In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **FRANCISCO JAY ALVAREZ,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S089619 **DEATH PENALTY**

Kern County Superior Court Case No. SC068352A
The Honorable John I. Kelly, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On January 5, 1995, the Kern County District Attorney filed an information in case number SC061026A, alleging appellant committed: count 1 – murder of Tyler Ransom (Pen. Code, § 187, subd. (a));[1] and count 2 –unjustifiable infliction of physical pain or suffering upon a child, Tyler Ransom, with means likely to produce great bodily injury or death (§ 273a, subd. (a)).[2] (2 CT 501-502.)[3] On April 13, 1995, the prosecution dismissed both charges.[4] (2 CT 589-590.)

On November 7, 1996, the Kern County Grand Jury handed up an indictment in case number SC68352A, charging appellant, Francisco Jay Alvarez, with the following: count 1 – murder by premeditation and/or torture of Tyler Ransom (§ 187, subd. (a)); count 2 – murder by premeditation and/or torture of Dylan Vincent (§ 187, subd. (a)); count 3 – assault on Dylan Vincent, a four year-old child, with force likely to produce great bodily injury and resulting in death (§ 273a, subd. (b)); and count 4 – failure to register as a sex offender (§ 290).[5] (2 CT 597-601.) The

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[1] All further statutory references are to the California Penal Code, unless otherwise indicated.

[2] The information incorrectly lists the offense as section 273a, subdivision (1). (2 CT 502.)

[3] "CT" refers to the Clerk's Transcript on Appeal. "RT" refers to the Reporter's Transcript on Appeal. All transcripts are referenced first by volume number, then by page number.

[4] The record fails to articulate the reason for the dismissal, the clerk's minutes states, "Upon motion of the People, Case Dismissed." (2 CT 589.) However, Respondent notes that on the prior scheduled hearing day, witnesses Regina Turney and Chris Turney failed to appear. (2 CT 587.)

[5] Count 4 was dismissed by the People in the interest of justice (§ 1385). (81 CT 24564.)

indictment set forth special circumstance allegations in counts 1 and 2 that appellant committed multiple murders (§ 190.2, subd. (a)(3)). (2 CT 597-601.) On November 11, 1996, appellant waived formal arraignment and pleaded not guilty to all charges, and denied the special circumstance. (2 CT 610.)

On February 24, 1998, appellant's first jury trial began. (5 CT 1549.) The jury returned guilty verdicts and true findings on the special circumstance allegations, and also returned a verdict of death (6 CT 2002, 2006, 2010, 2011; 7 CT 2151.) Appellant moved for a new trial based on juror misconduct. (7 CT 2174-2185.) On November 18, 1998, the trial court found juror misconduct, and granted appellant's motion for a new trial. (8 CT 2464.)

On April 4, 2000, appellant's second jury trial began. (80 CT 24181.) On May 24, 2000, the jury found appellant guilty of first-degree murder of both children (counts 1 and 2), and found the special circumstances true. (81 CT 24496, 24500, 24504.) The jury also found appellant guilty of assault on a child causing death (count 3). (81 CT 24505.) On June 1, 2000, after the penalty trial, the jury returned a verdict of death. (81 CT 24541.) The trial court sentenced appellant to death for counts 1 and 2. (81 CT 24564.) The trial court sentenced appellant to 25 years to life for count 3, but stayed that term (§ 654). (81 CT 24564.)

This appeal is automatic.

STATEMENT OF THE FACTS

A. Summary

On November 15, 1994, appellant fatally shook five-month-old Tyler Ransom while his mother was on the telephone in another room. Appellant

forcefully twisted, bent or used blunt-force on Tyler's[6] leg fracturing his right tibia and fibula. Analysis of the x-rays revealed that appellant had squeezed Tyler's ribcage on three separate occasions, causing approximately 40 fractures to all of his 24 ribs. The oldest rib fractures were approximately 10 to 14 days old. At the hospital, doctors restarted Tyler's heart and placed him on a ventilator, but ceased life support within 24 hours because Tyler had total and irreversible cessation of brain function.

