*, *supra*, 43 Cal.4th at pp. 619-620 [forfeiture of "unavailability" claim].)

adjunct to sodomy. We were going to have a 402 hearing on this. And if you've had an opportunity to talk to Dr. Rogers and if he's going to tell you that's the testimony, as far as I'm concerned, it goes to the weight rather to it's admissibility. And I don't see a need for a 402 hearing, Mr. Giller. I don't mind doing it.

MR. GILLER: I don't think you need a 402 hearing.

THE COURT: Have you talked to Dr. Rogers?

MR. GILLER: Yeah.

THE COURT: And is he going to say that?

MR. ANDERSON: It's going to be either or. It's either the aforementioned bodily function . . . could . . . be the result of the death and release of those bodily functions or as a result of the 286 of the Penal Code. . . . [I]t's anybody's guess. And I have supplied counsel with the additional evidence that was always in existence from the technician's reports about the aforementioned bodily functions being found on the sheets and bedding of the room where the incident occurred. . . .

THE COURT: So that would indicate to the Court . . . this woman was still alive because, from looking at the photographs, it appeared that she went from the bed to another room in an attempt to use the phone and expired at the phone. [¶] So the argument would be made that the feces on the bed sheets were as a result of the sodomy rather than after she died and then she moved her bowels.

MR. ANDERSON: That would be a logical conclusion.

MR. HOROWITZ: . . . [A]t this point I would also indicate that it . . . could have been on the penis or object inserted into the orifice and been wiped off.

THE COURT: That could be. That's something you'd have to develop on cross examination. [¶] But . . . what I'm driving at, I don't think its necessary to have a 402 hearing because you know very well what the doctor is going to testify to. And then it's a subject to cross-examination by the defense to get all those different theories as to how the feces could be on the bed and show she was found in this condition. . . . [¶] . . . [¶] I would

assume then Tuesday morning will be devoted mostly to opening statements and then the first witness will be the pathologist.

MR. ANDERSON: Don't forget Dr. Rogers is going to be testifying as an expert as to . . . the work done by another pathologist because Dr. Herrmann is in Patagonia.

(17RT 3690-3691.)

During his January 26, 1999, opening statement, 26, 1999, the prosecutor advised the jury of the anticipated substance of Dr. Roger's testimony.

First off, you will hear from Dr. Thomas Rogers, who is a forensic pathologist. Now, he will testify to an autopsy that was performed by another member of [IFS]. The one who did the autopsy was Dr. Paul Herrmann, and he is somewhere in the wilds of Patagonia in South America. And because the coroner's office works through the [IFS], the records are business records that will come in. And you will hear how the autopsy transpired and what was recovered . . . .

(18RT 3782-3783.)

Dr. Rogers testified he was employed by the IFS, located in Oakland, which was "a group of pathologists [who] contract to perform autopsies for the Coroner's Office of Alameda County." (18RT 3798.) Dr. Herrmann was also employed by IFS, and had been Dr. Rogers' colleague for 20 years. (18RT 3800-3801.) The prosecutor asked:

Did you review some records and photographs and other details and writings performed by Dr. Herrmann after an autopsy that he did on January 19th of 1996 upon . . . Terena Fermenick?

A. Yes, I did.

Q. Is there a document which is produced after every autopsy done by the coroner's office in this county which is numbered and is accepted as a business record?

A. Yes, there is.

Q. What is that document called, sir?

A. It's called an autopsy protocol.

(18RT 3801.)

The prosecutor then had marked as People's Exhibit No. 3, a copy of that autopsy protocol, which the prosecutor elicited from Dr. Rogers was made in the "regular course of business of the Coroner's Office of Alameda County." (18RT 3801-3802.) The prosecutor further established the protocol was "compiled at or near the time of the actual autopsy," and as a "an employee of [IFS]," Dr. Rogers was qualified to "identify" the protocol. (18RT 3802.) The prosecutor continued:

> And does the source of information from that document come within the observations of Dr. Herrmann, the actual autopsy physician?
>
> A. Yes, it does.
>
> Q. Sir, now, just so we're patently clear, sir, you're testifying as an expert in the area of forensic pathology as to the findings made by Dr. Herrmann who is unavailable at this time? Would that be a fair statement?
>
> A. That is fair.

(18RT 3802.)

Dr. Rogers had been present for part of the autopsy, and when he went to review the case he "had some vague recollection of it." (18RT 3832.) In his review, Dr. Rogers had examined the autopsy slides and photographs. (18RT 3804, 3831.) Dr. Rogers went through the various autopsy photographs with the jury which the court had deemed admissible, explaining what those photographs were, and, on some photographs, pointing out the location of various wounds. (See, e.g., 18RT 3804-3805 [describing the nature of various types of wounds on Terena's body]). Regarding some of the photographed wounds, Dr. Rogers gave his own

opinion on multiple issues, including what he believed caused the particular wound. (See, e.g., 18RT 3803 [photo of incised and blunt injuries to left hand appeared to be "defensive" wounds], 3811 [lacerations to rectal area consistent with insertion of penis into anus], 3815 [infliction of eight stab wounds to neck was not accidental], 3816 [stab wounds on Terena's flank were "potentially survivable"], 3816-3817 [photos showed lacerations to anal area were inflicted premortum], 3825 & 3837-3838 [handyman tool seized from appellant's bedroom could have been used to inflict the stab wounds], 3826 [contents of stomach appear to be broken up but not digested, indicated Terena could have eaten her last meal not long before her death], 3831 [opinion after looking at the autopsy photographs Terena appeared to be lactating when she was murdered].) Dr. Rogers did not rely on Dr. Herrmann's ultimate conclusions during his testimony.

Where Dr. Rogers could not offer his own expert opinion regarding some of the prosecutor's questions, he said so. (See 18RT 3809-3810 [would not opine on how Terena came to have the blunt force injuries on her right hand], 3810-3811 & 3836 [could only opine bruise on Terena's right buttock was blunt-force trauma, although he testified the bruise was consistent with being a "hickey"],[47] 3812 [could not opine on the degree of pain Terena suffered when sodomized], 3817-3818 [could not express an opinion on what caused fecal matter to be around Terena's anus, although the extraction of a penis from the anus was "a possibility"].)

Dr. Rogers opined the severe incised wound to neck would cause death within 3-5 minutes. (18RT 3818; see 18RT 3814.) In response to the prosecutor's question: "[W]hat was the cause of death of Terena

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[47] During cross-examination, Dr. Rogers explained that in talking to Dr. Herrmann, Herrmann told him a forensic dentist opined the bruise was not a bite. (18RT 3833.)

Fermenick?" Dr. Rogers answered: "Incised wound to the neck." (18RT 3827.)

The prosecutor then inquired:

> Doctor, were various swabs taken of body cavities of Mrs. Fermenick -- anything at this point in time?
>
> A. Yes.
>
> MR. ANDERSON: I'd like to have marked as People's [No. 12] . . . . It appears to be a coroner's envelope – [¶] . . . [¶] And these are containing rectum swabs.

(18RT 3818-3819.) The court marked the vial inside, containing rectal swabs, as People's Exhibit No. 12A. (18RT 3819.) The prosecutor also had marked for the identification, Exhibit No. 13, another coroner's evidence envelope, and Exhibit No. 13A, the two vials contained in the latter evidence envelope, which were marked respectively as swabs taken from Terena's vagina and vulva. (18RT 3819-3820.)

The prosecutor asked Dr. Rogers:

> . . . I'm going to show you what has been marked previously as People's Number 12 and it's contents 12A and ask if you recognize that particular evidence envelope?
>
> A. Yes, I do. [¶] . . . [¶] It's an evidence envelope in use at the coroner's office of Alameda County. It also has a coroner's case number on it, 9600217, that corresponds to the autopsy protocol from which I've been testifying.
>
> Q. Doctor, can you take a look at the contents of People's Number 12 please?
>
> [¶] . . . [¶] A. It's a plastic test tube. It contains some applicator sticks like Q-tips, only longer.
>
> Q. Do those appear to be the applicator tips that Dr. Herrmann used to insert in the rectum of the decedent to obtain some samples?
>
> A. Yes.

Q. How is that done, Doctor?

A. The applicator sticks are inserted into the rectum. Obviously in the process of doing this, the cheeks of the buttocks are spread apart usually by one's hand. [¶] And when the anus is opened, the applicator sticks have been inserted up and into the rectum. They're pulled out, and then they are eventually put into these test tubes.

Q. And then when they're put into the test tubes, where do they go from there?

A. They go into the evidence envelope that is in front of me.

Q. Okay. And do you have any evidence that Dr. Herrmann did that procedure and did anything with respect to that envelope once it was done?

A. It would be my opinion that Dr. Herrmann did put these test tubes into this envelope, and he then would have sealed it and also signed it, and I do see his signature on the front of the envelope.

Q. Is there some kind of a tape or sealing material contained on that envelope which bears Dr. Herrmann's initials?

A. Yes.

Q. And when the item that is retained by him after, you know, inserted in whatever cavity it's done in and put in the little vial and put in that evidence envelope and sealed, does anybody else have access to that?

A. The evidence envelope . . . is turned over to other personnel in the coroner's office, and it's going to go someplace from there . . . . [¶] . . . [¶] [i]n a sealed condition . . . .

(18RT 3821-3824.)

The prosecutor and Dr. Rogers went through the same exchange in regard to Exhibits 13 and 13A. (18RT 3822-3823.) In regard to the vulva swabs, Dr. Rogers explained that since this was not an orifice, "the application sticks are applied to this area of the body . . . ." (18RT 3823.)

Dr. Rogers opined Dr. Herrmann "eventually put them into an evidence envelope, sealed the envelope, and also signed it." (18RT 3823.) Once that is done, that envelope was also turned over to other coroner's staff. (18RT 3823.)

Mr. Anderson then asked Dr. Rogers' "opinion, or in the autopsies you've done," if the swabs "ever leave your presence prior to being put in that envelope and sealed up?" (18RT 3823.) Rogers testified it was "our routine" that the swabs would be collected, and that they would stay in the autopsy room, "and then put into the test tubes." (18RT 3823.) The tubed swabs would when go to the coroner's evidence locker. (18RT 3823.) Given the office "routine" and his 20-year experience with Dr. Herrmann, Dr. Rogers believed Dr. Herrmann would have air dried the swabs while in the autopsy room (18RT 3838, 3840), which is "the best way to handle the specimens so that they are preserved" (18RT 3839). Dr. Rogers testified Dr. Herrmann's initials were also on the material sealing the evidence envelope containing the vaginal/vulva vials. (18RT 3821.)

Sergeant Taranto was present at the autopsy. (20RT 4184.) He testified Dr. Herrmann "gather[ed] some things and put them into an evidence locker[.]" (20RT 4180-4841.) Sergeant Taranto specifically testified he was present when Dr. Herrmann collected the rectal, vaginal, and vulvar swabs from Terena. (20RT 4184.) He observed Dr. Herrmann put the various swabs in a container to dry. (20RT 4184.) Sergeant Taranto did not see what Dr. Herrmann did with those containers. (20RT 4184.)

In accord with Criminalist Smith's directive, on January 22, 1996, Sergeant Taranto picked up "some sealed envelopes," i.e., Exhibit Nos. 12 and 13, from a technician at the coroner's office and took those envelopes to Smith. (20RT 4183-4185.)

Prior to summation, the court admitted autopsy photos (see 18RT 3909; 26RT 4854-4855, 4867),[48] and the swabs taken from Terena's rectum, vagina, and vulva (26RT 4868). The court did not admit the autopsy protocol:

> I hate to put the autopsy protocol in. . . . [T]here is a lot of stuff in that autopsy protocol that was not covered, and I haven't the slightest idea what is in there. There may be some inflammatory stuff that was not testified to by [Dr. Rogers]. [¶] And so, out of an abundance of caution, contrary to what the law is – and I know this is discretionary with the Court – because of the possibility of some material in there that the Court is not aware of, since . . . every page wasn't testified to, I'm not going to let it in. [¶] . . . [¶] . . . There's plenty of evidence in this case. The answer will be no.

(26RT 4866-4867.)

During his summation, Mr. Horowitz did not complain of Dr. Rogers' testimony about Dr. Herrmann's autopsy, nor, specifically, did he complain or speculate about the procedures Dr. Herrmann used during the autopsy to collect the samples or the various swabs. In fact, Mr. Horowitz proffered Dr. Herrmann properly collected the swab samples. Mr. Howowitz's challenge to the DNA evidence was based upon the alleged incompetence of, and perhaps deliberate fabrication by, Ms. Smith and Mr. Myers: "The problems in this case for the prosecution start with Sharon Smith. They end with Steve Myers." (27RT 4968.)

Mr. Horowitz argued that a slide made by Dr. Herrmann from a rectal swab did not contain any sperm, while another rectal slide made later by Ms. Smith showed the presence of sperm: "Dr. Herrmann, medical Dr. Herrmann, pathologist, does this all the time, took a swab directly from the vagina of Ms. Fermenick and he put it on a slide, on a little piece of glass.

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[48] Appellant does not specifically contend admission of the autopsy photographs violated his right to confrontation.

And he sealed it in an envelope. And he took a swab and make a rectal slide the same way direct from the rectum right to the slide. [¶] And he sent these to Sharon Smith." (27RT 4968; see 27RT 4960-4961, 4964-4966, 4968, 4997, 5001 ["Dr. Herrmann's slides are direct slides. In other words, he takes the Q-tip and puts it right into . . . the rectum, for example, and then [immediately] rubs it on the slide. [¶] . . . [¶] So what you have from Dr. Herrmann is directly from the person right to the slide"], 5002, 5080, 5117 ["I think it's very, very important to recognize that Dr. Herrmann when he made . . . [the] swab[s] was very, very unassociated with any lab or any prosecution theory of the case. He was just doing what the pathologist does"].)

B. Discussion

Appellant contends that under the compulsion of *Crawford v. Washington* (2004) 541 U.S. 36, 68, and its progeny, e.g., *Davis v. Washington* (2006) 547 U.S. 813, 819-833; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 310-311, and *Bullcoming v. New Mexico* (2011) ___ U.S. ___ [131 S.Ct. 2705, 2710, 2714-2719], and also relying on the dissenting opinion in *Williams v. Illinois* (2012) 567 U.S. ___ [132 S.Ct. 2221], Dr. Rogers' testimony, which used as one basis Dr. Herrmann's autopsy protocol, violated his Sixth Amendment right to confrontation. (AOB 201, 205-207, 211-222.) Therefore, he argues, the judgment must be reversed in its entirety, since the erroneous admission of Dr. Rogers' expert opinion testimony was not "harmless beyond a reasonable doubt . . . ." (AOB 207; see AOB 227-230.) As part of this argument, appellant now complains of Dr. Rogers' testimony about the office "routine" Dr. Herrmann would have followed in collecting the various evidentiary swabs. Appellant now asserts he was impermissibly denied a way to challenge "the critical link" where Dr. Herrmann collected and prepared the various swabs. (AOB 228-230.) Respondent disagrees.

Appellant's opening brief was filed on August 29, 2012. Appellate counsel did not have the benefit of this Court's opinions in the very recent case of *Edwards*, *supra*, 57 Cal.4th 658, and the Court's October 15, 2012, opinion in *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*), and *Dungo's* companion cases of *People v. Lopez* (2012) 55 Cal.4th 569 (*Lopez*) and *People v. Rutterschmidt* (2012) 55 Cal.4th 650 (*Rutterschmidt*). Respondent submits *Edwards* and *Dungo* are dispositive. Appellant's confrontation claim should be rejected.

In *Edwards*, the forensic pathologist who had conducted the victim autopsy and wrote the "signed, but not sworn or certified[]" autopsy protocol, had retired by the time of trial. He had been a named partner in the forensic pathology group contracted by the sheriff to do autopsies. Instead, another named partner of the group testified, after reviewing the protocol, and the photographs, x-rays, and microscopic slides of oral tissues obtained during the autopsy. (*Edwards*, *supra*, 57 Cal.4th at p. 704.) The autopsy protocol was not admitted into evidence. (*Ibid.*)

In *Dungo*, a "forensic pathologist testifying for the prosecution described to the jury objective facts about the condition of the victim's body as recorded in the autopsy report and accompanying photographs. Based upon those facts, the expert gave his independent opinion that the victim died of strangulation. Neither the autopsy report, which was prepared by another pathologist who did not testify, nor the photographs were introduced into evidence." (55 Cal.4th at p. 612.) This case differs from *Dungo* to the extent the trial court admitted the autopsy photographs.

Dr. Rogers reviewed both the autopsy protocol and the autopsy photographs before testifying. Like the pathologist in *Dungo*, Dr. Rogers did not explain whether his opinions were premised solely on the basis of his review of the autopsy protocol. (See *Dungo*, *supra*, 55 Cal.4th at pp. 614-615; see *id.* at p. 619) Also like the testifying pathologist in *Dungo*,

Dr. Rogers did not inform the jury of Dr. Herrmann's opinion as to the cause of death, but instead gave his own opinion about how Terena was murdered. (See *id.* at pp. 614-615.)

Since the autopsy protocol was not admitted into evidence—because the trial court believed it may have contained information prejudicial to appellant which was not reflected in Dr. Rogers' testimony—and because Dr. Rogers did not relate Dr. Herrmann's opinions as to insertion of a large object into Terena's rectum and the cause of death, and instead gave his own opinion as to those two factors—there was no denial of the federal right to confrontation. (*Dungo*, *supra,* 55 Cal.4th at pp. 618-619.) Relying on *Dungo*, *Edwards* explains:

> Autopsy statements that simply record anatomical and physiological observations . . . are "less formal" than statements of the autopsy physician's expert forensic conclusion as to the cause of death. [Citation.] Statements in the former category . . . are "comparable to the observations of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment. Such observations are not testimonial in nature. [Citation.]" [Citation.] A majority in *Dungo* further pointed out that the autopsy statements at issue were neither sworn nor certified for accuracy, and for this additional reasons they "lacked the solemnity and formality that characterize statements the high court deems testimonial." [Citation.]
>
> We also found the anatomical observations in the *Dungo* autopsy report to be nontestimonial under the "primary purpose" test. [Citation.] We noted that California statutes require an autopsy in certain types of death, only some of which are related to suspected criminal activity. [Citation.] Regardless of the circumstances, we explained, "the scope of the coroner's statutory duty to investigate is the same" [citation], and the report serves both forensic and nonforensic uses [citation]. Hence, we concluded, "criminal investigation was not the primary purpose for the . . . report's description of [the victim's] body; it was only one of several purposes." [Citation.] We pointed out that the report itself was, in essence, "simply an

> official explanation of an unusual death, and such official records are ordinarily not testimonial. [Citation.]" [Citation.]
>
> Here, as in *Dungo*, [the testifying pathologist] recounted objective medical observations derived from [the performing pathologist's] autopsy report and its accompanying photographs, microscopic slides, and x-rays, and expressed opinions based on those observations.

(57 Cal.4th at pp. 706-707; see *Dungo*, *supra*, 55 Cal.4th at p. 621-626; (Werdegar, J., conc.); see also see *Lopez*, *supra*, 55 Cal.4th at pp. 581-582, 584-585.)

In his concurring opinion in *Dungo*, joined in by the Chief Justice and Justices Baxter and Werdegar, Justice Chin applied both the reasoning used by the lead opinion in *Williams*, *supra*, 567 U.S. ___, 132 S.Ct. 2221, and the rationale used by Justice Thomas in his separate opinion affirming the judgment (the lead opinion was signed by only four justices) to assess whether the protocol was testimonial. Justice Chin concluded that under Justice Thomas's analysis, the protocol prepared by Dr. Herrmann "lacked the necessary formality and solemnity to be testimonial. [Citation.]" (*Dungo*, *supra*, 55 Cal.4th at p. 629.)

Under the reasoning applied by the *Williams* plurality, Justice Chin further concluded the protocol was not testimonial because "'[t]he report was produced before any suspect was identified. The report was sought not only for the purpose of obtaining evidence to be used against [the defendant], who was not even under suspicion at the time, but for the purpose of finding a [murderer who had committed a sexual assault prior to the actual killing] who was on the loose.'" (*Dungo*, *supra*, 55 Cal.4th at p. 629.) Dr. Herrmann conducted Terena's autopsy on the morning after her murder and before appellant was developed as a suspect.

The prosecution did not violate appellant's federal right to confrontation.

C. Any Error was Harmless

Assuming the admission of Dr. Rogers' testimony was a denial of confrontation, the error is measured under the *Chapman* (*Chapman v. California* (1967) 386 U.S. 18, 24) standard, i.e., where the prosecution must "'"prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." [Citation.]'" (*Pearson*, *supra*, 56 Cal.4th at p. 463; see *Rutterschmidt*, *supra*, 55 Cal.4th at p. 661.)

At trial, appellant did not dispute the cause of death, or that a foreign object had been inserted into Terena's rectum. The autopsy photographs were properly admitted since they recorded objective facts and were neither "testimonial," nor prepared for the purpose of appellant's prosecution.