On October 23, 1996, appellant beat to death four-year-old Dylan Vincent while Dylan's mother was at work. Dylan had 70 to 75 bruises all over his body – 20 to 30 of the bruises were on his abdomen and were caused by appellant's fists. He had multiple bruises on his forehead, face, throat, mouth, back of the head, upper back, lower back, and buttocks. Dylan also suffered injuries to his lungs, mouth, and face from appellant suffocating him. Dylan bled to death internally in his toddler bed after blunt-force trauma to his abdomen caused his internal organs to impinge upon his spine. When emergency responders arrived, Dylan was cool to the touch and could not be revived. Dylan died within minutes to three to four hours after suffering his fatal injuries.

B. Tyler Ransom's Murder

1. People's Case

Tyler Ransom was born on June 18, 1994, to Shari and Brian Ransom. (80 RT 16942, 16940-16941.) Tyler was a healthy, happy baby

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[6] Respondent use the first names of the family members of both Tyler Ransom and Dylan Vincent to avoid confusion and intends no disrespect.

and not colicky. (80 RT 17145, 16960.) Shari was eighteen years old. (79 RT 16889.) They lived at 313 Louella Street in Bakersfield, in a house owned by Shari's parents, Albert and Elaine Turney (Albert and Elaine respectively). (80 RT 16946; 79 RT 16894, 16858-16859.) Brian and Shari separated in October of 1994, and he moved in with his mother, Rita Sites (Rita). (79 RT 16860-16861; 80 RT 17132, 17142.) Appellant was Brian's friend and Shari had known him for about one year. (80 RT 16948.) Shari and appellant formed a romantic relationship and appellant moved into the Louella house about one week after Brian moved out. (80 RT 16948-16949, 17137; 79 RT 16861.)

At the beginning of the relationship, appellant treated Shari well, often making flattering comments. (80 RT 16950.) Shari did not see appellant act mean-spirited toward Tyler. (80 RT 16973.) Appellant was gentle with Tyler, called him a good boy, and said that they would be a family. (80 RT 16951.) One time, however, when appellant was putting Tyler down in his crib, he turned Tyler's head sharply to one side. (80 RT 16951.) Unbeknownst to appellant, Shari had been watching. (80 RT 16951.) Shari confronted appellant telling him not to do it again explaining it could hurt Tyler. (80 RT 16951-16952.) Appellant claimed he did it because he did not want Tyler to see him walk out of the room. (80 RT 16952.)

Before appellant moved in, Shari had not noticed any bruises or injuries on Tyler and he did not whimper or grimace when picked up. (80 RT 16960-16961, 16963.) After appellant moved in, bruises began appearing on Tyler; Tyler became crankier, whined and stopped smiling when picked up. (80 RT 16975, 16963, 16975.) Shari noticed bruises on Tyler's wrists, ears, buttocks, and back. (80 RT 16963-16964.) The

bruises on Tyler's wrists were deep purple and looked as if somebody had picked him up by the wrists or had smashed them. (80 RT 16964.) There were bruises on Tyler's earlobes and fingernail marks inside both ears. (80 RT 16964.) The bruising on Tyler's buttocks was very faint and was barely visible. (80 RT 16964.) Shari noticed three separate bruises on Tyler's mid and lower back that resembled fingerprints. (80 RT 16964-16965.) Shari testified in an earlier hearing in 1994 that she possibly could have caused the bruises on Tyler's back because they matched her fingers, but she did not match them to anyone else. (80 RT 16973-16974.) However, Shari believed that she had not caused the bruises as she had never put any finger mark bruises on Tyler before appellant moved in with her. (80 RT 16974, 16973.)

Appellant had opportunities to be alone with Tyler in the mornings or when Shari simply left the room. (80 RT 16966, 16972) Appellant typically woke up first in the mornings, checking on Tyler while Shari continued to sleep. (80 RT 16966, 16972.) Appellant preferred that Tyler stay in his crib. (80 RT 16984.) Shari recalled that she confronted appellant saying, "[T]his is Tyler's house and he can be up and around any time he want[s] to." (80 RT 16984.) When Tyler awoke from his naps, appellant frequently wanted him to stay or return to his the crib. (80 RT 16984.) At appellant's insistence, Shari oftentimes put Tyler back in the crib even though he had been there all day. (80 RT 16984-16985.)