Dr. Rogers testified the applicator tips in Exhibit 12A appeared to be the application tips Dr. Herrmann used to obtain samples from Terena's rectum. (18RT 3820.) Dr. Rogers testified to the procedure routinely used at IFS to obtain rectal samples. (18RT 3821.) Dr. Rogers explained: "It would be my opinion that Dr. Herrmann did put these test tubes into this envelope, and he then would have sealed it and also signed it, and I can see his signature on the front of the envelope." (18RT 3821.) Dr. Rogers explained the vaginal swabs were taken "in the same fashion" as the swabs from the rectum. (18RT 3822.) In regard to the vulvar swabs, Dr. Rogers explained, "the applicator sticks are applied to this area of the body instead of inside the vaginal vault." (18RT 3822.) Dr. Rogers opined Dr. Herrmann "eventually put [the swabs] into an evidence envelope, sealed the envelope, and also signed it." (18RT 3823.)

When Mr. Horowitz asked "if the materials obtained from the swabs were dried before being packaged, Dr. Rogers responded: "I would offer the opinion they were. This is the routine of the coroner's office, and I know Dr. Herrmann too well, having worked with him for 20 years to think that he would not dry them." (18RT 3838.) When Mr. Horowitz asked the

purpose of drying the samples and then refrigerating them, Dr. Rogers testified "we have been told by the forensic laboratories that this is the best way to handle the specimens so that they are preserved . . . [¶] . . . [¶] And they don't decompose." (18RT 3839.)

Regarding appellant's specific DNA complaint that the record was lacking as to a personal explanation of how the various swabs were obtained, and then secured pending transport to Criminalist Smith (see AOB 201, 204, 228-229), we note that had this separate issue been raised in the trial court, the prosecutor could have then possibly conducted further inquiry of Sergeant Taranto regarding what he observed as Dr. Herrmann collected the samples, or brought in coroner's staff who assisted Dr. Herrmann during the autopsy. We submit this subclaim is forfeited. (See *Green*, *supra*, 27 Cal.3d at p. 22, fn. 8.) In fact, as noted, in summation appellant himself relied upon Dr. Rogers' testimony as to what procedures Dr. Herrmann utilized, to support his claim of contamination by either, or both, Ms. Smith and Mr. Myers.

Evidence Code section 1105 provides: "Any otherwise admissible evidence of habit and custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom." Dr. Rogers testimony about the normal "routine" in collecting samples, especially when combined with Dr. Rogers personal knowledge of Dr. Herrmann's professional habits and custom, would have been sufficient to establish what Dr. Herrmann did in collecting and preserving the swabs. Therefore, the swabs would be admissible, even over possible objection, using Dr. Roger's custom and habit testimony and the chain of custody shown by the evidence envelopes. (See *People v. Memro* (1985) 38 Cal.3d 658, 681 & fn. 22, overruled on other grounds in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2; *People v. Wein* (1977) 69 Cal.App.3d 79, 91.)

For the reasons set forth above, respondent submits: (1) the trial court could properly admit the autopsy photographs independent of any alleged confrontation violation; and (2) Dr. Rogers' habit and custom testimony—the nature of which was clearly indicated to the jury—about the procedures used by Dr. Herrmann in securing and preserving the swabs would have allowed admission of the DNA evidence even if appellant had raised a chain-of-custody complaint in the trial court. In addition, the jury heard the testimony and saw the crime scene photographs prepared by the testifying officers and Ms. Nice, and the diagrams prepared by the one of the officers and Ms. Nice.

Even assuming the autopsy photographs and Dr. Rogers' opinions about them, and the DNA evidence are excluded from the evidentiary calculation, given the other, overwhelming evidence of guilt adduced at trial, any error was harmless beyond a reasonable doubt. Given the empty fast food containers and the cup still holding liquid, it was evident Terena had, or was in the final process of, finishing a meal when she got out of the Saturn. Even appellant conceded he was the last one to see Terena alive and therefore he must be the "lead" suspect. Appellant told Sergeant Taranto he used a cutting instrument with a three-inch blade during his work.

The jury was well aware of appellant's evident fascination with anal sex given the admission of the note pad containing graphic materials and letter expressing his interest in anal sex taken from appellant's nightstand dresser, and the other pornographic materials in appellant's bedroom dresser. While appellant was alone in the rectory, two 900 telephone calls—similar to the multiple foreign telephone calls made from appellant's residence in November and December 1995—were made from the rectory telephone.

Paul Miller estimated the original job would have taken between one and one-and-one-half hours. Yet, there was a notation and charge on the work order for cleaning the master bedroom carpets, and according to Detective Miller that would have been a reason why appellant took additional time at the rectory. The master bedroom was uncarpeted.

While the usual practice was to ask permission to use the client's telephone to call the office upon finishing a job, there was no evidence, including appellant's statement to Sergeant Taranto, why appellant did not do that, or why he did not use any one of the myriad of public telephones on the route appellant claimed to have taken to reach the Oakland Jack-in-the-Box. Appellant had not gone directly back to the office where he could have used the bathroom and/or consumed the rest of his lunch.

Appellant told Sergeant Taranto that with Terena's assistance he had completed the necessary information—including recordation of Terena's driver's license number—to be included on the work order, and that he obtained a check from Terena. Appellant told Sergeant Taranto Terena signed the work order, and he recorded Terena's driver's license number at the kitchen sink adjacent to the kitchen door. According to appellant, he left Terena at that location, and exited the kitchen door, leaving that door open at Terena's request. The testimony showed Terena would not have left Regan alone in the Saturn except, possibly, for a very short time. Yet, that "open" kitchen door was locked when Donald arrived – which necessarily would have been locked by Terena despite Regan being in the Saturn, or by the murderer as he left via the kitchen door.

Officers found Terena's wallet, a credit card, and a ball point pen lying on the edge of the master bedroom bed over which Terena had been bent over and been sodomized and her neck cut. Terena's other shoe and a folded copy of the work order were on the floor next to the bed.

Assuming Paul Miller's testimony about the raincoat, and not appellant's statement to Taranto he had worn a company jacket, was more credible, appellant did not have his raincoat when he returned to the office. The next day, neither the Jack-in-the-Box employees nor Detective Miller could confirm appellant's story he had left the rain coat in the rest room.

During appellant's sexual assault examination, conducted within 48 hours of Terena being sodomized and killed, the examining medical personnel observed an abrasion on appellant's penis near the urethra. Prior to being arrested appellant told an officer that he was "feeling the weight of this, all on my shoulders."

In order to accept appellant's claim of lack of other sufficient evidence which would allow the prosecution to prove any error in the admission of Dr. Roger's testimony was harmless beyond a reasonable doubt, the jury would have had to find that Terena paid for and signed off for, the cleaning of a non-existent carpet in the master bedroom. The jury would have also had to believe that upon appellant's departure, Terena remained in the rectory, despite the fact that her infant was in her parked car. The jury would also have to believe that almost immediately upon appellant's departure, an unknown assailant chose to enter the normally unoccupied rectory, by way of the kitchen door. This entry was done despite the fact that Terena was supposedly standing at the kitchen sink with her diver's license, wallet and copy of the work order. Then that unknown assailant would have needed to coax Terena to the bedroom—taking with her the wallet, license and the copy of the work order—where he sodomized her and cut her throat before fleeing the residence.[49] These scenarios are not plausible. Any error was harmless under *Chapman*.

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[49] Alternatively, the jury would have had to conclude that Terena chose to leave her young child in the car while she returned to the bedroom

(continued...)

IV. THE TRIAL COURT PROPERLY CONDUCTED THE INVESTIGATION INTO THE ALLEGED JUROR MISCONDUCT

Appellant asserts the trial court abused its discretion when it "fail[ed] to perform an appropriate inquiry as to [alleged] juror misconduct" related to two poems written by guilt phase Juror No. 1. (AOB 231; see also AOB 244.) He alleges the trial court's "[in]adequate" investigation "violated state law and [his] Fifth, Sixth, Eighth, and Fourteenth Amendment rights as well as his concomitant rights under the state Constitution[.]" (AOB 231.) Now applying Evidence Code section 1150[50] to this record, appellant contends the court improperly asked questions which "invaded the deliberative process." (AOB 244; see, e.g., AOB 248-249.) Given the lack of affirmative questioning into the factual circumstances surrounding the alleged misconduct, and alleging this Court must strike the responses to the trial court's inquiry into the subjective "mental processes" of each juror, appellant argues that redacted record is insufficient to overcome the presumption of prejudice arising from this allegedly-substantial misconduct, and therefore, the judgment must be reversed in its entirety.

(...continued)
with her belongings and the work order for no ascertainable purpose—an equally implausible scenario—at which point the unknown assailant entered the rectory to sodomize and kill her.

[50] Evidence Code section 1150, provides, as relevant:

> **Evidence to test verdict.** [¶] (a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

(AOB 254-255.) Respondent disagrees. The writing and distribution of the poems at issue did not constitute juror misconduct, and even if they did, appellant fails to demonstrate the trial court abused its discretion in conducting this preliminary investigation.

A. Relevant Proceedings

During its preinstruction on January 26, 1999, the court advised the guilt jury:

> You must not converse among yourselves or anyone else on any subject connected with the trial except when all the following conditions exist: [¶] (a), the case has been submitted to you for your decision by the Court following arguments by counsel and jury instructions; [¶] (b), you are discussing the case with fellow jurors; and, [¶] (c), all 12 jurors and no other persons are present in the jury deliberating room.

(18RT 3773; see also 18RT 3733.)

During its charge on the afternoon of February 17, 1999, the court further instructed:

> You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. You must not independently investigate the facts or the law or consider or discuss facts as to which there is no evidence. . . .
>
> You must not discuss this case with any other person except a fellow juror and then only after the case is submitted to you for your decision and only when all 12 jurors are present in the jury room.

(27RT 5183-5184.)

The jury started its deliberations that afternoon. Before the evening recess, the court admonished the jury not to discuss the case with anyone outside of the jury room when the constituted jury was present. (27RT 5206, 5209.) The jury deliberated the following day, Thursday, February 18, Monday, February 22, and the morning of Tuesday, February 23, 1999.

At 2:15 p.m., the jury returned its guilty verdicts and sustained the special circumstance. (4CT 903-906.)

The evidentiary portion of the first penalty phase began on Tuesday, March 2, 1999. (4CT 999-1000; 29RT 5234.) At the beginning of the Wednesday, March 3, morning session, the court advised the parties outside the presence of the jury that the previous night "when the bailiff was tidying up the jury room, he gave me what appears to be two poems written by . . . Juror Number 1 . . . February 1999, sort of a reflection on the soul searching that a juror goes through with respect to *their chores as jurors*." (30RT 5481, italics added; see 4CT 1001.) The court marked the two poems as Court's Exhibit XXVI, and showed them to respective counsel. The prosecutor did "not desire to inquire . . . ." (30RT 5480-5481.)

The court indicated it would discuss the poems after the prosecutor rested his penalty case, but before releasing the jury for lunch: "We are not going to excuse them . . . until [defense counsel] decide if you want me to pursue those poems that apparently one of the jurors wrote." (30RT 5482.) The court continued: "If worse comes to worse, we have to bring every juror down and inquire, we can do that this morning. *But to me [the poems] seem to be fairly neutral.* I don't know when they were written, if they were written before . . . [¶] . . . [¶] or during the guilt phase or after the jury returned the verdict or whatever." (30RT 5482, italics added.)

After the prosecutor had concluded his penalty case, the court placed the contents of the poems on the record, noting the poems, including the "signatures," appeared to have been "produced on a computer." (30RT 5511.) The first note was titled: "**JUROR #1.**"

> What kind of person could do such a crime?
> This is the thought that runs through my mind.
> The brutality and nature of this attack –
> Surely was a vicious act.
> The day seems long focusing on facts;

I start to get pains in my neck and my back.
The details are very long and graphic,
My mind seems like it's weaving in traffic.
Both sides arguing to prove their points;
Listening so hard you feel it in your joints.

The jury enters and leaves in a row,
Emotions and feelings unable to show.
You're instructed not to talk about the case;
You're insides churn; the tension in your face.
For someone to hold all of this in
Really should be considered a sin.
A part of you has to stop living
While on the jury you are sitting.
Some of the evidence I have seen
Are in my thoughts and in my dreams.

No one said it was going to be easy;
Talking about blood and samples of feces.
I can't wait 'til the end of this trial
So I can release my soul of this bile.

[Redacted]
February 1999.

(Ct.'s Exh. No. XXVI; see 30RT 5509-5510.)

The second poem was titled: "**JUROR RESPONSIBILITY.**"

The responsibility of someone's life in your hands –
Only a juror would understand.
Is he guilty? Or is he not?
In your mind this battle's fought.
If there is a reasonable doubt,
"Not guilty" the jury will shout.
If the evidence is so compelling,
"Guilty" is what they'll be yelling.

Justice certainly will prevail
If a guilty man is put in jail.
An innocent man shall be free.

These decisions are up to WE.
WE as a jury need to find

If, or if not, he did the crime.

Clear up any of your confusion
Before you come to your conclusion.
Remember, WE all must agree
Whether or not he's guilty!

[Redacted]
February 1999.

(Ct.'s Exh. No. XXVI; see 30RT 5511.)

Mr. Giller requested the court examine Juror No. 1 individually. (30RT 5511-5512.) He wanted to know "when . . . she wrote this. [¶] . . . [¶] Was it before or after the verdict, has she shown it to any other jurors, did they discuss it, and has she written . . . anything else, and, if so, what and where is it, and has it been shown to other jurors." The court agreed to inquire of Juror No. 1 if the poems were written before or after the guilt verdict, and if Juror No. 1 had shown the poems to any other jurors. Defense counsel also asked the court to inquire if Juror No. 1 had written anything else, "what and where is it, and has it been shown to other jurors." (30RT 5012.)

Defense counsel further asked the court to inquire "whether or not . . . prior to the submission of the case to them or outside the times that they were all assembled together in the jury room, have the jurors been discussing their reaction to the evidence, their feelings about the case in ways that might violate the jurors' obligation not to deliberate except in the presence of all 12 and after the case had been submitted to them." The court responded: "Well, I don't think I can really inquire as to that. I can . . . if the need develops, I can bring each individual juror down – and depending on what this inquir[y] discloses – and ask each one of them if anything they have heard or read or said might affect their ability to be fair

in this case. I don't think I can go into what reasoning or so forth." (30RT 5513.)

Mr. Horowitz replied he was not asking the court to inquire about Juror No. 1's reasoning, but rather he sought to ascertain if "*this has been a hard case for her* and that there may have been talk during breaks or at other times, like that evidence of that picture is really bad and I don't know if I can stomach it or this is really hard for me, things that . . . she might not [have] intellectually . . . understood but which from a technical legal level was a discussion." (30RT 5513, italics added.) The court and Mr. Horowitz further discussed the proposed substance of the court's inquiry:

> MR. HOROWITZ: I'm not saying on purpose. I'm saying that she might – that she would say yes. I'm saying that without her understanding, perhaps, the parameters, her strong emotional reaction may have caused her to do what she considered venting but what we might consider deliberating.
>
> THE COURT: That's really a stretch. [¶] I'm going to deal with it in my own way.
>
> MR. GILLER: And then also whether anything about it – whether she still feels she is a fair and impartial juror.
>
> THE COURT: Oh, sure.

(30RT 5513.)

Juror No. 1 agreed she had written the poems. (30RT 5514.) She initially said she wrote the poems at home and had not shown them to other jurors until after they had rendered their guilty verdicts. (30RT 5514-5515.) However, on further inquiry, Juror No. 1 told the court she "distributed" the poems during guilt deliberations. (30RT 5516.) She explained another juror "typed [the poems] up for me, and she brought them in. She gave them all copies." Juror No. 1 had not written or distributed "anything else." (30RT 5516.) The court asked Juror No. 1:

[A]s far as you're concerned, did anything you wr[o]te here affect your ability to be a fair juror in the guilt phase . . . ?"

JUROR NUMBER ONE: I mean I didn't put anybody – that's why I put it as impersonal. I mean it was my own feelings. I mean, to tell you the truth, it's really heard not to be able to talk about things to anybody, and the way I deal with my kind of feelings is to write things out.

THE COURT: Have you talked to anybody about your feelings in this case?

JUROR NUMBER ONE: No. We are not allowed to.

THE COURT: So you followed the Court's instructions in that regard?

JUROR NUMBER ONE: Correct.

THE COURT: Okay. Fair enough. [¶] Juror Number One, is there anything about what you wrote here that you think might affect your ability to be a fair juror as far as this penalty phase goes?

JUROR NUMBER ONE: No. I don't believe so.

[¶] . . . [¶] THE COURT: Okay. All right. [¶] Mr. Giller, do you have any questions?

MR. GILLER: You said that one of the other jurors typed this up for you?

THE COURT: I'm going to bring all the jurors down. [¶] . . . [¶] First of all, it's my intention now to bring down every juror and ask them whether or not . . . the poetry had affected their verdict as to the guilt phase in any way, shape, or form; and secondly, whether or not if they read this, has it compromised their ability to be a fair juror in the penalty phase.

JUROR NO. ONE: I apologize.

MR. GILLER: That's okay. It's good actually.

THE COURT: Well, it's good. [¶] But, see, we also have to be very careful that you don't influence some of the other jurors.

> JUROR NUMBER ONE: I mean, like to tell you the truth, I wrote the one poem because the one lady was struggling. You know, I meant it wasn't – nobody was pressuring her. I felt for her, to tell the truth.

(30RT 5516-5518.)

> Mr. Horowitz told the court:
>
> We are a little concerned because we think that there may be jury misconduct, number one, to focus attention on what we thought one of the problems might be. *There may be others that we're missing.*
>
> But it seems to us that there might have been one juror either holding out or unsure of a guilty verdict and that this juror and another juror in some context, perhaps out of the presence of the other 12 jurors – which would be a violation – said let's type up this tomorrow and give [] it [to] her or in some way, shape, or form this poem was then given to that juror to help her reach a decision, which in this case was guilty.
>
> So there would have been – actually been a poem written out of the presence of the jury—two people talk at least about it, and then the poem being used in a way to help a juror. [¶] And, sure, it's not a threat, it's not a gun to the head, but it is an out-of-the process application of emotion to get a juror to feel better, i.e., to vote guilt.

(30RT 5519, italics added.)

The court replied: "[D]id you hear the questions I said I intended to ask each juror: Whether or not, if they had read it, it influenced their decision in any way? [¶] And so whoever this juror may have been, the juror has an opportunity to say yes, you know, it was not my intention to do this, but because I read this, then it affected my decision." (30RT 5519-5520.) When defense counsel asked the court to "get the facts more as an investigator so that they don't know[,]" the court responded: "I'm going to bring each juror down and ask them whether or not they read these poems before they arrived at a guilty verdict in this case, number one. [¶] Number two, did these poems in any way affect their decision in arriving at a guilty

verdict. [¶] Number three, assuming the answer is no, then has it compromised your ability to be a fair juror as far as the penalty phase." (30RT 5520.)

Mr. Horowitz objected: The first question was "fine. [¶] But I wish you would follow it up with what are the circumstances and how was it used, in other words, a factual basis . . . ." (30RT 5520-5521.) The court "reject[ed]" such inquiry in the first instance: "So it's on the record, . . . I intend to do it the way I indicated, whether or not it affected their verdict, in any way, shape, or form, and then *if that gives rise to something else, then I'll pursue it.*" (30RT 5521, italics added.) When defense counsel stated Juror No. 1 "used [the poems] to help influence another juror," the court responded: "Maybe. [¶] . . . [¶] . . . Each juror will have an opportunity to tell me whether or not this poetry in any way affected her or his decision in the guilt phase. If they say no, baboom." (30RT 5521.)

Mr. Giller asked the court to further inquire:

> Did it affect in the way they deliberated or their decision? [¶] Because . . . apparently, from what she is saying, is that one of the jurors was having a real struggle. That is why she gave her the poem.
>
> THE COURT: That's right.
>
> MR. GILLER: . . . [T]he poem apparently helped somebody.
>
> THE COURT: . . . I'm going to ask each juror . . . if they read the poem, whether or not it influenced their verdict in any way and see what the answers are.

(30RT 5521-5522.)

Juror No. Two reported the poems were distributed during guilt deliberations. Juror No. Two read the poems, but she stated the poems did not "in any way" affect her guilt phase decision. The poems also had not compromised her ability to be fair during the penalty phase. (30RT 5523.)

Mr. Giller was: "[C]concerned – just listening to her, that was so short and to the point. [¶] However, there are some other questions that we would have with them. . . [¶] . . . [M]y reaction would be let her explain how they came into being during the deliberations. [¶] So got those under what circumstances? [¶] To her, were they given to her for any particular reason that she knows of?" (30RT 5524.) He added, "I would have liked to ask her if she knows if that was given to her to aid her in particular . . . ." The court replied: "How would she know that if it was given to aid her?" Mr. Giller speculated the other jurors might have told the "struggling" juror: "Maybe this will help you. Read this. Were all are all on your side. We are not fighting you and trying to badger you. Look, we care about you. Come on into the fold." The court stated it "was giving the jurors an opportunity to tell me whether or not these poems have influenced their decision in any way. [¶] . . . [¶] That's all I'm interested in. [¶] . . . [¶] . . . If they say yes, it has, then I'll pursue it." (30RT 5524-5525.)

Juror No. 3 said he received a copy of the poems during the guilt phase deliberations. (30RT 5525-5526.) He did not read the poems until after the jury reached a guilt verdict; therefore, they did not affect his guilt phase determination. He added: "I think it was just one person's way of expressing the whole feeling of the whole trial." Juror No. 3 did not believe the poems would affect his ability to be fair in the penalty phase: "That's just one person's opinion." (30RT 5526.)

Juror No. 4 received copies of the poems, but she had not yet read them: "I folded mine up and put it in my backpack first thing because I didn't want to read it -- [¶] . . . [¶] at this point." Therefore, the poems had not affected her guilt phase deliberations, nor had they tainted her ability to be a fair juror during the penalty phase. (30RT 5528.)

Juror No. 5 said copies of the poems had been made "subsequent to the deliberations and I took them home." (30RT 5529.) He did not read

the poems prior to the guilty verdicts, but had since read them. Therefore, the poems had not affected Juror No. 5's guilt phase deliberations, and, after reading the poems, he believed he could be a "fair juror" regarding the penalty phase. (30RT 5529-5530.)

Juror No. 6 read the poems prior to the jury's guilt verdicts. The poems did not affect Juror No. 6's guilt verdict, and he believed he could be a fair juror during the penalty phase. (30RT 5530.)

Juror No. 7 could not remember if she read the poems before the jury found appellant guilty. She did not "believe it affected what we did. It simply is the expression of a juror of what she was feeling. [¶] . . . [¶] . . . And I think it expressed pretty much the responsibility we felt." (30RT 5531-5532.) When the court asked if "the poetry in any way, shape, or form affected [her] verdict . . . ?" she responded, "Absolutely not." Juror No. 7 did not believe the poems would impair her duties during the penalty phase. (30RT 5532.)

Juror No. 8 also could not remember if she had read the poems before or after the jury had reached guilt verdicts. When the court asked if the poems "had in any way affect[ed] your verdict," she responded, "No, sir, it did not." Juror No. 8 did not believe the poems would affect her ability to be a fair juror during the penalty phase. (30RT 5533.)

Juror No. 9 did not read the poems prior to the jury rendering its guilty verdicts, and therefore, the poems had not affected her guilty votes. While Juror No. 9 had since read the poems, she did not believe they would impact on her ability to be fair during the penalty phase. (30RT 5534.)

When Juror No. 10 was asked if he had read the poems, he responded: "Not too much, no." The poems did not affect Juror No. 10's guilty votes, and he believed they would not affect his ability to be a fair juror during the penalty phase. (30RT 5535.)

Juror No. 11 had not read the poems. Asking if he would elaborate, he explained Juror No. 1: "[W]rote the poetry, I believe had that . . . in her three ring. [¶] . . . [¶] And that was during the deliberative process, that she likes to write poetry. [¶] . . . [¶] One of the other jurors took that and put it on the computer. So my guess estimate is probably not all of the jurors even heard or had access to that until it was over because . . . the lady that wrote it didn't distribute it. Somebody else did it."[51] Juror No. 11 continued, "And my point is that . . . as far as the jury seeing or having that, that wasn't until yesterday. . . . [¶] . . . [¶] . . . It was the day we came back to start this phase."[52] (30RT 5536.) Since he had not read the poems, Juror No. 11 did not believe they would affect his duties as a juror during the penalty phase. (30RT 5537.)

The foreperson, Juror No. 12, could not remember if he had read the poems before the guilty verdict.

> JUROR NUMBER TWELVE: Frankly, I really don't remember. I think it was the very end of the deliberations that that thing came out.
>
> THE COURT: Did this poetry affect your deliberations in any way, shape, or form?
>
> JUROR NUMBER TWELVE: Can I add one more thing?
>
> THE COURT: Sure.
>
> JUROR NUMBER TWELVE: You really have 16 very bright people up there, and they are compassionate, and they are

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[51] Juror No. 11 evidently believed the juror distributing the poems was Juror No. 7 (who said she could not remember if she read the poems prior to the guilty verdict). (30RT 5536-5537; see 30RT 5531.) Appellant makes the same supposition on appeal. (AOB 251; but see 30RT 5537 [Mr. Giller].)

[52] The bailiff did not find the poems until after the first day of evidentiary portion of the penalty phase.

extremely bright. Something like this – [¶] . . . [¶] . . . It's not going to affect them.

THE COURT: But, I have to pursue it.

JUROR NUMBER TWELVE: Sure. Absolutely.

THE COURT: One other thing, Mr. Foreperson. [¶] Has this poetry in any way affected your ability to be a fair juror as far as the penalty phase?

JUROR NUMBER TWELVE: No. No.

THE COURT: Now did this poetry come up at any time during the deliberations? Did anybody make reference to this or at all?

JUROR NUMBER TWELVE: None.

THE COURT: None at all?

JUROR NUMBER TWELVE: No. As a matter of fact, I think if you poll most of the people, probably half of them don't even remember what was in there.

THE COURT: Yeah. That's pretty much the case. Okay. All right, So as far as you as the foreperson, it's your opinion that this poetry in no way affect any of the deliberations upstairs?

JUROR NUMBER TWELVE: None.

(30RT 5538-5539.)

Given the foreperson's reference to "16 very bright people," Mr. Giller wondered "if the alternates got it." (30RT 5339.) Upon the court's individual inquiry, Alternate No. 1 said she had received a copy of the poetry, but she did not believe it would affect her ability to serve as penalty phase juror. (30RT 5540.) Alternate No. 2 said he had received a copy of the poetry, but had not read it until "yesterday briefly[.]" When the court asked if the poetry "has affected your ability to be a fair juror at all?" he responded: "No, not at all." (30RT 5541.) Alternate No. 3 received and read a copy of the poetry, but she did not "feel that this ha[d] affected or

compromised [her] ability to be a fair juror[.]" (30RT 5541.) Alternate No. 4 said, "I saw them, and I asked what they were because I thought they were from the Court, and they said it was a poem. And so, honestly I didn't even read it." (30RT 5542.)

Mr. Horowitz asked:

> [T]he Court [to] make further factual inquiry, and at the same time I make a motion for a mistrial.
>
> THE COURT: . . . What further inquiry?
>
> MR. HOROWITZ: I think we should talk to the person who typed it and –
>
> THE COURT: And what would that person tell us?
>
> MR. HOROWITZ: . . . I would like to know under what circumstances there were people talking about this poem. It looks like the jury pads were used to write this poem and that the pads or pages were used to write this poem and that the pads or pages from it were taken out of the court room, which is improper. . . .
>
> THE COURT: That's all speculation . . . .
>
> MR. HOROWITZ: . . . [T]hat's why we would like you to make a better inquiry.
>
> THE COURT: No.
>
> MR. HOROWITZ: But what I'm understanding is from – Juror No. 10 [*sic*], the gentleman who expanded a little bit, he said Number 7 somehow was looking at the binder and then took the notes out of court and typed them. So this looks to me like this juror is talking out of the presence of other jurors – let's type this up, let's give them to the other jurors, let's give them to this woman who was having problems. [¶] And, bottom line, what you've got jurors—I'm using loaded words—jurors conspiring to help, which means manipulate, another juror to go their way.
>
> And you can do things with sugar or you can do them with a bat, but what's illegal is illegal, and what's wrong is wrong. And it is wrong out of the presence of every other jury member to

> manipulate or handle a juror. [¶] And that's what happened here, so I would ask the Court to find out who typed it, what the conversations were, what was taking place in the jury room, what was taking place out of the jury room, because I think what we have here is a hold-out juror who was coerced, maybe with a velvet glove in an iron fist, but you know, a velvet glove is still peer pressure, and that is an issue here. And one juror was targeted with a poem, and then shortly thereafter, according to our foreperson, a verdict came down. . . .

(30RT 5542-5544.)

The court summarized its understanding of the jurors' statements regarding when they received copies of the poems, and if, and when, they read them. "Some said yesterday. Some said they got it during deliberations. Some said they got it after the deliberations. Some said they read it. Some said they didn't read it." (30RT 5544.) The court denied appellant's request for further inquiry of specific jurors and denied his mistrial motion. (30RT 5544-5545.)

Summarizing the above inquiries: (1) Juror No. 1 wrote the poems; (2) Jurors No. 2 and 6 read the poems prior to the guilt verdicts; (3) Jurors No. 3, 5 and 9 did not read the poems prior to the guilty verdict; (4) Jurors No. 7, 8 and 12 could not remember if read the poems before or after the guilt verdicts; (5) Juror No. 10 had not read "much" of the poems; and (6) Jurors No. 4 and 11 had not yet read them at the time of the inquiry. (Cf. AOB 251 ["a number of jurors read the poems prior to the guilt phase verdict"].)

B. General Applicable Law

"An accused has a constitutional right to a trial by an impartial jury. [Citations.] An impartial jury is one in which no member has been improperly influenced [citations] and every member is '"capable and willing to decide the case solely on the evidence before it."' [Citations.]" (*In re Hamilton* (1999) 20 Cal.4th 273, 293-294 (*Hamilton*).) "'[W]hen the

alleged misconduct involves an unauthorized communication with or by a juror, [the] presumption [of prejudice] does not arise unless there is a showing that the content of the communication was about the matter pending before the jury, i.e., the guilt or innocence of the defendant. [Citations.]" (*Id.* at pp. 305-306.) "Not all comments by all jurors at all times will be logical, or even rational, or strictly speaking, correct. But such comments cannot impeach a unanimous verdict; a jury verdict is not so fragile." (*People v. Riel* (2000) 22 Cal.4th 1153, 1219 [no error where jurors briefly discussed possibility of commutation of death sentence].)

"'When a trial court is aware of possible misconduct, the court "must 'make whatever inquiry is reasonably necessary'" to resolve the matter.' [Citation.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 274 (*Prieto*).)

> The trial judge is afforded broad discretion in deciding whether and how to conduct an inquiry to determine whether a juror should be discharged. [Citations.] Our assessment of the adequacy of a court's inquiry into juror misconduct is deferential: We have long recognized that, except where the bias is apparent from the record, the trial judge is in the best position to assess the juror's state of mind during questioning.

(*Clark*, *supra*, 52 Cal.4th at p. 971; see *Maciel*, *supra*, 57 Cal.4th at p. 543); *Bennett*, *supra*, 45 Cal.4th at p. 624 [""""The decision whether to investigate the possibility of juror bias, incompetence or misconduct . . . rests within the sound discretion of the trial court""""]; *People v. Ramirez* (2006) 39 Cal.4th 398, 416 (*Ramirez*); *Prieto*, *supra*, 30 Cal.4th at p. 274.) The court is not, however, required to accede to a request for a jury investigation premised on speculation. (*Clark*, *supra*, 52 Cal.4th at pp. 966-976.) Here, appellant offers only speculation that two or more jurors: (1) "communicated" about the case outside the presence of the other jurors (see AOB 254-255, 258 ["There is no question that the two jurors . . . [met] privately and discuss[ed] the case. . . . [O]bivously, Juror No.1 and Juror No. 7 talked about the poems and the struggling juror"]); or (2) those jurors

either alone or in combination with other jurors sought to coerce a "struggling" juror by giving that juror a copy of the poems (AOB 252-253).[53]

While appellant contends the court's failure to conduct further investigation violated various of his rights under the state and federal Constitutions, "failure to conduct a sufficient inquiry is ordinarily viewed as an abuse of discretion, rather than as constitutional error. [Citation.]" (*People v. Pinholster* (1992) 1 Cal.4th 865, 927-928 (*Pinholster*), disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.) Here, although the guilt phase verdict had been entered, the jury was still receiving penalty phase evidence and had yet to deliberate as to penalty. A trial court's inquiry into possible misconduct by a seated juror should be as limited in scope as possible. (*Maciel*, *supra*, 57 Cal.4th at p. 547; *People v. Allen* (2011) 53 Cal.4th 60, 73 (*Allen*); *People v. Thompson* (2010) 49 Cal.4th 79, 137 (*Thompson*); *People v. Wilson* (2008) 44 Cal.4th 758, 829 (*Wilson*).) Even where a trial court conducts a post verdict investigation, it "should use caution when making inquiries because of the need to protect the sanctity and secrecy of juror deliberations." (*Bennett*, *supra*, 45 Cal.4th at p. 624.)

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[53] Appellant now relies on Juror No. 1's initial response to the court that she wrote the poems "'at home.'" (AOB 249-250.) As noted, while Juror No. 1 made that statement in conjunction with her initial statement she had not distributed the poems until after the guilt determination, she had later corrected herself to state the poems were distributed prior to the guilt determination. Juror No. 11 affirmatively stated Juror No. 1 wrote the poems in a three-ring binder during deliberations. (30RT 5536.)

C. Discussion

1. Given the nature of the alleged misconduct, the trial court's inquiry was proper and its conclusion that further investigation was unnecessary was a proper exercise of discretion

As previously noted, a trial court's inquiry into possible misconduct by a seated juror should be as limited in scope as possible. (*Maciel*, *supra*, 57 Cal.4th at p. 547; *Allen*, *supra*, 53 Cal.4th at p. 73.) "In deciding whether to discharge a juror for misconduct, a court should focus on its own consideration of a juror's conduct." (*Allen*, *supra*, 53 Cal.4th at p. 75.)

While the receiving or proffering of *extraneous* information not received in evidence is misconduct, the sharing of Juror No. 1's poems was not. As the trial court pointed out, the poems were "fairly neutral." (See *Pinholster*, *supra*, 1 Cal.4th at p. 926.) The poems did not in any way express an opinion as to appellant's guilt or innocence, much less proffer information not received during trial. As the court summarized, the poems were "sort of a reflection on the soul searching that a juror goes through with respect to their chores as jurors." (30RT 5480.) There was no introduction of "new facts" or outside information in the poems. (See *Allen*, *supra*, 53 Cal.4th at pp. 76-78; *In re Boyette* (2013) 56 Cal.4th 866, 897 ["the record shows the [prison] movie did not introduce any new facts or ideas into the court room"]); *People v. Majors* (1998) 18 Cal.4th 385, 425 [""in order to predicate misconduct it must be made to appear that the [communications] had improper reference to the evidence, or the merits of the case""].)

Likewise, the poems did not in any way infer that appellant was guilty. In fact the second poem specifically contemplated a not guilty verdict if the case was not proven: "Is he guilty Or is he not? In your mind this battle's fought. If there is a reasonable doubt, 'not guilty' the

jury will shout." (Court's Exh. No. XXVI; 30RT 5511.) All the poems did was summarize in part, what the court would instruct regarding the jurors' duties and responsibilities and the jurors' permissible actions in light of those instructions, and express the common sense and logical belief that the determination as to whether appellant was guilty or innocent of the murder was a very stressful responsibility.

"Jurors are allowed to reflect about the case during the trial and at home. [Citation.] In fact, it is unrealistic to expect them not to do so. [Citation.]" (*People v. Linton* (2013) 56 Cal.4th 1146, 1195 (*Linton*).) Contrary to appellant's claim, these poems did not constitute premature deliberation outside the group as a whole. As this Court noted in *People v. Collins* (2011) 49 Cal.4th 175, "'[a]lthough the deliberation process of course includes thinking, defendant has failed to cite any authority suggesting that jurors must be directed not to think about the case except during deliberations. . . . Indeed, it would be entirely unrealistic to expect jurors not to think about the case during the trial and when at home.' [Citation.]" (49 Cal.4th at p. 253, quoting *Ledesma, supra,* 39 Cal.4th at p. 729.)

In *Collins*, this Court also cited favorably the holding in *Bormann v. Chevron USA, Inc.* (1997) 56 Cal.App.4th 260, where that court found that a juror's outside preparation of a summary version of the evidence based upon her own musings, and the use of that summary during deliberations did not constitute misconduct. "'[A]s long as such notations are the product of the juror's own thought processes and the evidence, rather than extraneous influences,'" nothing improper occurred. (49 Cal.4th at 254, quoting *Bormann*, 56 Cal.App.4th at 265.)

Certainly, there would have been absolutely no question of misconduct had Juror No. 1 orally expressed the thoughts she put into poetic form during deliberations. Given the court's inquiry, there was

absolute no evidence that the poems coerced or otherwise impacted on a particular juror's deliberative process. (See *Thompson*, *supra*, 49 Cal.4th at p. 137 [court's inquiry of allegedly-pressured juror indicated no coercion and a claim of coercion was therefore speculative].) As noted, if any juror had suggested such an impact, the court would have conducted further investigation.

The poems do not reflect "actual bias" by either Juror No. 1 or the distributing juror. "'It is not required . . . that the jurors be totally ignorant of the facts and issues involved. . . . It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' [Citation.]" (*People v. Nestor* (1997) 16 Cal.4th 561, 580-581 (lead opn. by George, C.J.) (*Nestor*).) There is absolutely no indication Juror No. 1 went outside the evidence presented at trial in writing the poems.

The record similarly fails to support appellant's speculation that the poems were somehow used to coerce a reluctant juror into voting for guilt. While appellant claims that the trial court's inquiry was inadequate to address this possibility, in fact the record shows that the reading of the poems was not a significant, if any, part of the deliberations. As noted above, two of the seated jurors (Nos. 4 and 11) and one of the alternates (No. 4) had not read the poems even at the time of the inquiry. One juror (No. 10) had not read much. Three seated jurors (Nos. 3, 5 and 11) and an alternate (No. 2) did not read them until after deliberations, and three jurors (Nos.7, 8 and 12) could not recall when they read them.

Moreover, the few jurors who bothered to comment upon the poems concurred with the court's interpretation that they were simply an expression of the juror's feelings regarding the responsibilities in the trial. (See, e.g. 30RT 5526 ["I think it was just one person's way of expressing the whole feeling of the whole trial. . . . That's just one person's opinion"];

30RT 5531-5532 ["It simply is the expression of a juror of what she was feeling. [¶] . . . [¶] . . . And I think it expressed pretty much the responsibility we felt"].) Juror No. 12 specifically stated that the poems were not referenced during deliberations, adding, "I think if you poll most of the people, probably half of them don't even remember wheat was in there." (30RT 5539). The record thus fails to support any inference that the poems were intended to, or did, coerce a juror into voting a certain way and no further inquiry was warranted. (See *People v. Danks* (2004) 32 Cal.4th 269, 308, fn. 12 (*Danks*).) "Mere speculation" does not require further investigation. (*Clark*, *supra*, 52 Cal.4th at p. 966.)

Even assuming Juror No. 1 and/or the distributing juror committed misconduct, such misconduct:

> [G]enerally raises a rebuttable presumption of prejudice, but "[a]ny presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant." [Citation.]
>
> " . . . [W]hen misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears to be a substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [Citations.] Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant. [Citation.] The judgment must be set aside if the court finds prejudice under either test." [Citation.]

(*In re Lucas* (2004) 33 Cal.4th at 682, 697.)

The poems, when viewed objectively, were not inherently and substantially likely to influence any of the jurors. Nor, do the poems show a "substantial likelihood" either Juror No. 1 or the distributing juror were "actually biased" against appellant. Even if misconduct, "there is no substantial likelihood that [Juror No. 1] or any other juror was biased. [Juror No. 1's] comments were not inherently and substantially likely to exercise an improper influence on the jury, nor were they indicative of actual bias on h[er] part." (*In re Lucas*, *supra*, 33 Cal.4th at p. 697.)

2. Appellant's Evidence Code section 1150 claim is forfeited, and in any event, any error under Evidence Code section 1150 was harmless

For the first time on appeal, appellant argues the court's questions improperly invaded the mental processes of the individual jurors in violation of Evidence Code section 1150. This argument is based upon the second and third questions asked by the court: whether the poems in any way affected the jurors' decision in arriving at a guilty verdict, and whether reading the poems compromised their ability to be fair jurors in the penalty phase. He further argues that, pursuant to his request, the trial court should have conducted an inquiry only into the factual circumstances surrounding the alleged misconduct. (AOB 248-249, 254-257.) Appellant asserts prejudice must be presumed in light of the "misconduct," and that, in striking the various responses dealing with the jurors' thought processes, the evidentiary record is insufficient to rebut that presumption. (AOB 254-255, 259.) Respondent disagrees.

Appellant's Evidence Code section 1150 argument is forfeited. Appellant asserted an objection when the court identified the questions it intended to ask of the jurors, counsel said, "Your first question is fine. But I wish you would follow it up with what are the circumstances and how was it used, in other words, a factual basis --" (30RT 5520-5521.) However, at

no time did appellant inform the trial court it should not ask the challenged question because it was prohibited under Evidence Code section 1150. "It is essential that if a party deems prejudicial an act or statement of the presiding judge that he call the matter to the attention of the judge when the matters occur so that the error may be corrected. [Citation.]" (*People v. Archerd* (1970) 3 Cal.3d 615, 636, see also *Boyette*, *supra*, 29 Cal.4th at p. 424.) Appellant did not do so, and therefore his present reliance on a strict application of Evidence Code section 1150 should be forfeited.

Moreover, appellant's present reliance on Evidence Code section 1150 is misplaced, at least as to question three regarding the potential impact on penalty phase deliberations which had not yet occurred, as Penal Code section 1089 provides for the discharge of a juror if the court finds that he or she is unable to perform his duties. Even assuming Evidence Code section 1150 is applicable to the guilt phase, appellant cannot demonstrate that by asking the third question, he was prejudiced. (See *People v. Loker* (2008) 44 Cal.4th 691, 754 (*Loker*).)