Neither Shari nor appellant worked. (80 RT 16952.) Appellant did not give Shari any money for living expenses and, in fact, never gave Shari any money at all. (80 RT 16991-16992.) Shari paid rent, purchased food, and paid the bills. (80 RT 16993.) Appellant attended physical therapy for

a work related injury. (80 RT 16952.) Appellant had a pickup truck, but Shari did not have a vehicle. (80 RT 16952.) Shari did not know how to drive and did not have a license, so she depended on appellant to drive her to appointments and to run errands. (80 RT 16952-16953.)

a. Tyler's Pediatrician

Dr. Sacamoto first saw Tyler when he was born on June 8, 1994. (76 RT 16118.) She ordered a drug toxicology test on June 10, 1994, which was negative for alcohol and drugs. (76 RT 16155-16156.)

On June 15, 1994, Dr. Sacamoto saw Tyler again for his first physical examination. (76 RT 16121.) Tyler had gained at least one pound, which was a "good sign," and he appeared to be perfectly fine – Dr. Sacamoto did not find anything abnormal. (76 RT 16121-16122.)

On June 24, 1994, Shari brought Tyler to see Dr. Sacamoto for a circumcision. (76 RT 16122.) Tyler had gained another pound and appeared to be a healthy baby with no abnormalities. (76 RT 16123-16124.)

b. August 10, 1994

On August 10, 1994, Dr. Mark Eller was working as an emergency room physician at San Joaquin Community Hospital when Shari brought Tyler in for an upper respiratory infection. (73 RT 15590-15592, 15595.) Dr. Eller performed a physical exam and ordered a chest x-ray. (73 RT 15595, 15596.) The x-ray was negative for pneumonia, fluid in the lungs or any enlargement of the heart. (73 RT 15596.) Dr. Eller did not note any evidence of fractures from the x-ray. (73 RT 15596.) Another radiologist also read the report. (73 RT 15596.)

c. September 23, 1994

On September 23, 1994, Dr. Sacamoto examined Tyler. (76 RT 16125.) Tyler weighed 15 pounds and was 25 inches long. (76 RT 16125.) Shari told Dr. Sacamoto that Tyler had chest congestion, had difficulty breathing, and that he had been coughing for the previous two weeks. (76 RT 16125.) Dr. Sacamoto did not hear any chest congestion when she examined Tyler and she did not hear him cough. (76 RT 16126.) She did not find any abnormalities after her examination of Tyler. (76 RT 16126.) Dr. Sacamoto prescribed antibiotics for the congestion. (76 RT 16126.) She opined babies fewer than six months old were susceptible to colds and were commonly sick. (76 RT 16179-16180.) Tyler's chest x-ray did not present any pneumonia consistent with acute bronchiolitis. (76 RT 16182.) That was last time Dr. Sacamoto saw Tyler. (76 RT 16152-16154.)

d. September 28, 1994

On September 28, 1994, Dr. George Flynn was working as physician in the emergency room in San Joaquin Community Hospital. (73 RT 15600-15601.) At 4:35 a.m., Shari arrived with Tyler and reported that Tyler had shortness of breath and a cough. (73 RT 15600-15601, 15603-15604.) Dr. Flynn examined Tyler and concluded Tyler was suffering from an upper respiratory infection. (73 RT 15604.) Dr. Flynn ordered a chest x-ray and complete blood count. (73 RT 15604.) Tyler's chest x-ray was normal but the blood count showed elevated white blood cells, characteristic of a viral infection. (73 RT 15605.) Dr. Flynn diagnosed Tyler with bronchiolitis, or croup, a common respiratory virus for young children. (73 RT 15605.)

e. October 8, 1994

On October 8, 1994, Rebecca Clendenen (Rebecca), Brian Ransom's sister, played with Tyler at a cousin's birthday party. (82 RT 17549, 17553-17554.) Numerous family members were bouncing Tyler, changed his diaper, and held him around his chest area. (82 RT 17554.) Tyler was not in any discomfort. (82 RT 17554.) Rebecca did not see any marks or bruises on Tyler and did not find him to be unusually uncomfortable when picked up. (82 RT 17555.)

Rebecca thought Tyler was a "perfect" healthy, happy baby. (82 RT 17555.) She remembered that Tyler was lovable, often giggling and happy. (82 RT 17555.) He was not unusually colicky or cranky. (82 RT 17555.)

f. October 24, 1994

On October 24, 1994, Rebecca babysat Tyler overnight while Shari and appellant went out. (82 RT 17550, 17555.) Rebecca bathed Tyler and played with him. (82 RT 17556-17557.) Rebecca's husband held Tyler under his chest; Tyler did not grimace or whimper in pain. (82 RT 17556, 17557.)

Before October 1994, Regina Turney (Regina), Shari Ransom's sister-in-law, never noticed any bruises on Tyler and did not see Tyler grimace in pain when picked up. (82 RT 17562-17563.)

g. October 31, 1994

Brian had custody of Tyler Halloween weekend, the first weekend after he moved out. (80 RT 17132-17133; 79 RT 16897.) Brian took Tyler to Elaine and Albert's apartment so they could see Tyler in his Halloween costume. (79 RT 16865.) Elaine and Albert held and played with Tyler, and Tyler did not react by grimacing. (79 RT 16865, 16866, 16898.) Tyler smiled and seemed to be normal, except for a cold and a runny nose. (79 RT 16865-16866, 16898.)

h. November 1, 1994

Shari noticed bruises on Tyler for the first time on November 1, 1994. (80 RT 17145-17146, 16876.) When Shari saw the bruises, she called Brian and his mother to discuss it. (80 RT 17146, 16977.) Shari did not accuse Brian of causing the bruises. (80 RT 17146-17147.) The bruises were on Tyler's wrist and ear, there were also some fingernail scratch marks inside his ears. (80 RT 17147.) Shari thought Tyler might have scratched his ears with his own fingernails. (80 RT 17147.)

i. November 5, 1994

Brian had custody of Tyler the weekend of November 5, 1994. (80 RT 17164-17165.) Tyler was not his normal, happy self. (82 RT 17558.) Rebecca saw Tyler at Rita's house and noticed that his breathing was labored. (82 RT 17558.) Tyler was fussy, and he winced and grimaced when held or picked up under his arms. (82 RT 17558.) Tyler did not sleep well, only sleeping for short periods, which was uncommon for him. (82 RT 17559.) Rebecca had never seen Tyler in such a condition before. (82 RT 17559.) Rita pointed out about six finger-shaped bruises on both sides of Tyler's buttocks. (82 RT 17559.) The bruises were not very dark and seemed to be fading. (82 RT 17560.) Shari did not notice any bruising on Tyler when he returned. (80 RT 17167.)

Tyler was sick, with a cough and runny nose when he came home to Shari. (80 RT 17168.) Elaine saw Tyler on Saturday, November 5, 1994, and he appeared normal, but had a cold. (79 RT 16880-16881.) It seemed to Elaine that Tyler always had a cold, runny nose, and congestion. (79 RT 16881.)

j. November 8, 1994

On the morning of November 8, 1994, appellant woke Shari up saying that he had performed CPR on Tyler. (80 RT 16970, 16967.) Shari jumped out of bed and found Tyler lying on the floor in the den; he appeared normal, like he had just woken up. (80 RT 16967-16968.) Appellant told Shari that he had gone into Tyler's room in the middle of the night, and found that Tyler had stopped breathing. (80 RT 16968.) Shari told appellant that if anything ever happened to Tyler, if he quit breathing or anything, to immediately wake her up. (80 RT 16970.) Shari thought appellant was lying, but wrote the incident down on her calendar as, "saved baby." (80 RT 16970-16971.)

Shari rode her bike to Regina's house later that day and asked her to drive them to Tyler's doctor because Tyler was sick. (80 RT 17169-17170, 17168; 82 RT 17564-17565.) Shari could not take Tyler to see Dr. Sacamoto because appellant's truck would not start. (80 RT 17173.) During that visit, Shari told Regina about appellant reviving Tyler with CPR. (80 RT 17170; 82 RT 17564.) Regina asked Shari why she did not call 9-1-1, and Shari responded she did not need to because appellant said it was okay and there was nothing wrong. (82 RT 17565-17566.) Regina told Shari that she should still take Tyler to the doctor, but Regina was unable to drive them, as she did not have a car. (82 RT 17566.)

k. November 12, 1994

On Saturday, November 12, 1994, Shari, Tyler, and appellant were all home. (79 RT 16867-16868.) Shari noticed that Tyler whimpered and acted sore when she picked him up, but thought it was related to his congestion. (80 RT 16690.) Shari was worried and asked her parents to drive Tyler to the doctor. (80 RT 16990, 17297, 17398.)