Even under Evidence Code section 1150, a defendant is not: "[E]ntitled to an evidentiary hearing as a matter of right. Such a hearing should be held only when the court concludes an evidentiary hearing is 'necessary to resolve material, disputed issues of fact.' [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 604 (*Avila*).) As defense counsel acknowledged as set forth above, they sought to find other possible instances of misconduct. Any juror misconduct hearing "'should not be used as a "fishing expedition" to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. . . .' [Citation.]" (*Ibid.*; see *People v. Schmeck* (2005) 37 Cal.4th 240, 294 (*Schmeck*), disapproved on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-641.)

Because evidence showing that a juror's internal thought processes reflect bias may not generally be used to support a motion for a new trial or in collateral proceedings to attack a verdict, "where a verdict is attacked for juror taint, the focus is on whether there is any overt event or circumstance . . . which suggests a likelihood that one or more members of the jury were influenced by improper bias." (*Hamilton*, *supra*, 20 Cal.4th at p. 294; see *In re Boyette*, *supra*, 56 Cal.4th at p. 894 ["Evidence of a juror's mental process—how the juror reached a particular verdict, the effect of evidence or argument on the juror's decisionmaking—is inadmissible"]; *Danks*, *supra*, 32 Cal.4th at p. 302 [testimony relating "solely to the mental processes and subjective reasoning of the . . . juror regarding the . . . deliberations . . . cannot be considered"].) Since appellant speculates that "one poem" improperly coerced the "anguishing" juror to vote to convict (see AOB 252-253), he asserts "prejudice should be presumed" (AOB 254). Even under Evidence Code section 1150, the initial burden is on the defendant to prove misconduct. (*In re Carpenter* (1995) 9 Cal.4th 634, 651; *People v. Dykes* (2009) 46 Cal.4th 731, 810 [the Evidence Code section 1150 hearing is to be held where the defendant presents evidence "demonstrating a strong possibility that prejudicial misconduct has occurred"].) Here, as noted above, there is absolutely no indication one of the poems coerced one of the jurors into voting for guilt. Appellant's coercion argument is speculative and should be rejected. (See *People v. Cowan* (2010) 50 Cal.4th 401, 508 (*Cowan*).)

3. Given the nature of the poems, any error was harmless

As noted above, even assuming Juror No. 1 and the distributing juror committed misconduct by writing out and distributing the poems, respectively, the court should find prejudice only if it determines that it is "substantially likely a juror was 'actually biased' against the defendant."

(*In re Boyette*, *supra,* 56 Cal.4th at pp. 890-891.) The "substantial likelihood" test is an objective standard.

> The standard is a pragmatic one, mindful of the "day-to-day realities of the courtroom life" [citation] and of society's strong competing interest in the stability of jury verdicts [citations]. It is "virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." [Citation.] Moreover, the jury is a "fundamentally human" institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and weakness of the institution. [Citation.] "[T]he criminal justice system must not be rendered impotent in the quest of an ever-exclusive perfection. . . . [J]urors are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias." [Citation.]

(*Hamilton*, *supra*, 20 Cal.4th at p. 296.) This Court "independently determine[s] whether there was such a reasonable probability of prejudice. [Citation.]" (*People v. Harris* (2008) 43 Cal.4th 1269, 1304; see *Danks*, *supra*, 32 Cal.4th at p. 303 ["'Whether prejudice arose from juror misconduct . . . is a mixed question of law and fact subject to an appellate court's independent determination'"].)

Certainly, the poems were not premised on an event which occurred outside the trial evidence, nor did they explicitly or implicitly address this particular defendant's guilt or innocence. (See *Nestor*, *supra*, 16 Cal.4th at pp. 578-580.) As noted, the poems did not suggest what verdicts the jury should reach. The first simply pointed out the sordid nature of the facts, regardless of whoever committed the sodomy and murder, and also repeated the jurors' responsibilities. In fact, the first poem reflected: "Both sides arguing to prove their points, listening so hard you feel it in your joints." The second poem was no different; again pointing out the jurors' responsibilities in neutral terms. Besides being neutral, the poems did not address the merits of the case.

Even under an Evidence Code section 1150 analysis, the poems did not constitute "'evidence developed'" outside the courtroom, and reading of the poems by at least Jurors No. 2 and 6 did not in any way negate the existence in this case of a jury who was "'"capable and willing to decide the case solely on the evidence before it . . . ." [Citations.]'" (*In re Boyette*, *supra*, 56 Cal.4th at p. 890.)

Appellant fails to demonstrate that drafting or distributing these poems constituted misconduct. From a review of the entire record, it is clear the poems "were not the sort of evidence falling within the first *Nestor* [*Nestor*, *supra*, 16 Cal.4th at pp. 578-579] category, i.e., evidence that 'judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror.' [Citation.]" (*In re Boyette*, *supra*, 56 Cal.4th at p. 892.) These poems "'merely shared [Juror No. 1's] personal view" of their general responsibility as jurors. It did not in anyway bring outside "information" into the jury room – and there is no evidence either Juror No. 1 or the distributing juror "attempt[ed] to impose [their] views on others." (*Danks*, *supra*, 32 Cal.4th at p. 309.)

Even if the "subjective" mental processes, i.e., whether the poems affected their deliberations, must be removed from the misconduct calculation, there is no evidence to suggest the poems constituted "outside" information, or that the poems improperly coerced the "struggling" juror. Juror No. 1 said she wrote the poems. As noted, while initially Juror No. 1 said she did not show the poems to the other jurors prior to the guilt verdict, she later said that another juror had typed up the questions outside of deliberations and distributed the poems to the other jurors prior to the guilty verdicts. It is clear that Juror No. 1, in accord with what she believed was the court's admonition, did not discuss the poems with any other juror outside jury deliberations. (See also *Wilson*, *supra*, 44 Cal.4th at p. 839

["trivial violations of the [rule not to communicate with nonjurors] doe not require reversal because no prejudice to the defendant resulted"].)

As already noted, appellant's claims are premised on speculation. Appellant relies on the statement by Juror No. 1 that she "wrote the one poem because the one lady was struggling. You know, I meant it wasn't – nobody was pressuring her. I felt for her, to tell the truth" (30RT 5516-5518), to claim improper coercion of the "struggling" juror (AOB 251-253). Even assuming Juror No. 1's above comments did not go to her mental processes, according to appellant, since the court's second question to the jurors about the effect of the poems was improper and therefore should be disregarded, there was insufficient evidence "to address the facts and circumstances surrounding the drafting, distribution, and potential impact of the poems on the guilt phase deliberations." (AOB 249.) However, this record lacks any indication of pressure, or that the "struggling" juror was singled out for pressure to convict.

The jury had been instructed not to discuss the case unless all jurors were present, and, as noted, Juror No. 1 indicated she had taken that admonition to the extreme of not discussing her emotions about the case outside the presence of all of the other jurors. "'[I]n the absence of evidence to the contrary we must presume [the jury] following the court's admonition.' [Citation.] . . . . [W]e will not "presume prejudice" absent a threshold showing . . .'" of misconduct." (*Prieto*, *supra*, 30 Cal.4th at pp. 272-273; see *Ramirez*, *supra*, 39 Cal.4th at p. 460; *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 ["We presume the jurors comprehend and accept the court's directions. [Citation.] We can, of course, do nothing else. The crucial assumption underlying our constitutional system of trial by jury is that jurors generally comprehend and accept the court's directions"].)

This claim should be denied.

V. THE TRIAL COURT PROPERLY DECLINED TO ALLOW DNA "LINGERING DOUBT" EVIDENCE AT THE PENALTY RETRIAL

Appellant asserts the trial court committed reversible error at the penalty retrial when it refused to allow defense DNA lingering or "residual doubt" evidence, which would show the: (1) presence of a "third donor" on the "vulva swabs"; and (2) alleged "contamination" of the various DNA samples. (AOB 260-261.) He claims the trial court's ruling denied him "a fair and reliable penalty determination under the Eighth and Fourteenth Amendments . . . and state law and deprived [him of] due process . . . under both the federal and state Constitutions . . . ." (AOB 260-261, 300-303.) Respondent disagrees. Under state law, the trial court properly exercised its discretion by excluding DNA evidence. This Court has repeatedly held that appellant's constitutional claims lack merit.

A. Facts and Proceedings

Sheriff's Criminalist Smith testified during the guilt phase. (21RT 4264.) Her testimony took the entire trial day of February 2, 1999. (3CT 847-848.) When Ms. Smith looked at a rectal slide made by Dr. Herrmann, she "didn't see a smear on the slide, so I didn't see much microscopic debris in the slide." (21RT 4303; see 21RT 4352 [saw no sperm].) Looking at a slide Smith herself prepared using one of Terena's rectal swabs, she observed spermatozoa. (21RT 4272-4273, 4352.)

In doing an initial chemical test on, and also looking microscopically at, one of Terena's vaginal swabs, Smith was unable to "confirm the presence of semen." (21RT 4274.) When Smith looked at the coroner's vaginal slide, she saw "[t]he indication of" a sperm head on an epithelial cell, an intact sperm and several other sperm heads. (21RT 4302-4306, 4319-4320; see 21RT 4354.) Ms. Smith used two of Terena's four vaginal swabs to make two new vaginal slides; the first had two possible sperm

heads, while she saw skin cells, but no sperm on the second slide. (21RT 4320-4321, 4323-4327, 4355.)

Ms. Smith's initial, chemical test of one of Terena's vulvar swabs was positive for the presence of semen. (21RT 4274.) Using one of Terena's vulva swabs, Smith prepared a slide which showed a few sperm heads. (21RT 4352-4353; see 21RT 4274; 21RT 4306 [coroner had not submitted a vulva slide].) Smith also found semen on two yellow-brown (feces) stain samples taken from the back of Terena's jeans. (21RT 4276.)

Smith repackaged the swabs for return to Sergeant Taranto. Smith described the various procedures she used to prevent contamination of the swabs, jean samples, and the samples obtained from the whole blood draws from Terena, Donald, and appellant. (21RT 4277, 4283-4284.)

During his cross-examination, Mr. Horowitz made repeated attempts to suggest Smith's work had previously been, and still was, deficient, and that she had cross-contaminated various swabs. (See, e.g., 21RT 4299-4300 [on a "early '80's" blood proficiency test Smith had made a clerical error and had "mistyped" a rare blood type], 4308 [told grand jury she could not confirm the presence of semen on the vaginal swabs].) But appellant failed to elicit any affirmative evidence Ms. Smith contaminated any of the evidence from which the DNA testing samples in this case were obtained.

Department of Justice Criminalist Myers' testimony took all of February 8 (his direct examination lasting until early afternoon), all of February 9, and the morning of February 10, 1999. (3CT 855-859.) According to Mr. Myers, while neither Terena or Donald were possible donors, appellant was the probable sperm donor, based on an RFLP DNA analysis of material obtained from one of Terena's rectal swabs and the feces stains on the back of Terena's pants. (23RT 4487-4496, 4501.) The frequency of that occurrence is one in 32 billion Caucasians. (23RT 4482.)

When Myers used PCR DNA testing,[54] "the sperm fractions for [a sample taken from another of [Terena's] rectal swab[s] and the jeans stains were all consistent with being from a single donor and all consistent" with fitting appellant's DNA profile. (23RT 4498-4498.) On one of Terena's vulva swabs Mr. Myers found a "very few sperm and a lot more non-sperm cells." "The sperm fraction [from the vulvar swab] has mostly one predominant type, and there were some results consistent with the non-sperm type." (23RT 4498.) "[B]oth [the sperm and non-sperm] fractions showed an additional donor that was not consistent with any of the people involved. This additional donor was a very minor donor and was only clearly detected at a few loci." (23RT 4498-4499.) Myers did not believe any possible contamination occurred in his lab. (23RT 4501-4502.) Looking at the PCR results for the major donor (appellant), the frequency of these DNA markers would be one in 150,000 Caucasians. (23RT 4506.)

Myers also conducted a STR (short tandem repeat) DNA test, which is a test based on PCR testing. (23RT 4507.) The major sperm factor on Terena's vulvar sample, i.e., appellant's DNA, would be found in one in 1.6 million Caucasians. (23RT 4508.) Myers testified he did not use the other vulvar swabs so as to allow for defense DNA testing. (23RT 4509.) As noted in Argument II, the prosecutor's direct examination revealed the defense had retained DNA expert Blake, and that Dr. Blake had access to all of Mr. Myers' written materials.[55]

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[54] Myers explained in using the PCR process the DNA from the suspected area is "xeroxed" "millions and billions" of times, and those copies are then tested. PCR testing also "work[s] for any degraded DNA." (23RT 4496-4498.)

[55] During his cross-examination of Mr. Myers, Mr. Horowitz stressed Dr. Blake had a doctorate in criminalistics, while Myers was still working on his masters' degree, and his direct supervisor, Gary Sims only had a masters' degree. (23RT 4517-4518.)

Mr. Horowitz began his cross-examination, suggesting the samples Myers received were cross-contaminated (sperm from one sample mixing with sperm from anther sample). (23RT 4512-4513, 4572-4574.) Myers responded that, while cross-contamination "can happen," "if it was a contamination issue, it would have to be a fairly considerable contamination [of "quite a fair number of sperms"], not just tiny bits of sperm that maybe were laying on a piece of paper and then the next sample was laid on it." (23RT 4513.) Mr. Horowitz questioned Myers' professional proficiency, competency and bias (see 23RT 4521-4522, 4565-4566, 4582; 24RT 4614-4615, 4692-4697, 4706, 4708-47096), and repeatedly returned to his theme of contamination (23RT 4557-4558, 4572-4577; 24RT 4686-4698). Mr. Horowitz's questioning continued to stress a theory that the vulvar swab used by Myers, and probably the swab containing her rectal sample, had been contaminated by either DNA "cross-hybridization," or an unknown third person's DNA. (23RT 4558-4565; see 24RT 4612, 4698-4721, 4726, 4731-4735, 4739, 4748.)

Mr. Horowitz also spent a large amount of time questioning the statistics by which probability of meeting the particular DNA profile is determined, and the workings of the DOJ lab computers used in making the DNA analyses. (See, e.g., 24RT 4616-4686.) He stressed that both Mr. Myers and others in the DOJ lab had used manual computer overrides to size the DNA strands in the RFLP testing. (24RT 4660-4673.) He pointed out that there had been non-DNA contamination of reference samples. (24RT 4698-4707.) But, again, Mr. Horowitz was unable to proffer any affirmative evidence of contamination, much less any testimony supporting a reasonable inference of such contamination. Nor, was Mr. Horowitz able to elicit any evidence showing either directly, or by reasonable inference, that anyone but appellant's sperm DNA was on the sampled rectal swab or the jean stains.

Following the guilt determination, the defense filed their proposed penalty phase instructions on February 24, 1999. (4CT 974 et seq.) While acknowledging it was not required, appellant requested a lingering doubt instruction given the defense's "significant emphasis upon the weakness of the prosecution's DNA evidence."[56] (4CT 986.) On March 1, the court declined to include the proposed addition to CALJIC No. 8.85, indicating first, it did not know if the jury found appellant guilty "based on the DNA," and second, the defense could argue the concept of lingering doubt during summation. (28RT 5296.)

During Mr. Giller's March 10, 1999, summation at the first penalty trial, the sum total of his DNA argument, made in the context of his discussion of possible mitigating factors, was: "The unanswered question that was never ferreted out here, was there a third donor. And the authorities had an opportunity to try to determine who that was, but they never did. But there is no evidence that that third donor would have committed this crime, and so I just leave with that thought." (33RT 6005.)

The jury began its deliberations at 10:45 a.m. on March 11, 1999. (4CT 1041; 33RT 6065.) On March 12, at 2:00 p.m., they sent a note informing the court: "We cannot reach a unan[i]mous decision; we have gone over this many times." After "five or six" votes, the division was "7,

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[56] Appellant proposed adding to CALJIC No. 8.85, the following:

> 1. The adjudication of guilt is not infallible and any lingering doubts you entertain as to the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that at some time in the future, facts may come to light which have not yet been discovered. [¶] 2. It may be considered as a factor in mitigation if you have a lingering doubt as to the guilt of the defendant.

(4CT 986.)

4, 1." (4CT 1047, 1107; see 33RT 6085-6086.) The court declared a mistrial. (33RT 6087-6088.)

On April 6, 1999, appellant moved "for a new unitary trial on guilt/innocence and penalty, or, alternatively, for a ruling allowing lingering doubt evidence" at the penalty retrial. Appellant explained he sought that alternative ruling at that early juncture because "the cost of preparing for DNA evidence is extremely high, [so] that either party m[a]y petition for [writ] relief . . . prior to a jury being empaneled and so the costs of preparation will not be wasted if the prosecution should ultimately prevail." (4CT 1115-1116.) There was no indication in the motion of the substance of the evidence appellant sought to present on this issue at the penalty retrial. (4CT 1115-1118.) On April 13, 1999, the prosecutor filed opposition to the new trial motion, and to preclude appellant from presenting "non-mitigating" evidence at the penalty phase. (4CT 1119-1121.)

During the June 2, 1999, hearing on the new trial motion, the prosecutor opposed putting DNA evidence before the penalty retrial jury: "[T]he DNA is part of the guilt issue. [¶] . . . [¶] . . . [T]he things they wish to speak about . . . do[]n't go to anything in the defendant's character, prior record, or the circumstances of the offense. DNA just goes to who did it, so . . . it wouldn't qualify as penalty phase evidence." (34RT 6101-6102.)

The defense responded that part of the circumstances of the crime included what type of sexual conduct was involved and whether appellant acted alone or whether he was an "aider and abettor, whether there's another person involved." (34RT 6102.) The defense also proffered: "There are differences between absolute certainty and reasonable doubt, and this jury has the right to understand whether this is a circumstantial evidence or a direct evidence case or what combination of the two. [¶] So it

goes both to the circumstances of the offense and also to the constitutional rights that we've outlined in our brief." (34RT 9104.)

The court denied the new trial motion, commenting specifically:

> First of all, the defense may not -- the law is that the defense may not introduce evidence not otherwise admissible at the penalty phase for the purpose of creating a doubt as to the defendant's guilt. I think that's what you are talking about. You can introduce evidence of the defendant's character, prior record, and circumstances of the offense, so I think this is beyond the scope of the evidence that will be admissible in the penalty phase.
>
> So the Court's ruling is as follows: [¶] Motion for a new trial on the guilt phase is denied. [¶] And the Court will order there will be no DNA evidence presented by the defense in the penalty phase for the reasons I've already stated.
>
> MR. HOROWITZ: We'd ask the Court then to bar the prosecution or any of their witnesses from mentioning anything about the DNA evidence whatsoever.
>
> THE COURT: He is not presenting any DNA evidence.
>
> MR. ANDERSON: . . . There is going to be no mention of DNA.

(34RT 6103-6104; see 35RT 6108-6109; see also, e.g., 38RT 6525 [as he repeatedly did, during voir dire of a prospective retrial juror, the prosecutor said, in substance: "Now, I told you when you were here the first time that he's been found guilty of certain crimes, so you have to accept that fact. That's an historical event. That is in stone"].)

On January 12, 2000, appellant's new, second counsel, Mr. Selvin, "argue[d] . . . the DNA stuff all over again[[57]]" Initially, the court noted its

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[57] Earlier that day, Mr. Selvin asked the court to consider appellant's petition for writ of mandate as part of the rediscussion of this issue. The court said: "I have that right in front of me." (47RT 8471; see 64CT 18000

(continued...)

belief the defense "want[ed] to introduce the PCR because the PCR is the one that showed the possible third party donor." (47RT 8477-8478.) Mr. Selvin argued, the DNA evidence was:

> [A] circumstance of the crime . . . . [¶] In addition . . . the defense wants to show that there was some contamination in the process that was involved in the testing. . . . [A]pparently there was an argument made, which could be made in this penalty phase, that the preliminary testing which preceded the DNA testing first found no semen in the initial coroner's rectal slide and on retesting of a newly made slide, sperm was found in the rectum.
>
> Okay. There was also in the same lab, the vaginal swab—as opposed to the rectal swab—the first testing from the coroner showed semen, and the retest sample of the vaginal sample showed semen—also showed semen—and on the third test it did not.
>
> So the point we are making is that the DNA, what I've referred to as the DNA type of evidence that we want to introduce, goes to the issue of the circumstances of the crime. It goes to show there might have been another person involved in the crime, goes to show the fact that the crime itself involved, you know, sodomy. It certainly . . . has evidentiary value in terms of residual and lingering doubt.

(47RT 8478-8479.)

The trial court had revised its earlier view of the applicable law, acknowledging: "I'm satisfied that's a rule of law, that the defense has an absolute right to present evidence of lingering doubt at the penalty phase. [¶] . . . [¶] That is not in dispute . . . ." (47RT 8479.) The court pointed out the defense sought to introduce only the PCR DNA evidence, and not the RFLP DNA evidence. (47RT 8481.) The court asked how the defense

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(...continued)
et seq. [Petition for Writ of Mandamus and/or Prohibition in *Nadey v. Superior Court*, A087306 (assigned to Div. 5), and order denying petition].)

sought to introduce this evidence. Mr. Selvin agreed when the court speculated:

> [Y]ou would either do it by calling Mr. Myers or, if the prosecutor called Mr. Myers, you would just bring out the fact that there was this third party donor, I'm going to call it, or second source or whatever way you want to call it in the PCR; and you would not be offering any expert testimony to contradict the findings, but you would only argue to the jury that the fact that there was a second source or a third party donor raises the issue of lingering doubt.