When Elaine arrived, she immediately noticed something was obviously wrong with Tyler. (79 RT 16882-16883.) There was dried blood in Tyler's nose and he whimpered when touched. (79 RT 16883, 16868.) Appellant had tightly wrapped Tyler in a long, crocheted blanket with his arms pinned down at his sides. (79 RT 16868-16869; 80 RT 16982-16983.) Elaine told Shari to get him out of the blanket. (79 RT 16869.) Appellant said that the blanket was not hurting Tyler, but Elaine again told them to get Tyler out of the blanket. (79 RT 16869.) Appellant rationalized that having Tyler wrapped tightly in the blanket was not hurting him and Tyler rested better that way. (79 RT 16888, 16869.) After appellant unwrapped Tyler, Shari heard Tyler moaned in pain. (80 RT 17298.)

Elaine put her hands under Tyler's arms to take him from appellant and Tyler whimpered. (79 RT 16868-16869.) Tyler acted hurt when Elaine touched him around his chest and whimpered or grimaced when moved. (79 RT 16883, 16872.) Tyler was not breathing deeply, taking only short little shallow breaths. (79 RT 16884-16885.) Elaine believed there was something wrong with Tyler because he was limp, would not sit up, hold up his head, or even cry. (79 RT 16870, 16884-16885.) Elaine dressed Tyler and did not notice anything wrong with Tyler's legs when she bent his legs to put his feet in the sleeper outfit. (79 RT 16870, 16872; 80 RT 17294.) As long as she did not move Tyler, he stayed very still on her lap. (79 RT 16873.) Shari recalled Tyler was weak and limp and fell against Elaine's chest when she picked him up. (80 RT 17298.)

Appellant pointed to Tyler and said, "[S]ee, he's okay; he's playing." (79 RT 16871.) Tyler was not playing and did not move. (79 RT 16871.) On three different occasions that day appellant stated that Tyler was fine. (79 RT 16887-16888.) Elaine felt appellant was attempting to discourage

her from taking Tyler to the hospital, while Shari seemed anxious to go. (79 RT 16889-16890, 16873.)

(1) Dr. Leidheiser

Shari and Elaine brought Tyler into the San Joaquin Community Hospital emergency room and saw Dr. Loren Leidheiser. (77 RT 16268-16269.) The chief complaint was cough and congestion for four days. (77 RT 16269.) Dr. Leidheiser examined Tyler's entire body. (77 RT 16278.) Tyler presented with coarse breath sounds. (77 RT 16271.) Dr. Leidheiser inspected Tyler's ears and noted that his eardrum was pink. (77 RT 16271.) He looked at the area that Tyler's mother was concerned about and documented that there was a hyperkeratotic area, that is, a thick, leathery area on the skin from buildup. (77 RT 16271.) Dr. Leidheiser did not notice anything wrong with Tyler's right leg; it was not fractured. (77 RT 16278-16279.) Dr. Leidheiser did not suspect child abuse and neither did any of the hospital staff. (77 RT 16279.)

Shari pointed out areas that she described as bruised on Tyler's left wrist and on the outer part of his right ear, and asked Dr. Leidheiser how they could have occurred. (77 RT 16270-16271, 16280.) Dr. Leidheiser documented ecchymosis, discoloration of the skin, a purplish area of abnormal color on the top part of Tyler's ear and on his wrist. (77 RT 16271-16272.) The upper portions of both the outside and inside of Tyler's outer ear were discolored. (77 RT 16273-16274.) Tyler's left wrist was also discolored. (77 RT 16384-16385.) The ecchymosis on Tyler's ear was consistent with a trauma bruise. (77 RT 16400.) Dr. Leidheiser did not make any diagnosis related to the ecchymosis and was not able to diagnose the cause. (77 RT 16387, 16383.) He did not think that a five-month old

could have caused such bruising to himself. (77 RT 16274.) Dr. Leidheiser recalled Shari was very concerned about the appearance of Tyler's ear and wrist and wanted to take more time than he wanted to give discussing where the discolorations had come from. (77 RT 16407.)

When Dr. Leidheiser looked at Tyler's chest x-ray, he was concerned with some shadows that he assumed were consistent with a lung infection. (77 RT 16277.) Dr. Leidheiser did not consult with anyone about Tyler's x-ray, including the radiologist. (77 RT 16281-16282.) Dr. Leidheiser independently concluded that the fuzzy white appearance in Tyler's x-ray was an early infection. (77 RT 16284-16285.) He wrote on Tyler's chart that he thought it was an early sign of pneumonia. (77 RT 16285.) Dr. Lui, a radiologist, agreed with Dr. Leidheiser's opinion that it was not full-blown pneumonia; there was nothing in the report about a rib fracture. (77 RT 16286.)