(47RT 8481.) The prosecutor argued the DNA evidence went solely to the issue of identity, including whether appellant sodomized Terena (47RT 8481-8482): "[A]s I told each and every juror on voir dire, identity is a done deal issue. It's not going to be relitigated. (47RT 8482.)

The court denied appellant's request, indicating it was fully aware of the applicable law, as it exercised its discretion under Evidence Code section 352.

> [T]he Court already ruled on this issue once before, and . . . I'm going to start out with this statement. And I'm sure this is the law. The Court's mindful that interfering with the defendant's trial strategy is doubtful, and the Court risks reversible error in excluding useful and probative evidence. . . . The argument is being made that this is the defense trial strategy, and the Court should not interfere with whatever evidence the defendant wishes to offer in the penalty phase, and in particular evidence relating to lingering doubt, because you have a right to present evidence regarding lingering doubt . . . .
>
> [¶] . . . [¶] The first thing we have to determine is this . . . whether or not the semen samples taken relate to the circumstances of the crime or identity. [¶] I think a strong argument can be made that they do, in fact, relate to the circumstances of the offense. This was semen recovered from the rectum of the victim, and there is evidence that she was sodomized, and so the argument can be made that it does go to the circumstances of the offense. . . . [¶] . . . [¶] Anyway, I'm leaning toward the fact that it's a circumstance of the offense.

Two, evidence to be admissible has to be useful and probative in order to submit it to the jury. I'm mindful of the fact that Dr. Ed Blake was the defense expert. No testimony was forthcoming from Dr. Blake at any time during the trial, either in the guilt phase or the first penalty phase, so I have to assume, arguendo, that the results are not subject to dispute, that the conclusions that Mr. Myers came to are, in fact, bona fide conclusions and that there was not going to be any evidence offered to the contrary . . . that there was some sort of shortcoming with respect to the manner in which these tests were conducted. So that is not an issue.

Now, the next question I have to decide is whether or not revisiting the DNA issue could raise the issue of lingering doubt in this case. [¶] . . . [¶] . . . Let's [re]visit the testimony.

In the RFLP method of the DNA testing, the results showed a match with the defendant's blood with a random match of one in 32 billion. One in 32 billion. *No evidence to the contrary as to the veracity and the integrity of the RFLP . . . method* of DNA testing. . . . It is the Court's opinion that one out of 32 billion is not lingering doubt. To the contrary, it's proof beyond a reasonable doubt, so I cannot come to the conclusion that the evidence offered would raise the issue of lingering doubt.

My recollection, that even on the PCR, it was like one in 400[.[58]] [¶] . . . [¶] And also the Court's of the opinion that . . . does not reflect lingering doubt. [¶] So even though an argument can be made that . . . in the PCR[,] even if you ignore the RFLP, you can make the argument in the PCR test that there was this second source, third party donor. It's the Court's opinion that that DNA evidence does not raise the issue of lingering doubt. One in 32 billion, in the Court's opinion, is not lingering doubt.

So the Court's of the opinion under 352 that this evidence . . . will not be admitted because it would tend to confuse the issues. There is no issue as to whether or not the semen was the semen of the defendant. . . . [N]o third party donor was discovered

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[58] Actually, as noted above, Mr. Myers testified the frequency using the PCR method was one in 150,00 Caucasians. (23RT 4506.) Using the sub-PCR STR method of testing, the frequency was one in 1.6 million Caucasians. (23RT 4508.)

> under the RFLP method, nor was there any second source detected in the RFLP method. So that . . . is not lingering doubt as far as the Court's concerned.
>
> And, also, I'm keeping it out under 352, because it would require an undue consumption of time, and the evidence is not useful evidence because it doesn't clear up and it doesn't raise the issue of lingering doubt.
>
> How can you argue to this jury if there's a one chance in 32 billion that the match is a random one, one in 32 billion, that that somehow raises lingering doubt? I don't think that's going to fly. [¶] I'm also mindful of the fact that a lot of people are released from custody on DNA issues and no big issue is made as to its integrity at that time. Everybody accepts it on face value.

(47RT 8483-8486.)

During a January 20, 2000, pre-retrial hearing, the court and counsel discussed possible jury instructions. (50RT 8835.) The court said that while it would "entertain" a lingering doubt instruction," it was "disinclined" to give it "particularly for the reasons I've already stated. One in 30 billion in my mind is not lingering doubt." (50RT 8848.)

The trial court was cognizant of the concept of lingering doubt evidence during the penalty retrial. For example, during the defense cross-examination of Sergeant Taranto, the court overruled a prosecution relevancy objection to questions concerning the police investigation of the crime scene: "[T]his goes to the issue of lingering doubt, so the objection is overruled." (49RT 8685.)

On February 1, 2000, during further pretrial conversations regarding jury instructions, the court denied appellant's request to give a lingering doubt instruction: "I think one in 30 billion is not lingering doubt." (54RT 9480-9481.)

During the penalty retrial, the prosecutor presented the circumstances surrounding the sodomy and murder without the use of the DNA evidence,

relying only on the testimony of the various peace officers and Crime Scene Investigator Nice. He used the testimony of Dr. Herrmann, the performing pathologist, to describe the various wounds, instead of relying on Dr. Rogers' opinions. The prosecutor did not introduce the testimony of: (1) Dispatcher Morrow regarding Regan's condition the night of Terena's murder; (2) Nurse Wilson regarding appellant's unkempt appearance, that his penis appeared "crusty," and that he had an abrasion on his penis near his urethra; (3) Lucky store Manager Valencia; and (4) Officer Rodekohr regarding appellant's prearrest surveillance.

The prosecutor reintroduced appellant's prior convictions. In addition to the aggravating evidence presented at the first penalty phase trial, the prosecutor also introduced the testimony from: (1) Rialto Police Officer Huddleston regarding appellant's January 1990 possession of a billy club; and (2) Deputy Rocha's testimony about appellant's October 1999, mid-proceedings possession of a razor blade. Appellant did not call FBI Special Agent Skeets, who inspected appellant's van after Terena's murder with negative results.

In rebuttal, the prosecutor presented for the first time: (1) testimony from Deputy Borland, and related photographic evidence, regarding the possible effects of an inmate attack using a razor blade; (2) the testimony of Christopher Giles and Costa Mesa Police Officer Carver concerning appellant's exposure of his penis to Giles and his sister on December 26, 1992, and appellant's behavior later that day when he invited Giles into his bedroom and took off his underpants; and (3) Inspector Brosch's testimony about the sexually-oriented telephone calls placed from the Nadey residence in November and December 1995, and his recounting of calling various of those telephone numbers; and (4) the limited introduction of a tape recording of one of Brosch's telephone calls.

During his summation, Mr. Selvin's discussed the circumstances of the murder noting the prosecutor "never introduced . . . evidence to show you essentially who . . . in fact, did the killing." (54RT 9574.) Later, in his discussion of the circumstances of the murder, Mr. Selvin argued this is "a factor that is very important in this case." (54RT 9582.) Mr. Selvin explained: "There is a concept . . . and I'll get to that much later on – the concept of lingering doubt about the crime. . . . That could fit under this particular factor." (54RT 9582-9583.) Near the close of his summation, Mr. Selvin argued:

> Now, I've got to talk about one more thing. This is a delicate matter, and I'll try to frame it as properly as I can. In the ordinary trial involving the death penalty, the jury sits as the fact finder and penalty determiner assuming they found the person guilty of murder with special circumstances. Given the nature of this case -- and the law required it to be that way without going into details why -- you don't hear the first part of the case. You only hear the parts that Mr. Anderson wants to present and that we present regarding why you should impose a particular penalty. Okay. So there's got to be in your mind some question about not only how it happened but who exactly was involved with what happened.
>
> Let me make it . . . absolutely clear: A former jury has convicted Mr. Nadey of murder in the first degree with special circumstance sodomy. They had the same beyond-a-reasonable-doubt standard to deal with as you have been given, and they did find him guilty. And I cannot and am not asking you to decide that he is not guilty. Okay? He is guilty. You have to accept that.
>
> But the thing you don't know -- because you can't, you haven't heard -- is the certainness of this particular verdict and what arises under these particular circumstances. And it's not your fault.
>
> Is there any kind of a lingering or residual doubt that you may have in terms of the certainty of this verdict, the kind that you may want to, you know, give a person the death penalty? [¶] I can't answer it. We are caught in this bind. Mr. Anderson could

> have chosen to present the entire case to you. For whatever reasons -- and I'm not assigning any misconduct here at all, don't get me wrong -- he chose not to, and he has every right not to. Okay?
>
> You will be instructed that neither side is required to call as witnesses all persons who have may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events. Neither side is required to produce all objects or documents mentioned or suggested by the evidence. So he has every right to present the case the way he did and not present what he doesn't want to present. [¶] But the question still remains, the certainty of someone else's verdict -- not the certainty for his guilt, but the certainty to send the man to death, to death, that's what we are talking about.

(54RT 9631-9632.)

Following the death verdict, appellant filed a motion for a new unitary trial. (7RT 1818.) Appellant complained the penalty retrial court committed an error "of constitutional dimension" by refusing "to allow defendant to introduce *forensic* evidence to raise the possibility of lingering doubt as it relates to the circumstances of the crime." (7CT 1828-1829, italics added.) Appellant contended that if the court had allowed the "proffered forensic evidence showing the presence of sperm from a third person," he could have argued: (1) "there was another unknown individual at the crime scene who sodomized" Terena; or (2) Terena "prior to her death had consenting anal intercourse with an unknown third person. . . . The fact that RFLP test may have shown a match is not relevant to the defendant's attempt to introduce forensic evidence of a third party donor and the significance of such evidence upon the circumstances of the offense." (7CT 1829.)

At the April 12, 2000, sentencing, the court denied the new trial motion.

> The Court has read and reviewed the motion for a new trial, both the guilt and penalty phase. And the cases that the defense cites,

> they -- those were thoroughly briefed, thoroughly argued, the Court weighed the pros and cons under 352 and so forth, and the Court made its rulings accordingly. And they're in the record and certainly subject to review. [¶] In any event, I'm not persuaded by the motion, so the motion for a new trial on the guilt and penalty phase is denied.

(7CT 1867; 55RT 9746.)

B. Applicable General Law

> In *Lockett v. Ohio* (1978) 438 U.S. 586, 604[], the United States Supreme Court ruled "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of a capital case, not be precluded from considering, as a mitigating factor, any aspect of . . . the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." [Citation.] In a footnote, the high court added this clarification: "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on . . . the circumstances of his offense." [Citation.]

(*People v. Zapien* (1993) 4 Cal.4th 929, 988-989 (*Zapien*).) "This court has held that at the penalty phase, jurors may consider any lingering doubts concerning the defendant's guilt. [Citation.]" (*Id.*, at p. 989.)

As more fully set forth below, this Court has repeatedly held that the sole legal justification of the admission of lingering doubt evidence in California is section 190.3. Under subdivision (a), the jury shall "consider the circumstances of the crime . . . ." Under subdivision (j), the evidence of a third DNA donor on a vulvar slide could conceivably support an argument—if the jury was to completely ignore the DNA evidence supporting the sodomy count and special circumstance—"[w]hether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor." (§ 190.3, subd. (j), italics added; see AOB 260.) Under subdivision (k), the jury was required to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

Under section 190.3, "residual doubt about the defendant's guilt is something that juries may consider at the penalty phase under California law [albeit, it is not required under the federal Constitution], and a trial court errs if it excludes evidence material to this issue. [Citations.]" (*People v. Hawkins* (1995) 10 Cal.4th 920, 966-967 (*Hawkins*), disapproved on other grounds in *People v. Blakeley* (1995) 23 Cal.4th 82, 89; see, e.g., *People v. Hamilton* (2009) 45 Cal.4th 863, 912.) However, among other things, "'[t]he evidence must not be unreliable [citation], incompetent, irrelevant, [or] lack probative value . . . .'" (*Linton*, *supra*, 56 Cal.4th at p. 1198, quoting *People v. Hamilton*, *supra*, 45 Cal.4th at p. 912; see also *People v. Gay* (2008) 42 Cal.4th 1195, 1219 (*Gay*) [where this Court noted that in the seminal case of *People v. Terry* (1964) 61 Cal.2d 137, 144-145 & fn. 5 [overruled on other grounds in *People v. Laino* (2004) 32 Cal.4th 878, 893], the Court concluded lingering doubt evidence could properly be excluded if it was "'incompetent,'" "'irrelevant,'"[59] or "lack[ed] 'probative value'"[60].)[61]

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[59] "Relevant evidence is defined as 'evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence in the determination of the action.' [Citation.]" (*People v. Mills* (2010) 48 Cal.4th 158, 193.) "[E]vidence leading only to speculative inferences is irrelevant." (*People v. Kraft* (2000) 23 Cal.4th 978, 1035.)

[60] "Probative value" is "the 'tendency [of the evidence] in reason to prove or disprove any deputed fact that is of consequence to the determination of the action.'" (*People v. Hill* (1995) 3 Cal.App.4th 16, 29.)

[61] Appellant places great reliance on *Gay*. In that case, while the penalty retrial court gave a lingering doubt instruction, it erred by: (1) failing to permit *new eyewitness* testimony contradicting the conclusion Gay was the shooter; (2) allowing only one actual eyewitness's testimony tending to show Gay was not the actual shooter; (3) excluding evidence that appellant's *crime partner repeatedly told others he was the sole shooter*; and (4) after defense counsel's opening statement which argued Gay was not the actual shooter, instructing the jury that guilt had been conclusively

(continued...)

As noted above, simply characterizing something as being "lingering doubt" evidence does not give a capital defendant carte blanche to introduce speculative, nonprobative, confusing, and/or unnecessarily-time-consuming testimony. """[A]s '"a general matter, the ordinary rules of rules of evidence do not impermissibly infringe on the [capital] accused's [state or federal constitutional] right to present a defense." [Citation.]' [Citations.]" (*Linton*, *supra*, 56 Cal.4th at p. 1202; see also *Edwards*, *supra*, 57 Cal.4th at p. 728; *Blacksher*, *supra*, 52 Cal.4th at p. 821.) "We have previously determined that due process does not bar the application of Evidence Code section 352 at the penalty phase of capital trials." (*People v. Yeoman* (2003) 31 Cal.4th 93, 141-142 (*Yeoman*).) "'Under Evidence Code section 352, a trial court may exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns about prejudice, confusion, or consumption of time.'"[62] (*Edwards*, *supra*, 57

(...continued)
proven and that they were to ignore the defense argument that Gay was not the actual killer. (*Gay*, *supra*, 42 Cal.4th at pp. 1224-1225.)

This Court has clarified or distinguished *Gay* on several occasions. (See *People v. Streeter* (2012) 54 Cal.4th 205, 266 [explaining the facts in *Gay* in the context of a requested lingering doubt instruction]; *People v. Enraca* (2012) 53 Cal.4th 735, 768 [""We reversed the judgment [in *Gay*] because "[t]he combination of the evidentiary and instructional errors present[ed] an intolerable risk that the jury did not consider all or a substantial part of the penalty phase defense, which was lingering doubt""]; *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 326 (*Gonzales*).)

[62] Appellant agreed with the trial court's characterization that he would seek to show a third donor on the vulvar sample based on the PCR results. The court suggested that could be done if the prosecutor call Mr. Myers and appellant was then able to cross-examine him. Appellant never made clear how he would make the contamination challenge. (See *People v. Brady* (2005) 129 Cal.App.4th 1314, 13332 ["'It is the burden of the proponent of evidence to establish its relevance through an offer of proof or otherwise,' and a specific offer of proof is necessary in order to preserve an (continued...)

Cal.4th at p. 713; see *Clark*, *supra*, 52 Cal.4th at p. 893.) The trial court's broad discretion under Evidence Code 352 applies to lingering doubt evidence. (*People v. Coffman* (2004) 34 Cal.4th 1, 115-116 ["the trial court determines relevancy in the first instance and retains discretion to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the jury or misleading the jury"]; see also *People v. Stitely* (2005) 35 Cal. 514, 550 (*Stitely*); *People v. Fauber* (1992) 2 Cal.4th 792, 856 ["the trial court determines relevancy in the first instance and retains discretion to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury"].) "Speculative inferences are . . . irrelevant." (*Stitely*, *supra*, 35 Cal. at pp. 549-550.)

Here, the court properly exercised its discretion under Evidence Code section 352, finding that the presentation of the requested evidence not only did not constitute lingering doubt, given the one in 32 billion figure associated with appellant's sperm on the rectal and jeans samples, but that

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(...continued)
evidentiary ruling for appeal. . . . '[A]n offer of proof must be specific. It must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued'"]; cf. *Gay*, *supra*, 42 Cal.4th at pp. 1216 [offer of proof as to what each excluded witness would testify].)

Absent other forensic testimony, appellant would necessarily be required to call Ms. Smith and Mr. Myers. If appellant had been allowed to present evidence suggesting either contamination or an additional donor based on the PCR testing, we submit the prosecutor would have been called upon to call Ms. Smith about the procedures she used during her initial evaluation, and Mr. Myers regarding the minor status of the alleged third donor, and about the RFLP and STR testing, and that there was absolutely no evidence suggesting that anyone other than appellant sodomized Terena. As noted, Ms. Smith testified for a day at the guilt trial, and Mr. Myers' testified for two-and-one-half days.

the presentation of such evidence would be unduly time consuming and create a substantial danger of confusing the issues or misleading the jury. The record amply supports this finding.

Unlike the guilt phase jury, the penalty retrial jury was not presented with any DNA evidence, and thus was not exposed to the significant impact of the one in 32 billion figure. As noted, the defense was able to argue the failure to present clear evidence of identification as lingering doubt as a result of this decision. When considering the defense motion, the trial court assumed, and appellant agreed, that any DNA lingering doubt evidence would be presented by Mr. Myers. Some background on DNA would, of necessity have to have been presented to the jury, and any attempt to present the alleged contamination and third-party donor evidence would have allowed the government to present the remaining DNA evidence, a process that involved two witnesses and three-and-one-half days at the guilt phase.

This undue consumption of time is further compounded by the fact that appellant's "aider and abettor" argument lacks any merit since, again, the only evidence before the trial court conclusively established that appellant was the only DNA sperm donor to the rectal and jean samples. There is absolutely no, much less lingering doubt, evidence that someone else sodomized Terena, and then, while she was still bent over, inflicted the fatal stab wound to Terena's neck. Even had appellant been allowed to somehow show the PCR results, there is no indication that the jury would even speculate appellant only abetted the sodomy and murder, and rationally determine that during those crimes his aiding and abetting participation was "relatively minor."

The fact remains that only appellant's semen DNA was found on rectal and jean samples. Any argument, either below, or in this Court, that admission of the unspecified forensic DNA evidence would show: (1)

appellant was only an aider and abettor; (2) someone other than appellant sodomized Terena; and/or (3) the sperm DNA obtained from the rectal and jeans samples resulted from consensual anal sex between Terena and an unknown third party, is speculative at best and contrary to any reasonable interpretation of the evidence.

In regard to the above third possibility, "'[t]he court is not required to admit evidence that merely makes the victim of a crime look bad.' [Citation.]" (*Stitely*, *supra*, 35 Cal.4th at p. 548.) There was no evidence Terena was alone to have sex with anyone other than Donald, except in the time frame that she was away from the rectory with Regan while appellant was cleaning the carpets. Even then, despite the prosecutor's failure to call Ms. Kelly and Mr. Valencia, or otherwise introduce evidence Terena had been at Kelly's shop, and had been at Lucky's, and that the remains from a fast food restaurant had been in the Saturn, Terena's time was mostly accounted for between when Donald returned home and Terena's return to the rectory to pay appellant. The possibility Terena, a religious young lady, married only 18 months, left her five-month old infant alone outside to engage in consensual sex with a third party would not negate the rectal and jean-stained samples showing only appellant's sperm DNA.

Moreover, this speculation of consensual sex would not negate in any way, the evidence that the sodomy (as opposed to any other remotely-possible sexual act) was forcible since: (1) Terena's top clothing was forcible removed in one motion while she was bent over the bed, and that her lower clothing was left dangling so as to allow quick access to her anal area; (2) the rectal premortum lacerations; and (3) the perpetrator inflicted seven non-life-threating stabs wounds to Terena's neck and one possibly-life-threatening wound and one nonthreatening wound to Terena's right flank.

Assuming arguendo the trial court erred in excluding the unspecified defense PCR DNA evidence, the question is whether "there is 'a reasonable possibility [its exclusion] affected the verdict.' [Citations.]" (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 912.) "This standard is essentially the same as the [*Chapman*] harmless beyond a reasonable doubt standard . . . ." (*People v. Lancaster* (2007) 41 Cal.4th 50, 94.)

Assuming the sodomy and murder occurred in concert with a third person, the strength of the finding that the DNA on the rectal and jean samples was appellant's, strongly negates any argument that he was merely an aider and abettor. Likewise, it does nothing to overcome the aggravation implicit in the facts of these crimes, and could, in fact, increase it. First, as the prosecutor would no doubt have pointed out to rebut a speculative inference that appellant acted merely as an aider and abettor, a sexual assault in concert is legally more culpable than mere forcible sodomy. (§ 286, subd. (d); *People v. Adams* (1993) 19 Cal.App.4th 412, 429 [increased punishment for sexual assault committed in concert "'exhibits a legislative recognition that [sexual assault] is even more reprehensible when committed b two or more persons'"].) Moreover, the jury would properly have determined that an in concert anal attack would have been more humiliating to this young pastor's wife than an anal assault committed by only one person. But, most importantly, to argue appellant had acted only as an abettor would necessarily imply appellant preplanned the attack with another (despite the unrebutted evidence that appellant was accompanied by Paul Miller throughout the day until he left for the rectory), and not that appellant simply was opportunistic in sodomizing and murdering Terena.

While appellant recognizes this Court's extensive authority to the contrary (AOB 296), he argues this Court must now "revisit the federal . . . constitutional issues presented based upon the unique facts of this case." (AOB 297; see AOB 260, 282-283, 302-304.).) He premises this

"uniqueness" on the fact that the first jury heard the evidence and argument related to appellant's DNA challenge and hung "7-4-1." (AOB 297; see AOB 298-304.) This Court has consistently held "a capital defendant has no federal constitutional right to have the jury consider lingering doubt at the penalty [retrial] . . . . [Citation.]" (*Hawkins*, *supra*, 10 Cal.4th at p. 967; see, e.g., *Linton*, *supra*, 56 Cal.4th at p. 1198; *People v. Hamilton*, *supra*, 45 Cal.4th at p. 911; *Gay*, *supra*, 42 Cal.4th 1220; *Stitely*, *supra*, 35 Cal.4th at p. 566.)

The fact that the first jury hung as to penalty does not alter that calculation. (See *Hawkins*, *supra*, 10 Cal.4th at p. 966 [first jury hung "eight to four to sentence defendant to death"].) Despite appellant's reliance on the fact the first jury hung, that necessarily assumes that different individuals will be mirror images of the background and experiences of the first jury. Necessarily, a new jury comes with different viewpoints based upon different backgrounds.

Moreover, we disagree with appellant regarding the similarity of the evidence presented at the two trials. As noted above, here the second jury was presented with additional, substantial aggravating evidence. The second jury was aware of the additional "violent" act of possession of the billy club, which occurred in the midst of appellant's criminal history. Regarding the new aggravating evidence regarding appellant's possession of the razor, the retrial jury was also given an explicit recounting of what injuries such a blade can inflict. Also, some of the additional aggravating evidence demonstrated appellant's inappropriate and sexually-related behavior, even aside from his sexual assault on young Sarah.

Moreover, in accord with the above discussion of any harmless error under state law, any possible federal constitutional error in precluding the proffered evidence would have been harmless beyond a reasonable doubt.

VI. APPELLANT'S DEATH SENTENCE FOLLOWING PENALTY RETRIAL DOES NOT CONSTITUTE CRUEL OR UNUSUAL PUNISHMENT UNDER EITHER THE STATE OR FEDERAL CONSTITUTIONS

As noted, the first jury hung as to penalty, and a penalty retrial jury was empaneled without any cruel and/or unusual punishment objection.[63] Acknowledging this Court's opinion in *People v. Taylor* (2010) 48 Cal.4th 574, 633-634 (*Taylor*) to the contrary, appellant asks the Court to reconsider that decision, and hold penalty retrial is barred by the state and federal constitutional bans on cruel and/or unusual punishment. (AOB 305; see *id.* at fn. 21.) Appellant has forfeited his cruel and unusual punishment claim (cf. *Gurule*, *supra*, 28 Cal.4th at p. 646 [forfeiture of double jeopardy claim at penalty retrial]), and, in any event, appellant fails to show why this Court should overrule its precedent.

In part, appellant relies on language from Justice Ginsberg's dissenting opinion in *Jones v. United States* (1999) 527 U.S. 373, 419, to support this challenge. (AOB 305.) However, in the main, like previous attempts to have this Court declare that part of section 190.4, subdivision (b), unconstitutional, he argues that since the federal statute precludes penalty retrial, and that California is one of only five states that "statutorily authorize retrial of a penalty phase following deadlock in the original penalty phase," California is outside the "national consensus [that] has emerged" precluding penalty retrial. (AOB 307-308; see AOB 309-310).

As noted, in *Taylor*, this Court concluded, in accord with its own precedent, that a death verdict after penalty retrial is not cruel and unusual

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[63] Appellant does not complain that the trial court erred by declaring a mistrial after the guilt jury could not reach a penalty verdict.

punishment.[64] (Cf. *People v. Turner* (2004) 34 Cal.4th 406, 422-423; *Gurule*, *supra*, 28 Cal.4th at pp. 645-646; *People v. Davenport* (1995) 11 Cal.4th 1171, 1192.) "[T]hat California is among the 'handful' of states that allows a penalty retrial following jury deadlock on penalty does not, in and of itself, establish a violation of the Eighth Amendment or 'evolving standards of decency that mark the progress of a maturing society.' [Citation.]" (*Taylor*, *supra*, 48 Cal.4th at p. 634; accord, *People v. Gonzales* (2011) 52 Cal.4th 254, 311.)

The United States Supreme Court has upheld the process of penalty retrial against federal double jeopardy, and due process claims. (*Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 106-110, 115-116). Specifically addressing *Sattazahn*, *Taylor* pointed out: "Given that the double jeopardy clause permits retrial following jury deadlock under such circumstances, we fail to see how subjecting defendant to retrial of the penalty phase in this case could offend the constitutional proscription against cruel and unusual punishment." (48 Cal.4th at p. 634.)

Appellant supplies no reasons why circumstances have changed since *Thompson* which would justify overturning *Gonzales* and *Thompson*. Appellant's cruel and/or unusual punishment claim should be rejected.

VII. THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING PENALTY SUMMATION, BUT EVEN ASSUMING JUDICIAL ERROR OR PROSECUTORIAL MISCONDUCT, IT WAS HARMLESS

Appellant contends the prosecutor committed misconduct during summation by referencing two "Nazi" publications not in evidence "to establish . . . appellant[, who had "runes"/"thunderbolts" tattooed on his

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[64] "If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new trial or impose [LWOP]." (§ 190.4, subd. (b).)

right hand[65]] was a member of a Nazi-like gang, the Aryan Brotherhood."[66] (AOB 311.) He further complains the prosecutor "sought to reinforce the purported gang membership by [unobjected-to] disparaging remarks,

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[65] Appellate counsel has declared that Exhibit W to his April 21, 2009, Supplemental Declaration to Support Order of Augmentation "is a true . . . copy of People's Penalty Retrial Exhibit 45, which was referenced by Mr. Anderson in closing argument relative to the runes, lightening bolts and/or thunderbolts on appellant's right hand." (64CT 17962; see 65CT 18581 [Exh. W].)

[66] While, as noted below, appellant objected to Mr. Anderson's display to the jury during summation of the "little book on the Gestapo," he did not ask that book, or the second, now-challenged book, "SS Regalia," be marked for identification or otherwise be made part of the record. (See *People v. Farmer* (1989) 47 Cal.3d 888, 992 & fn. 7, disapproved on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) In his supplemental declaration, appellate counsel avers that as part of record correction, Alameda County Deputy District Attorney Dolge spoke with Mr. Anderson, and that the "SS Regalia" book the prosecutor displayed was titled "SS Regalia," written by Jack Pia, and published in 1974. (64CT 17950, 17957.) Appellate counsel included a copy of that book as Exhibit T in support of the supplemental declaration. (65CT 18262-18344.)

In regard to the first, "little book on the Gestapo," Deputy District Attorney Dolge was unable to specifically identify the title of that book during record correction. Appellate counsel averred: "[B]ased on the description in closing argument . . . the additional information provided by DDA Dolge at the record correction hearing, and placing the book in context by way of publication in relation to the [date of the prosecutor's summation], I have been able to determine that the book . . . is 'The Gestapo and SS Manual,' translated by Carl Hammer, Paladin Press, Bolder, Colorado, published in March of 1996." (64CT 17958.) Appellate counsel attached a copy of that book to the supplemental declaration as Exhibit U. (65CT 18345-18455.) While it was unclear if that or another book was the one "about the Gestapo" (see RT[Apr. 23, 2012] 11 (RCRT)), the record correction court noted: "That's fine. That's the one that will bode as an exhibit. If it's the wrong book, it's not our problem." A deputy county clerk from the appeals division responded: "That's correct. Just as long as everyone here understands that we're including this in the record. This is counsel's representation that he believes this is the book. Our including it in the record does not certify that the clerk is indicated this was done." (RCRT 12.)

referring to appellant['s] *tattoo*, i.e., 'that tattooed hyena' and the 'tattooed barbarian.' (RT 9499-5960.)" (AOB 311, italics added.[67]) Appellant contends the prosecutor's references to the publications and his "disparaging" remarks about appellant's tattoo constituted misconduct under state law, denied him due process since "it infect[ed the] trial with fundamental unfairness," and violated his state and federal constitutional rights to confrontation. (AOB 311-312.) Finally, appellant asserts the alleged misconduct violated his Eighth Amendment right to "a reliable death judgment." (AOB 312.)

Appellant has forfeited the latter, "disparaging remarks" claim since he did not object to any of those remarks in the trial court, much less ask for a curative admonition. In any event, those remarks did not constitute misconduct.

Regarding the former claim regarding display of the books, as the questioning—including the court's inquiry and admonition—pointed out, the prosecutor's use of those books went solely to impeach Mr. Park. It appears from the record the prosecutor displayed the relevant covers and/or pages, and his comments regarding those books were based on common knowledge. Even if it constituted misconduct, it was harmless.

A. Facts and Proceedings

Mr. Park, a retired Department of Corrections (CDC) administrator, testified in mitigation, as an expert in the field of prison classification and

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[67] The photograph of appellant's hands shows appellant also had five tattoos on his left hand. None of the tattoos appear to have been professionally made. (65CT 18581.) Mr. Park testified appellant had "tattoos." (51RT 9124.) The penalty retrial record does not indicate whether or not appellant had other visible tattoos, but at the first trial, Nurse Wilson testified appellant had tattoos on his forearms. (19RT 4051.)

adjustment to prison life.[68] Mr. Park had reviewed the CDC records pertaining to appellant' classification and assignment during his earlier prison term, and appellant's jail records while he was in custody pending trial. (51RT 9105-9106.) According to Mr. Park, appellant "did very well" during his previous prison term. (51RT 9110.) If the jury voted for LWOP, appellant would be held in the most secure prison setting, and Mr. Park opined he "will adjust well, he will be a good prisoner, and that he will – if given the opportunity, he will work, be a good worker. [¶] . . . [A] good prisoner stays out of trouble and he works. And in my opinion . . . [he will] put some of his spare time to self-improvement, whether it[']s religion or schooling or what have you." (51RT 9114-9115.)

Mr. Park based his opinion on factors including appellant's age, since "he's over 26, which is the breaking point for behavior in prisons in general." (51RT 9115.) The second factor, "and this is very important – that his previous incarceration was very good. He did well. He worked well, and I would say that his county jail incarceration is reasonably good . . . ." (51RT 9116.) Appellant was never "a problem" for either CDC or jail staff. Appellant's jail rule violations, i.e., his possession of a razor blade and the "house keeping" violation of being in a prohibited place, did not affect Mr. Park's opinion. (51RT 9116-9118.)

During his cross-examination, Mr. Anderson inquired:

Q. Sir, is there a problem with gangs in the state prison system?

MR. SELVIN: Relevance, Your Honor.

THE COURT: Overruled. . . .

THE WITNESS: Yes, sir.

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[68] As appellant points out, Mr. Park also testified in mitigation at his first penalty trial.

MR. ANDERSON: Q. Explain to the jury the type of gangs that one would find in a California Department of Corrections facility?

A. Well, there are various kinds. The Latino Hispanic inmates form gangs. The Northern California or Southern determines whether they are enemies or not. The African-Americans have some gangs. Some of the Caucasians have gangs. They have Nazi gangs. They have so-called Aryan brothers. There is a whole variety of gangs which don't appear in his record, incidentally.

Q. You've interviewed Mr. Nadey; is that correct?

A. Yes, sir.

Q. Have you seen the tattoos on Mr. Nadey?

A. Yes, sir.

Q. Are you familiar with what something called SS runes are?

A. Not really. I – I've had a great deal of trouble keeping up with the gangs. They ebb and flow, ebb and flow.

Q. Well, are you familiar with the Nazis of World War II? [¶] You said there were Nazi gangs in jail; isn't that right?

A. So-called, yeah.

Q. Well, you remember the SS, that portion of the Nazis that had the little SS and the skull and cross bones?

A. Yes, sir.

Q. And didn't they have runes? That was part of their nomenclature?

A. Runes?

THE COURT: Like thunderbolts?

[¶] . . . [¶] A. Oh, bolts, yes.

Q. Have you seen those before?

A. Yes. In my career, I've seen so many tattoos, I don't pay a lot of attention to them.

MR. ANDERSON: I'd like to have marked as People's [¶] . . . [¶] number 45.

(51RT 9123-9125.)

Mr. Selvin objected: "Once again, Your Honor, I will make an objection on relevance grounds. We have absolutely no evidence in this case involving gangs." (51RT 9125.) The court overruled the objection. (51RT 9125.) Drawing Mr. Park's attention to appellant's right hand, Mr. Anderson asked:

Q. You notice those little SS marks on his hands?

A. Well, it's more like a double lightning bolt, I would say.

Q. Have you ever seen members of the Aryan Brotherhood or white supremacist groups use those markings?

A. Oh, I don't recall. I know they've used the Swastika.

Q. Have you ever seen those runes before?

A. I probably have. I don't have a specific memory of a specific inmate.

Q. Well, are you familiar with the Aryan Brotherhood?

A. Yes, sir.

Q. And what are they?

A. They're . . . a white supremacist group who sometimes identify themselves as Nazis, sometimes not.

Q. And don't they usually identify themselves as being members of that particular prison gang by tattooing their affiliations on various parts of their body?

A. Very often they do, yes, sir. [¶] . . . [¶] Especially when they are young. It depends on how long he's had these.

Q. Sure.

MR. SELVIN: I'm making an objection. There has been no evidence in this case of any gang in Mr. Nadey's involvement. [¶] . . . [¶] This is just an attempt to be prejudicial. That's all it is.

THE COURT: Let me explain the ruling. [¶] First of all, this witness testified in his opinion that he wouldn't be a custodial problem . . . . We're aware of the fact that there are, in fact, prison gangs. If he has these runes tattooed on his fingers, the jury can draw their own inferences whether or not this man would be a gang member with a likelihood of violence. That's for them to decide.

MR. ANDERSON: Q. Mr. Park, when people go to state prison, whatever race they may be, do they generally – [¶] . . . [¶] . . . hook up with members of their own race and join those gangs?

MR. SELVIN: Once again, I will object, Your Honor.

THE COURT: Overruled.

[¶] . . . [¶] THE WITNESS: . . . [T]his is one of your options for self-protection when you go to prison, is to line up with your homies or your gang or your buddies or whatever.

. . . Q. Why would people need self-protection in a secure prison?

A. Because there's a lot of very dangerous prisons and people in a secure prison.

(51RT 9127-9128.)

On redirect examination, Mr. Selvin returned to this issue:

Q. Now, with respect to gangs in prison, if Mr. Nadey were in a gang, would -- in prison or in county jail, wouldn't that come out in the records?

[¶] . . . [¶] THE WITNESS: A. Yes, sir. I would expect it to be in the record.

THE COURT: The point is he gets classified when he goes into the county jail, doesn't he?

THE WITNESS: Yes, sir. Staff are looking for gangs in the county jail.

THE COURT: So they would know about gang memberships?

THE WITNESS: Yes, sir.

MR. SELVIN: Q. In fact, that's one of the big things in prison. They have a whole intelligence unit doing work dealing with gangs and trying to find out who you are, gangs, and so forth; correct?

A. Yes, sir.

Q. And it's an elaborate system; correct?

A. Yes, sir.

Q. Identifying gang members, marking them as gang members, letting everybody know who the gang members are; correct?

A. Well, with an exception. There are highly secret records on some of the gang things because it involves informants and so forth. But it is a major unit, yes, sir.

[¶] . . . [¶] THE COURT: In any records you've examined, has he ever been identified as a gang member?

THE WITNESS: I have never seen any reference to gang membership.

(51RT 9143-9145.)

During Mr. Giller's subsequent examination of Ms. Gregory (who was now living with appellant's mother), he inquired:

Q. And you've talked to him innumerable times on the telephone. Has he ever mentioned anything about ever being in any kind of a gang?

A. No.

Q. Have you ever heard him make any disparaging remarks about any people, any African-Americans, any Jewish people, any Hispanic people?

A. No.

Q. Anything like that?

A. No.

(51RT 9161.)

At the close of evidence, Mr. Selvin objected to the admission of the photograph of appellant's hands: "There is no connection with anything in this particular case. . . . It doesn't connect to anything. He has a tattoo of lightening bolts . . . ." (53RT 9433.) The court admitted the photograph subject to later reconsideration: The photograph "certainly goes to the issue of whether or not he is going to be a law-abiding prisoner if he gets" LWOP. (53RT 9433.)

Prior to the prosecutor's summation, the court reminded the jury "the arguments of the lawyers are not evidence. The only evidence you can rely on in deciding this case is what you heard testified to from the witness stand. The lawyers are permitted to argue to you reasonable inferences and deductions from the evidence." (54RT 9498.) The prosecutor repeated that admonition at the beginning of his argument: "[T]he judge has just told you what the attorneys say to you via closing argument . . . is not evidence. The only evidence that you can consider are the statements you heard from the witness stand as testimony and any tangible items of evidence such as photographs, daggers . . . and other tangible items of evidence that have been produced as various exhibits in this case. [¶] So, once again, what we say is not evidence. We are both advocates for our point of view . . . ." (54RT 9499-9500.)

Mr. Anderson criticized Mr. Park's testimony:

> Next was James Park. Or should I call him the prophet? I'll say yeah. This guy is amazing. He comes in for a hundred bucks an hour and gives us the equivalent of some voodoo prediction and then makes off with some 700 or so dollars of taxpayer's money.

> Let's look more closely at what he testified to. The bottom line, if the defendant got [LWOP], he'll do just fine. He'll do just fine in prison, and this is based upon looking at the defendant's record, so to speak, and my, quote, "31 years experience in the state prison system."
>
> First off, Mr. Park is an avid opponent of the death penalty. Okay. You heard him testify to that. So . . . he's testified 117 times in trials . . . all for the defense, all in penalty phases of criminal trials. That should make your eyebrows kind of arch a bit when you think about his obvious bias.
>
> [¶] . . . [¶] Well, I've been a DA for 30 years, and I can predict Mr. Nadey will be a great prisoner on death row. . . . I disagree with Park. [¶] His bias toward the side that hired him was blatantly shown when it came to the issue of the defendant's tattoos, you know, those little SS runes that I asked him about.

(54RT 9535-9536.)

Mr. Anderson reread a portion of his cross-examination of Mr. Park, set out above, about the existence of prison white supremacist gangs, and the runes on appellant's right hand. (54RT 9536-9538.) He then argued:

> "Now, here is the right hand of Mr. Nadey. We talked about those lightning bolts, if you don't want to call them runes. And this 31-year expert, he thinks he may have seen them before, but he won't even give that up. [¶] Well, you know, what I did, I went to a library. I went to a library and picked up some nomenclature on World War II. Here is a little book about the Gestapo. [¶] What do you see at the top portion? Huh? What do you see? [¶] Oh, my."

(54RT 9538.)

Mr. Selvin objected: "One, it's not in evidence; two, we're far afield in light of the evidence that they've heard on this matter --" (54RT 9539.) The court overruled the objection: "Based on the opinion voiced by the expert, in his words these runes or these lightning bolts, I'll permit this providing he doesn't attempt to depict your client as a Nazi because there is

no evidence of that. It only goes to the issue of gang membership, Ladies and Gentlemen of the Jury." (54RT 9539.)

The prosecutor continued:

> See these runes? Don't they look familiar? Don't they? [¶] Okay. Another book, SS Regalia. Look, even the uniformed people of the SS, the pictures in here of their news magazine . . . . *what do you see*? Runes, lightning bolts, whatever you want to call them. Okay? [¶] And to show that these were not just something I made up, here is a Panzer SS uniform with runes on the collar patch. [¶] Gee, why didn't this 31-year expert in the prison system give me that? [¶] Because he doesn't want to anger the side who hired him. That's why.
>
> Here we go. Here is another one, an SS vehicle pennant, SS runes, okay, or thunder bolts, the identical thing we have on Nadey's hands. [¶] Now, if he can't recall those as matching these, I question his expertise. I question his opinion. [¶] Is he biased? Draw your own conclusions.

(54RT 9539-9540, italics added.)

Near the close of his summation, Mr. Selvin commented on Mr. Anderson's impeachment of Mr. Park:

> There is some kind of -- I believe under the guise of impeachment -- and I use the word "guise" -- impeachment of . . . our prison expert, we got into the issue of tattoos, thunderbolts, remember, which are supposed to somehow – I quite don't get it, but I think I understand the reasoning is this man has two thunderbolts, tattoos. The thunderbolt tattoos are supposed to be representative of something, and some gangs in prison have these kind of thing and, therefore, he must either be a member or an affiliate or somehow involved with the gang. I mean that's the purpose of all of this, even if it comes in under the guise of impeaching the testimony of Park because he is not an expert, because he doesn't know about thunderbolts, double thunderbolts. But the real reason is to try to in some way get you to think he is a gang member.
>
> . . . [T]here's been absolutely . . . no evidence that he is a gang member. Nothing in the records that we've seen, prison records or the jail records, indicate that he is a gang member. [¶] Let me

> tell you something: If he were a gang member, the [bailiff] would have a file, and on his file -- they call it a jacket -- on the jacket stamped would be "gang member" so that he knows and the rest of the world knows that this man is a gang member and should be kept apart from other gang members or whatever the real reasons.
>
> No such evidence has been introduced because there isn't any. No deputy sheriffs came and told you he is a gang member because he is not. The . . the prison system, which spent a fortune -- our CIA should be as good in that respect as our prisons are in investigating gang members -- quite frankly has no record of him being a gang member.
>
> Does he have tattoos? [¶] Yes, he has tattoos. [¶] Do those tattoos stand for something? [¶] Maybe. Maybe not. [¶] Could they resemble some other tattoos? [¶] Certainly, they can. [¶] Are they wannabes? [¶] . . . [¶] But there is no evidence that he is a gang member. [¶] And, Ladies and Gentlemen, I just have to point out you've got to . . . just not consider that at all, and certainly it's not a consideration under any of this factor (b), certainly.

(54RT 9636-9637.)

Mr. Giller also discussed the tattoos, going outside the record evidence to personally vouch for appellant's non-gang status, relying on his own religious beliefs and longtime interaction with appellant:

> Mr. Anderson spent some time talking to you about his tattoos and showing -- you know, talking about the tattoos on whatever hand they are on and then *holding up* Nazi literature. [¶] What was he trying to do? [¶] He was trying to incense you, that here is somebody that is a member of a gang, Aryan Brotherhood. This gang, that gang, I don't know. They've got all kind of gangs in prison. By that apparently he is more -- using the SS books, trying to show you that he is a member of . . . a gang.
>
> The fact is if he were a member of a gang, he would have had an expert in here from the prison system telling you about his gang membership. They keep records of every . . . gang there is in those prisons and who they think are members and any connections with those memberships. We didn't see or hear from anybody from the prison system about gangs. We didn't

> hear anybody from the jails. We didn't hear—Alameda County, he has been there four years. There is no gang ties, no nothing.
>
> And I can tell you this: . . . I've known Mr. Nadey for four years. I've been his attorney for some four years. I've talked to him on countless, countless occasions. I'm Jewish. If for any reason he was a member of a Nazi gang, I would have sensed it. I would have been upset by it. I doubt whether I'd continue to represent him. I've never seen anything to indicate any gang membership whatsoever or in any Nazi gang or any other gang.

(55RT 9687-9688, italics added.)

During its charge to the jury, the court again instructed: "Statements made by attorney's during the trial are not evidence." (55RT 9700.) The court also reminded: "Certain evidence was admitted for a limited purpose. . . . [A]t the time this evidence was admitted, you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted." (55RT 9701.) The court also gave an instruction on expert testimony, including: "You are not bound by an opinion. Give each opinion the weight you find it deserves. You may disregard any opinion if you find it to be unreasonable." (55RT 9703.)

During the April 12, 2000, oral proceedings on appellant's motion for a new trial, Mr. Giller told the court:

> [T]here is one thing that was inadvertently left out of the [motion for new trial] brief . . . [¶] . . . [¶] . . . and should have been included. It regards the fact that in Mr. Anderson's argument in referring to the tattoos, he brought the book of the Nazis and the SS signs and discussed, you know, the SS and made an analogy to the Nazi regalia. And I submit that that was error and misconduct on his part. And that inadvertently was left out, and we want to raise that at this time.

(55RT 9742.) As noted, the court denied the new trial motion.

B. Applicable General Standards

In *People v. Friend* (2009) 47 Cal.4th 1, 29 (*Friend*), this Court explained:

> Defendant contends that pervasive prosecutorial misconduct denied him a fair trial, a fair special circumstance finding, and a fair death penalty judgment in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the California Constitution. The standards governing misconduct claims are settled. "A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such '"unfairness as to make the resulting conviction a denial of due process"' [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial. [Citation.] "In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review." [Citation] When a claim of misconduct is based on the prosecutor's comments before the jury, "'the question is whether there is a reasonable likelihood that the jury constituted or applied any of the complained-of remarks in an objectionable fashion.'" [Citations.]

(Fn. omitted; see *People v. Lopez* (2013) 56 Cal.4th 1028, 1072, 1075; *Dykes*, *supra*, 46 Cal.4th at p. 786.)

"'A prosecutor is given wide latitude during closing argument. The argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom. '"A prosecutor may 'vigorously argue his case and is not limited to "Chesterfieldian politeness"' [citation], and he may 'use appropriate epithets . . . .'" [Citations.]' [Citation.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 244.)

During the guilt phase of a capital trial, it is misconduct for the prosecutor to appeal to the sympathy or passions of the jury. (See *People v. Jackson* (2009) 45 Cal.4th 662, 691 (*Jackson*); *People v. Haskett* (1982) 30 Cal.3d 841, 863.)

> The situation is different, however, during the penalty phase. "'Unlike the guilt determination, where appeals to the jury's passions are inappropriate, in making the penalty decision, the jury must make a moral assessment of all the relevant facts as they reflect on its decision. [Citations.] Emotion must not reign over reason and, on objection, courts should guard against prejudicially emotional argument. [Citation.] But emotion need not, indeed, cannot be entirely excluded from the jury's moral assessment.' [Citation.]"

(*Jackson*, *supra*, 45 Cal.4th at p. 691; see *People v. Roundtree* (2013) 56 Cal.4th 823, 859 ["'Considerable leeway is given for appeal to the emotions of the jury as "long as it relates to relevant considerations"'"].)

C. Discussion

1. Claim the prosecutor committed misconduct by making "disparaging" remarks during summation are forfeited and, in any event, were proper

Appellant contends 10 "disparaging" remarks made by the prosecutor during summation constituted misconduct.[69] (AOB 312; see AOB 312-313, 330-332.)

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[69] Appellant now specifically complains of the prosecutor's following remarks (AOB 313, 331):

(a) Asking for the imposition of the death penalty for "'this depraved aberration of humanity[.]'" Mr. Anderson's comment, in context, asked the jury to return a death verdict "for this depraved aberration of humanity, Giles Nadey. Depraved aberration of mankind. [¶] . . . [I]t's never going to be pleasant, but it's going to be the only decision you must come up with because it's of necessity when one considers the defendant, his conduct, his self-indulgent lifestyle of sex, drugs, and possession of weapons, his absolute lack of remorse as shown for his afternoon of carnal knowledge . .

(continued...)

(...continued)
. ." (54RT 9501.) While appellant does not specifically cite as misconduct the following statement, he also complains of the prosecutor's characterization of appellant's commission of the murder as "the most, cowardly, brutal, and depraved conduct ever done to another human being – the assault, sodomy, the murder of Terena Fermenick, a minister's wife, a new mother, and innocent human being." (54RT 9501; see AOB 312-313.)

(b) Characterizing appellant as "'that tattooed hyena[.]'" Discussing what Donald observed when he found Terena, the prosecutor argued: "Isn't this a lovely sight? Isn't that just lovely? You find your wife, the love of your life, the new mother of your pride and joy, baby Regan, you come and you see fecal matter on her. Fecal matter. [¶] Brutalized and sodomized by that *tattooed hyena*. Isn't he a great guy? Isn't he deserving of your sympathy? This is what he did." (54RT 9508-9509, italics added.)

(c) Characterizing appellant as "'this depraved cancer[.]'" In discussing the combination of the circumstances of this crime and appellant's prior violent criminal conduct, the prosecutor argued: "[T]he picture is all too clear of what the proper penalty is for this *depraved cancer*. The death penalty." (54RT 9509, italics added.)

(d) Describing appellant as "'that tattooed pervert[.]'" Discussing the sexual assault on Sarah S., the prosecutor asked: "This is what this case means. What is a just released felon, 28 years old, doing partying with a 13-year-old girl three days out of jail. What is he doing there? [¶] Where are his own girls, the ones he claims to love so deeply, or is this just one manipulation by that *tattooed pervert*?" (54RT 9414, italics added.)

(e) Addressing appellant as "'you tattooed hyena[.]'" In arguing the victim impact testimony from Donald, and Terena's parents and sister, the prosecutor sarcastically asked: "Isn't that beautiful? Thanks, Giles, you *tattooed hyena*. Congratulations. You've just shattered three generations of one family. And why? Because 'anal sex is my specialty.'" (54RT 9520-9522, italics added.)

(f) Calling appellant "'our tattooed hero[.]'" Discussing Dr. Tucker's testimony about methamphetamines' harmful effects by which appellant sought to discredit Mr. Ritchey's testimony: "However, just in case that you feel that you need some more evidence of the Sarah S[.] incident . . . Dr. Tucker given us that. Remember how he was talking about
(continued...)

(...continued)
the effects of methamphetamine? [¶] But our *tattooed hero* was also using. [¶] And what did Dr. Tucker say? [¶] As I said, there is often an exhilaration that goes with this . . . use of meth – and there is also a hyper sexuality. [¶] Oh, my. What a shock. Hyper sexuality. Now, here is a guy three days out of county jail, okay, probably not being able to practice his specialty. He's got this hyper sexuality going because of the methamphetamine use, and he tries to do Sarah[.]" (54RT 5926, italics added.)

(g) Calling appellant "the 'tattooed hyena[.]'" Discussing childhood friend John Karpe's testimony, the prosecutor argued: "Karpe. His best buddy going, is like a brother to him. Got it figured out. Who is the unwholesome environmental protector of his daughters? The *tattooed hyena*. That's who. Even his own cousin, his best buddy knows that. He is the bad influence on them." (54RT 9530, italics added.)

(h) Describing appellant as the "'tattooed predator[,]'" and "a 'nasty predator[.]'" Discussing Mrs. Nadey's testimony, the prosecutor asked:

[D]id you ever hear Mrs. Nadey say I can't imagine his killing anyone else. Did you ever hear her say Giles told me I'm sorry, Mom, for all I put you through, I'm sorry, Mom, for breaking your heart, I'm sorry, Mom, for making my girls come to go to court and cry for my life, I'm sorry, Mom, for destroying all those people's lives because of my perverted, miserable lifestyle? Did you hear one word of remorse from that *tattooed predator* to his mother or anyone else?" [¶] Damn, that silence is deafening.

Along with the spare me since I found the Lord, the other thing you are going to hear from the defense team is mercy, mercy, and mercy and more mercy and sympathy, forgive him what's he's done, show kindness by giving him [LWOP]. I'm going to predict right now you are going to hear at least some version of that cry, mercy and sympathy. [¶] You know, sympathy for what? A vile, *nasty predator* of young girls and women. They want you to give sympathy to him. Now, that's a stretch. When you think of sympathy, you think of how much sympathy he did as he took that knife to her throat eight times. (54RT 9553-9554, italics added.)

(i) Calling appellant "the 'tattooed barbarian[.]'" The prosecutor argued: "Let me tell you about mercy. Mercy is a theme that I guarantee you are going to hear. As you're thinking about mercy for Giles Albert

(continued...)

Respondent disagrees. Appellant has forfeited this claim. In any event, the prosecutor's characterizations did not constitute misconduct.

a. Forfeiture

Appellant did not object to any of these ten characterizations, much less, request a curative admonition. As noted above in *Friend*, and as this Court has repeatedly held, that failure generally forfeits a claim of prosecutorial misconduct on appeal. (See also *People v. Whalen* (2013) 56 Cal.4th 1, 74; *Dykes*, *supra*, 46 Cal.4th at p. 786; *Gurule*, *supra*, 28 Cal.4th at p. 659.)

Appellant recognizes the normal requirement for objection (AOB 332), but claims he may ignore those requirements in regard to the above 10 now-challenged "derogatory references" (AOB 331), given that "the[ir] nature and volume were so overwhelming that it was futile for the defense to attempt to remedy the situation by objecting. Moreover . . . objecting would have only reinforced the damaging force of the challenged remarks. This is particularly true here: where the disparaging remarks were entwined with the objected to – and overruled – use of the Nazi books by the prosecutor." (AOB 333.)

First, respondent disagrees the remarks were "intertwined" with the prosecutor's use of the Nazi publications. As shown above, at no time during the above remarks, did the prosecutor connect the six tattoos on appellant's hands, with the fact that one of those tattoos can be indicative of association with in-prison White Supremacist gangs.

As this Court recognized in *Friend*, an exception to the forfeiture rule is "when the 'misconduct [is] pervasive, defense counsel [has] repeatedly

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(...continued)
Nadey, Jr., I want to give some thought to what I think you should think. Think about the mercy this *tattooed barbarian* gave to Terena." (54RT 9557, italics added.)

but vainly objected to try to curb the misconduct, and the courtroom atmosphere was so poisonous that further objections would have been futile.' [Citation.]" (*Friend*, *supra*, 47 Cal.4th at p. 29; see also *Hill*, *supra*, 17 Cal.4th at pp. 821-822.) The prosecutor's summation lasted 80 minutes (4CT 1035), and comprised 68 pages of reporter's transcripts (54RT 9499-9567). At no time did appellant object to any of those "disparaging" remarks, much less ask for curative admonitions.

There is no indication in the record that appellant's complaint would necessarily have been futile. "We perceive nothing in the record suggesting that an objection to any of the [ten] alleged instances of misconduct would have been futile. [Citation.]" (*Boyette*, *supra*, (2002) 29 Cal.4th at p. 432.) Nor, is there any indication in the record that the court room atmosphere during the penalty retrial in general, and the summation process in particular, was so "poisonous" as to excuse the need for objection and request for a curative admonition. Thus, unlike the discussion in *Friend*, there were no repeated and vain objections to support a claim of futility.

Appellant's complaint about the "volume" of the remarks misses the point, since appellant never apprised the court of his complaints. (See *Harrison*, *supra*, 35 Cal.4th at p. 244; *People v. Dennis* (1998) 17 Cal.4th 468, 521.) Appellant's complaint that objection would only have emphasized the prosecutor's alleged misconduct is also misplaced. "This exception, of course, would swallow the rule requiring a timely objection, and a request for admonition, for one always runs the risk of drawing the jury's attention to an improper line of argument by registering an objection. The mere concern of highlighting alleged misconduct by objecting, without more, cannot serve as a exception to the general rule requiring an objection and request for admonition." (*Boyette*, *supra*, 29 Cal.4th at p. 432.)

Appellant has forfeited his "disparaging remarks" claim.

b. The prosecutor's characterizations of appellant did not constitute misconduct

In any event, this claim fails on the merits. As noted, appellant asserts the above now-challenged "derogatory remarks" referred only to the "runes" tattoo, and in doing so, the prosecutor's goal was to remind the jury about appellant's possible gang association. (AOB 311.) First, appellant overlooks that appellant's left hand bore five, apparently amateur, tattoos other than the runes. Second, three of the now-challenged references did not comment on appellant's tattoos. Finally, as noted, none of the challenged remarks even implicitly referenced the earlier discussion of the lightning bolt tattoo as it related to Mr. Park's testimony.

The prosecutor's use of all of the above now-challenged remarks constituted fair argument, "given the brutal and violent nature of the [assault, forcible sodomy and] stabbing murder . . ." (*Friend*, *supra*, 47 Cal.4th at p. 84; see *ibid.* ["'insidious little bastard' with 'no redeeming social value,' and being 'without feeling' and 'without sensitivity'" proper]; *Edwards*, *supra*, 57 Cal.4th at pp. 764-765; *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22 [penalty phase summation characterizing the defendant as "especially evil," and citing other death penalty cases where the prosecutor permissibly referred to the defendant as "monstrous," "cold-blooded," a "perverted murderous cancer," a "human monster," and a "mutation"]; *Harrison*, *supra*, 35 Cal.4th at p. 245 ["'a creator of victims . . . who turns people from life to death[,]'" "'the executioner[,]'" and "'the terminator of precious life[,]'" proper comment]; *Gurule*, *supra*, 28 Cal.4th at p. 659 [defendant "'innately evil'"]; *People v. Williamson* (1985) 172 Cal.App.3d 737, 749-750 [and cases cited therein].) Appellant fails to establish the prosecutor committed misconduct by using the identified characterizations during summation.

2. Use of the "Nazi" publications was proper

Appellant argues the prosecutor's use of the two publications constituted misconduct since Mr. Anderson's use of these two publications was "not simply illustrative, but substantive . . . ." (AOB 316; see AOB 319-328.) Respondent disagrees. Mr. Anderson did not commit misconduct.

"'The prosecutor should not . . . argue facts not in evidence.' [Citation.]" (*Lopez*, *supra*, 56 Cal.4th at p. 1073.) "'Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal.' [Citation]." (*Hill*, *supra*, 17 Cal.4th at p. 827-828; see *id.* at pp. 837-838; *Lopez*, *supra*, 56 Cal.4th at p. 1073.) But, here, when appellant objected to the prosecutor's use of the books (at least the first), the court overruled the objection, but also informed the jury of the limited, credibility-related, purpose for which the prosecutor could properly display the books.

> Although defendant characterizes his claim as of prosecutorial misconduct, it is more appropriately viewed as a claim that the trial court abused its discretion in overruling defendant's objections and allow the prosecutor to use the [two publications]. Regardless of whether we consider defendant's claim under the rubric of prosecutorial misconduct or the trial court abuse of discretion, our analysis must focus on the propriety of the use of the [publications].

(*Riggs, supra,* 44 Cal.4th at p. 325, fn. 40.)

First, contrary to appellant's characterization (AOB 319-328), since the prosecutor displayed the first page and other pages in the two publications, he was not arguing explicitly or implicitly, that he was privy to aggravating facts which the jury was never informed of during the evidentiary portion of the penalty retrial. Thus, he did not argue outside facts "which counsel, but not the jury, were aware." (*People v. Rundle* (2008) 43 Cal.4th 76, 161; disapproved in other grounds in *Doolin*, *supra*,

45 Cal.4th at p. 421, fn. 22; see also *People v. Bloom* (1989) 48 Cal.3rd 1994, 1213.) Second, the prosecutor's use of the publications, from which the jury saw the actual Nazi rune symbols is akin to "reading of a quotation from a book or other sources, which is generally a permissible tactic during argument to the jury. [Citations.]" (*Riggs*, *supra*, 44 Cal.4th at p. 325; see also *Zapien*, *supra*, 4 Cal.4th at p. 992-993 [prosecutor penalty argument describing an editorial carton and related it to the argument that the jury should not hesitate imposing the death penalty].)

Concomitantly, "[p]rosecutors are entitled '"'during summation [to] state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history, or literature.'"' [Citation.]" (*Friend*, *supra*, 47 Cal.4th at p. 38; accord, *Loker*, *supra*, 44 Cal.4th at p. 742; see *Hill, supra*, 17 Cal.4th at p. 819.) The nature of the symbolism of the runes was and continues to be a subject of common knowledge, even if at the time of summation, forty years had elapsed since the end of World War II. Moreover, organizations espousing the hatred of other races, nationalities and other groups, premised on Nazi symbols and philosophy (and the uniforms worn by some of those groups), unfortunately remain in the sphere of common knowledge, not only in prisons, but in our country generally, and other countries. (See *People v. Wharton* (1991) 53 Cal.3d 522, 568 [prosecutor's comparison of defendant's answer: "'To the best of my knowledge[,]'" to Watergate hearings, was "clearly permissible as an illustration drawn from history"].)

Here, the reference to the books was a part of the prosecutor's attack on Mr. Park's knowledge or lack thereof, of the runes tattooed on appellant's right hand, which was a valid basis for challenging his expert opinions. "'[I]t is well settled that the scope of cross-examination of an expert witness is especially broad; a prosecutor may bring in facts beyond those introduced on direct examination in order to explore the grounds and

reliability of the expert's opinion. [Citation.]' [Citation.]" (*Loker*, *supra*, 44 Cal.4th at p. 739.) Where a witness purports to be an expert on prison life, including gangs, and the likelihood that a given defendant will do well in the prison environment, pointing out that that same expert lacks reasonable familiarity with common gang symbols and tattoos may reasonably call into question his knowledge and bias.

3. Any misconduct was harmless

To establish reversible misconduct during penalty phase argument, """"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.'" [Citation.]'" (*Linton*, *supra*, (2013) 56 Cal.4th 1146, 1205; see *Hill*, *supra*, 17 Cal.4th at p. 838.) Appellant's main's argument is that he has established that reversible misconduct occurred, because "[t]he first penalty jury did not consider the Nazi books, the 'de facto' testimony and argument by the prosecutor in rebuttal to the opinion of the defense expert, Mr. Park, and the multitude of denigrating remarks as to Appellant Nadey[.]" (AOB 334.) As already noted, substantial new aggravating and rebuttal evidence was introduced at the penalty retrial, most of which reinforced appellant's prurient interests, and lack of control when it came to sexual matters. Moreover, a new jury, of necessity brings different experiences and view points in considering the appropriate verdict.

Further, in the first penalty trial summation, the prosecutor used, again without objection, the same type of "disparaging" remarks. For example, he: (1) told the jury they must now decide the penalty "for a man who has been found guilty by you of probably the most cowardly, brutal, and depraved conduct ever perpetrated on another human being – the assault, sodomy, and murder of Terena Fermenick, a new mother, a minister's wife, an innocent human being" (33RT 5901); (2) asked the jury "to return a death verdict for this depraved aberration of human kind, Giles Albert

Nadey, Jr." (33RT 5901); (3) argued the jury must return a death verdict "because it must be made of necessity when one considers the defendant, who he is, the crimes for which he's been convicted, his lifestyle of sex and drugs and self-indulgence, and the absolute lack of remorse he has show for his afternoon of carnal knowledge and carnage" (33RT 5901); (4) argued death row "is the only place to house this miserable sociopath" (33RT 5902); (5) discussing factor (a), telling the jury "you have found him guilty of these, repugnant, vile, nasty acts" (33RT 5905); (6) asked "this feral pig of a defendant," "what words this hyena was mouthing to her? What terms of endearment do you think he was telling her once he spilled his seed of lust into her now damaged anal cavity?" and "[w]hat a charmer, what a hero, what a man" (33RT 5906); (7) argued appellant "warrants death for this walking cancer. [¶] What do you do with cancers?" and "This malignancy sitting between the two defense lawyers deserved the same fate" (33RT 5908); (8) called appellant "Giles The Cancer Nadey" (33RT 5910); (9) discussed appellant's conduct with Sarah S., asking "what does our hero do?" (33RT 5916), and "Nice Conquest, Mr. Reptile" (33RT 9523); (10) asking how Donald would later explain to Regan, "[Y]our mommy was sodomized and murdered by some beast who did it in their own home, the home of a church?" (33RT 5931); (11) discussed the impact appellant had on Terena's family, telling appellant: "Thanks, Giles. Thanks. You miserable viper" (33RT 5932); (12) argued, "I'm still waiting for the sodomite-murderer, that walking cancer," and "this reptilian predator of the pastor's wife" (33RT 5957-5958) and (13) characterized appellant as "[a] vile, nasty predator of young girls and women" (33RT 5963).

Regarding the now-complained-of derogatory references during the penalty retrial, as already noted, contrary to appellant's assertion, a review of the references, when considering the context in which they were used,

and the totality of the prosecutor's summation, the prosecutor did not attempt to inject the issue of gang affiliation in making those references.

Regarding the use of the two publications, although the prosecutor did not inquire of Mr. Park at the first penalty trial regarding prison gangs, or about appellant's rune and other tattoos, he did challenge Mr. Park's credibility at the first penalty trial. For example, he characterized Mr. Park, arguing "should I say Swami Park or Carnac or Ezekiel the Prophet? [¶] This guy come in and gives us the equivalent of voodoo predictions, makes off with about eight or $900 of taxpayer money." (33RT 5946.) During his earlier penalty summation, he again stressed Mr. Park's opposition to the death penalty, and that he had never "work[ed]" with an LWOP prisoner who was a sentenced murderer[.]" (33RT 5944, 5948.)

As set forth above, the court told the jury they could consider the first book only as it bore on Mr. Park's credibility and expertise, and that they could not consider the publication for the purpose of showing that appellant was a gang member. Moreover, the questioning by defense counsel and the court, as stressed in the defense summation, made clear that there was absolutely no evidence appellant was or had been a gang associate.

The court instructed prior to summation: "[T]his is called argument. And I want to remind you again that the arguments of the lawyers is not evidence. The only evidence you can rely on in deciding the case is what you heard testified to from the witness stand." (54RT 9498.) At the beginning of his summation, the prosecutor told the jury: "This is the time the attorneys get to argue to you what they think the evidence has proven in this case. And the Judge just told you what the attorneys say to you via closing argument – and you've heard this before from me, but you'll hear it again – it is not evidence. The only evidence that you can consider are the statements you heard on the witness stand as testimony and any tangible items of evidence such as photographs, daggers . . . and other tangible items

of evidence that have been produced as various exhibits in this case." (54RT 9499-9500.)

In its charge, the court instructed the jury it must determine the facts from the evidence received during trial (55RT 9697), and later repeated that caution: "You must decide all questions of fact . . . from the evidence received in this trial and not from any other source" (55RT 9700). The court again instructed the jury that "[s]tatements made by the attorneys during the trial are not evidence." (55RT 9700.) The jury is presumed to be composed of intelligent people, who are capable of understanding correlating and applying the court's instructions. The jury must be presumed to have followed the court's instructions, obviating any misconduct. (See *Blacksher*, *supra*, 52 Cal.4th at p. 839; *People v. Cash* (2002) 28 Cal.4th 703, 734.)

Most importantly, if any of the characterizations and/or the prosecutor's display of the two Nazi publications were improper, the record fails to establish that the prosecutor sought to use "deceptive and reprehensible methods," in making the derogatory remarks, or using the two publications. (See *Lopez*, *supra*, 56 Cal.4th at p. 1073.) Additionally, the record is devoid of any indication the challenged characterizations of appellant and the prosecutor's use of the publications to challenge Mr. Park's testimony, "contributed to the penalty verdict and [thus they] w[ere] harmless . . . ." (*Friend*, *supra*, 47 Cal.4th at p. 30.)

VIII. IMPOSITION OF THE DEATH PENALTY DID NOT VIOLATE APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS

Recognizing this Court has rejected his various claims, and therefore is making them for the purpose of preserving those issues for later review, appellant makes summary claims that the imposition of the death penalty would violate his constitutional rights in several ways. (AOB 336.) As appellant notes, this Court has rejected those claims.

A. "Factor (a)" Complaints

Appellant contends that the application of, and jury instruction regarding, "the circumstances of the crime" factor "is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death, is vague and standardless," and violates his federal constitutional rights to due process, equal protection, a "reliable and non-arbitrary determination[] of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment." (AOB 337.) He also complains the jury "was not required to be unanimous as to which 'circumstances of the crime' amounted to an aggravating circumstance had been established, nor was the jury required to find such an aggravating circumstance has been established beyond a reasonable doubt, thus violating *Ring v. Arizona*[(2002)] 536 U.S. 584 (*Ring*), and its progeny . . . ." (AOB 337, fn. omitted.)

As appellant notes, this Court has rejected those claims, and he offers nothing to distinguish his case or to support a reconsideration of those prior holdings. (See, e.g., *DeHoyos*, *supra*, 57 Cal.4th at p. 149 (*DeHoyos*); *Linton*, *supra*, 56 Cal.4th at p., 1215; *Whalen*, *supra*, 56 Cal.4th at p. 90; *People v. Livingston* (2012) 53 Cal.4th 1145, 1180; *People v. Dement* (2011) 53 Cal.4th 1, 56 (*Dement*); *Blacksher*, *supra*, 52 Cal.4th at p. 848; *Friend*, *supra*, 47 Cal.4th at p. 90; *Yeoman*, *supra*, 31 Cal.4th at p. 164; see also *Tuilaepa v. California* (1994) 512 U.S. 976 (*Tuilaepa*).)

B. "Factor (b)" Claim

Appellant argues application of this factor wherein the jury is not instructed it must establish each of the "violent" conduct circumstances beyond a reasonable doubt violated his Sixth Amendment right to a jury trial under *Ring*. He also complains this lack, as well as allowing the guilt jury to decide the factor (b) other violent conduct deprived him of his

Eighth Amendment right to a "reliable, non-arbitrary penalty determination, and against cruel and unusual punishment. (AOB 338.) This Court has rejected these arguments, and appellant offers nothing to distinguish his case or to support a reconsideration of those prior holdings. (See, e.g., *DeHoyos*, *supra*, 57 Cal.4th at p. 150; *People v. Nunez* (2013) 57 Cal.4th 1, 62; *Linton*, *supra*, 56 Cal.4th at p. 1216; *Williams, supra,* 56 Cal.4th at p. 697; *Dement*, *supra*, 53 Cal.4th at p. 56; see *People v. D'Arcy* (2010) 48 Cal.4th 257, 308; *Friend*, *supra*, 47 Cal.4th at p. 89; see also *Tuilaepa*, *supra*, 512 U.S. at pp. 976-977.)

He also contends that "allowing a jury that has already convicted the defendant of first degree murder to decide" penalty, violates various federal constitutional rights. (AOB 338-339.) Not only has this Court rejected this claim (*Dement*, *supra*, 53 Cal. at p. 56), but more importantly, here penalty was actually determined by a second jury.

C. "Factor (c)" Claims

Appellant asserts that, even though the jury was "instructed they could not rely on a prior conviction unless it had been proven beyond a reasonable doubt," since they were not instructed they must unanimously make that reasonable doubt determination, under *Ring* and its progeny, he was denied his Sixth Amendment right "to a jury trial on the 'aggravating circumstance[s] necessary for imposition of the death penalty.'" (AOB 339.) He also claims that lack of a need for unanimity also deprived him of his "Eighth Amendment right to a reliable and non-arbitrary penalty phase determination." (AOB 339.)

As appellant again acknowledges, this Court has held to the contrary, and appellant offers nothing to distinguish his case or to support a reconsideration of those prior holdings. (*Williams*, *supra*, 56 Cal.4th at p. 697; *Whalen*, *supra*, 56 Cal.4th at p. 91; see *Yeoman*, *supra*, 31 Cal.4th at p. 157.)

D. "Factors (b) and (c)" Claim

Appellant contends that allowing the jury to consider his prior felony convictions in aggravation violated his right against double jeopardy. (AOB 340.) In regard to "factor (b)" evidence, appellant does not explain in what specific context his federal constitutional rights were violated. (See AOB 340.) Appellant did not raise this "double jeopardy" claim regarding the prior convictions in the trial court; therefore it is forfeited. (Cf. *Gurule*, *supra*, 28 Cal.4th at p. 646 [claim that retrial of penalty violated right against double jeopardy].)

Addressing the double jeopardy claim as to the prior convictions, the Court has rejected that claim. (See *Williams*, *supra*, 56 Cal.4th at pp. 684-685.) Assuming appellant contends that use of the prior violent conduct related to his possessions of the billy and dagger for which he sustained misdemeanor convictions, also violated his right to be free from double jeopardy, not only is this claim forfeited for failure to raise the issue in the trial court (cf. *Gurule*, *supra*, 28 Cal.4th at p. 646), but this Court has rejected that claim (*Williams*, *supra*, 56 Cal.4th at pp. 684-685), and appellant offers nothing to distinguish his case or to support a reconsideration of those prior holdings.

E. "Factor (i)" Claim

Section 190.3, subdivision (i), allows the jury to consider the defendant's age at the time of the offense in determining penalty. Appellant contends that the court's failure to explain how his age should be factored into the penalty determination violated his right to due process, and, under the Eighth Amendment, his right to "a reliable, non-arbitrary penalty determination . . . ." (AOB 340.) Appellant did not request an explanatory instruction in the trial court. This claim is forfeited. (*People v. Johnson* (1993) 6 Cal.4th 1, 52.) Nor, does appellant now explain the

parameters of what the court supposedly should have instructed in regard to appellant's age of 29 when he committed the offenses.

Addressing the merits, this Court has rejected this claim, since the trial court is not required to instruct whether a sentencing factor is either potentially aggravating or mitigating. (*Mills*, *supra*, 48 Cal.4th at p. 214; see *Tuilaepa*, *supra*, 512 U.S. at p. 977; *People v. Sanders* (1995) 11 Cal.4th 475, 564.) Appellant offers nothing to distinguish his case or to support a reconsideration of those prior holdings

F. CALJIC No. 8.85 Claims

Appellant contends that CALJIC No. 8.85 "is constitutionally flawed," since it: "(1) . . . failed to delete inapplicable sentencing factors, (2) . . . contained vague and ill-defined factors, particularly factors (a) [circumstances of murder and sodomy] and (k) ["any other circumstance which extenuates the gravity of the crime"], (3) . . . limited factors (d) [crime committed under influence of "extreme mental or emotional disturbance"] and (g) ["acted under extreme duress or under the substantial domination of an another"] by adjectives such as 'extreme' or 'substantial' and (4) . . . "failed to specify a burden of proof as to either mitigation or aggravation." (AOB 341; see also AOB 342.)

There was no evidence produced by either side which directly or inferentially showed appellant "acted under extreme mental or emotional disturbance," or "acted under extreme duress" or domination of another person. Moreover, this this Court has rejected appellant's claims, and appellant offers nothing to distinguish his case or to support a reconsideration of those prior holdings. (See *DeHoyos, supra*, 57 Cal.4th at pp. 149-150; *Pearson*, *supra*, 56 Cal.4th at p. 478; *Whalen*, *supra*, 56 Cal.4th at p. 85, 89; *Dement*, *supra*, 53 Cal.4th at pp. 56-57 [trial court not required to delete inapplicable factors and "[u]se of the adjectives 'extreme' and 'substantial'" constitutional]; *Friend*, *supra*, 47 Cal.4th at pp. 89-90.)

G. "Failure to Narrow"

Appellant claims "California's capital punishment scheme, as construed by this Court . . . and as applied, violates the Eighth Amendment by failing to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not." (AOB 341.) This Court has held to the contrary, and appellant offers nothing to distinguish his case or to support a reconsideration of those prior holdings. (See *DeHoyos*, *supra*, 57 Cal.4th at p. 149; *Whalen*, *supra*, 56 Cal.4th at p. 90; *Blacksher*, *supra*, 52 Cal.4th at p. 848.)

H. "Burden of [P]roof and [P]ersuasion"

Appellant contends his constitutional rights were violated because the jury was not instructed, except as to the proof of prior convictions and violent criminal conduct, as to the "burden of proof [beyond a reasonable doubt] or persuasion" regarding the various sentencing factors. (AOB 342.) This Court has rejected analogous claims, and appellant offers nothing to distinguish his case or to support a reconsideration of those prior holdings. (See, e.g., *DeHoyos*, *supra*, 57 Cal.4th at pp. 149-150; *Livingston*, *supra*, 53 Cal.4th 1145, 1180; *Dement*, *supra*, 53 Cal.4th at pp. 55-56; *Friend*, *supra*, 47 Cal.4th at p. 89; *Boyette*, *supra*, 29 Cal.4th at p. 466.)

I. Lack of Writing Findings

Appellant contends California's death penalty law violates a multitude of his federal constitution rights because the jury is not required to provide written findings "as to the aggravating and mitigating factors found and relied on . . . ." (AOB 342.) The Court has held to the contrary, and appellant offers nothing to distinguish his case or to support a reconsideration of those prior holdings. (*DeHoyos*, *supra*, 57 Cal.4th at p. 150; *Dement*, *supra*, 53 Cal.4th at p. 57; *Friend*, *supra*, 47 Cal.4th at p. 90.)

J. Lack of Instruction as to LWOP

Appellant complains the trial court improperly failed to instruct the jury "that if it determines mitigation outweighs aggravation it must return an" LWOP verdict. (AOB 343.) This Court has rejected this claim, and appellant offers nothing to distinguish his case or to support a reconsideration of those prior holdings. (*DeHoyos*, *supra*, 57 Cal.4th at p. 150; *Whalen*, *supra*, 56 Cal.4th at p. 89; *Dement*, *supra*, 53 Cal.4th at p. 56; *Friend*, *supra*, 47 Cal.4th at p. 90.)

K. "Vague [S]tandard for [D]ecision-making"

Appellant contends that portion of CAJLIC No. 8.88, which instructs the jury they may impose the death penalty "only if the aggravating factors are 'so substantial' in comparison to the mitigating factors that death is warranted [citation]" "creates an unconstitutionally vague standard," violating his rights to due process, equal protection, "a reliable, non-arbitrary" penalty determination, and not be subjected to cruel and unusual punishment. (AOB 343-344.) This Court has found this claim to lack merit, and appellant offers nothing to distinguish his case or to support a reconsideration of those prior holdings. (See, e.g., *Lopez*, *supra*, 56 Cal.4th at p. 1083; *People v. Thomas* (2012) 53 Cal.4th 771, 839; *Dement*, *supra*, 53 Cal.4th at p. 56; *Friend*, *supra*, 47 Cal.4th at p. 90; see also *Tuilaepa*, *supra*, 512 U.S. at p. 979 ["A capital sentence need not be instructed how to weigh any particular fact in the capital sentencing decision"].)

L. "Intercase [P]roportionality" and "Disparate [S]entence [R]eview"

Appellant contends his rights to due process, equal protection, a reliable penalty determination, and against cruel and unusual punishment were violated since California does not provide for (1) intercase proportionality review (AOB 344 [subargument L]); or (2) "the same kind

of disparate sentence review as is afforded felons under" the Determinate Sentencing Law (AOB 344-345 [subargument M]). Intercase proportionality review is not required. (See *DeHoyos*, *supra*, 57 Cal.4th at p. 151; *Dement*, *supra*, 53 Cal.4th at p. 58; *Friend*, *supra*, 47 Cal.4th at p. 89; *Harrison*, *supra*, 35 Cal.4th at p. 261; see also *Pulley v. Harris* (1984) 465 U.S. 37, 45 [intercase proportionality not a constitutional requirement].) Capital defendants are not similarly situated to other felons and thus disparate sentencing review is not required. (*Whalen*, *supra*, 56 Cal.4th at p. 91; *Linton*, *supra*, 56 Cal.4th at p. 1216; *Boyette*, *supra*, 29 Cal.4th at p. 466, fn. 22.) Appellant offers nothing to distinguish his case or to support a reconsideration of those prior holdings.

M. Violation of International Law

Appellant contends his death sentence must be reversed because its use as "regular punishment for substantial numbers of crimes violates international norms of human decency and international law . . . ." (AOB 345 [subargument N].) The Court has rejected this claim, and appellant offers nothing to distinguish his case or to support a reconsideration of those prior holdings. (*DeHoyos*, *supra*, 57 Cal. at p. 151; *Whalen*, *supra*, 56 Cal.4th at p. 92; *Dement*, *supra*, 53 Cal.4th at p. 58; *Friend*, *supra*, 47 Cal.4th at p. 90.)

N. "Cruel and [U]nusual [P]unishment

Appellant contends the death penalty constitutes cruel and unusual punishment. (AOB 345; subargument O].) This Court has held to the contrary, and appellant offers nothing to distinguish his case or to support a reconsideration of those prior holdings. (*DeHoyos*, *supra*, 57 Cal.4th at p. 151.)

O. "Cumulative [D]eficiencies"

Appellant finally contends that the cumulative effect of the above deficiencies violate Eighth and Fourteenth Amendments, requiring reversal. (AOB 346 [subargument P].) Again, appellant's claim lacks merit. (See *Pearson*, *supra*, 56 Cal.4th at p. 479.)

IX. ANY COMBINATION OF ALLEGED ERROR DOES NOT REQUIRE REVERSAL

Appellant argues that "[e]ven assuming that none of the errors [he has] identified . . . is prejudicial standing alone, the cumulative effect of these errors, taken together or in any combination, undermines confidence in the guilt and penalty phase proceedings[]" and therefore the judgment must be reversed. (AOB 347.) Respondent submits that appellant's arguments are mistaken and there was no error. Even assuming there was error which could be cumulated, "[t]he heinous nature of defendant's crimes and his prior convictions [and non-adjudicated conduct] for violent acts [demonstrates] that the verdict would not have been otherwise even in an error-free trial. [Citations.]" (*People v. Morris* (1991) 53 Cal.3d 152, 233, disapproved on other grounds in *People v. Stansburg* (1995) 9 Cal.4th 824, 830, fn. 1.) "Defendant was entitled to a fair trial, not a perfect one." (*People v. Box* (2000) 23 Cal.4th 1153, 1214, disapproved on other grounds in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10; see *Avila*, *supra*, 46 Cal.4th at p. 718 ["Defendant has merely shown that his "'trial was not perfect—few are" (internal quotation marks deleted)]; *Loker*, *supra*, 44 Cal.4th at pp. 756-757.)

CONCLUSION

For the above reasons, respondent asks this Court to affirm the judgment.

Dated: October 24, 2013

Respectfully submitted,

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SF2000XS0002

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 87,692 words.

Dated: October 24, 2013

KAMALA D. HARRIS
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Giles A. Nadey, Jr.*** No.: **S087560**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On October 24, 2013, I served the attached **Respondent's Brief** by placing a true copy thereof enclosed in a sealed envelope 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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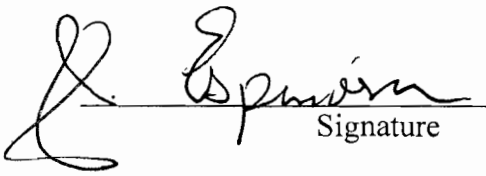
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 24, 2013, at San Francisco, California.

J. Espinosa
Declarant



Signature

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