Dr. Leidheiser testified that he had failed to notice that on November 12, 1994, Tyler's x-ray showed two small fractures to his ribs. (77 RT 16287, 16396-16398.) He said that he has overlooked it because he was focused on looking for an infection in the lung tissue based on the symptoms. (77 RT 16287.) The radiologist or x-ray specialist also overlooked the rib fractures. (77 RT 16398-16399.) On the day he testified, Dr. Leidheiser stated he could see the fractured rib on the left side of Tyler's November 12, 1994, x-ray, but found it hard to locate the one on the right. (77 RT 16399.) Dr. Leidheiser is not a radiologist and deferred to a board certified pediatric radiologist in reading Tyler's chest x-rays. (77 RT 16399-16400.)

In retrospect, Dr. Leidheiser stated it was reasonable to conclude that Tyler was having respiratory problems from fractured ribs on November 12, 1994. (77 RT 16357.) Dr. Leidheiser explained that the rib

fractures he had failed to see on Tyler's x-ray would cause difficulty breathing, and the coarse breath sounds could have been from the increased fluids that facilitate healing. (77 RT 16358.) Dr. Leidheiser opined the rib fractures he had missed in the x-ray and the bruises on the wrist and ear were consistent with child abuse bruise trauma. (77 RT 16401.) Had Dr. Leidheiser seen the fractured ribs on the x-ray on November 12, 1994, he would have called Child Protective Services ("CPS") to investigate. (77 RT 16402.) He would have made the diagnosis of trauma associated with the discoloration to the wrist and ear and with the rib fractures. (77 RT 16402.)

Dr. Leidheiser did not observe any type of retinal hemorrhaging or hemorrhaging of the fundus, opposite the pupil. (77 RT 16367.) If Dr. Leidheiser had seen the retinal hemorrhaging, he would have investigated the possibility of child abuse at that time. (77 RT 16367.)

When Dr. Leidheiser told Shari that Tyler had pneumonia, she believed him. (80 RT 17299, 16991.) At the time, Shari did not think that Tyler needed to be hospitalized and did not think Tyler was being abused. (80 RT 17299.) Shari believed that Tyler would get better from the medication Dr. Leidheiser gave her. (80 RT 17299.) Shari administered Tyler's prescribed medication and scheduled a follow-up appointment. (80 RT 16991-16992.)

I. November 14, 1994

There were occasions that Shari had to cancel doctor appointments for Tyler because appellant's pickup truck was not working. (80 RT 16978, 16953; 79 RT 16930.) The truck would work other times and did not break down when appellant had plans, such as his physical therapy. (80 RT 16953-16954.) Shari told her father about the missed doctor's

appointments, and Albert fixed the truck on November 14, 1994. (80 RT 16955, 16995; 79 RT 16921-16922.) Albert and appellant discussed Tyler's need to attend his doctor's appointments. (79 RT 16899-16900.) Albert told appellant that he would fix the pickup truck because Tyler was important to him. (79 RT 16899.)

Albert saw Tyler in his crib in the front room. (79 RT 16900-16901, 16926.) Albert thought Tyler looked sick because his breathing was labored and he did not look right. (79 RT 16901, 17926.) Albert watched Tyler for about two to three minutes knowing something was wrong but not sure exactly what. (79 RT 16927.) Albert told Shari that he thought Tyler was very sick and was concerned. (79 RT 16924-16925.)

That night, appellant's friend, Jeff Moody, and Moody's girlfriend went to dinner at Shari's house and met Tyler. (75 RT 15937-15938.) Moody said Tyler cried the entire time he was there. (75 RT 15937-15938.) Appellant and Shari told Moody that Tyler had colic. (75 RT 15938.) Shari retrieved Tyler from his crib and tried to soothe him by bouncing him on her knee; it did not work and Tyler cried harder. (75 RT 15940.) Appellant told Moody that Tyler cried all the time, which bothered him, and sometimes it got to him. (75 RT 15940-15941.)

m. November 15, 1994

The morning of November 15, 1994, began with Shari getting up and taking care of Tyler. (80 RT 16996.) Appellant left for a physical therapy appointment and she and Tyler spent most of the day by themselves. (80 RT 16996.) Tyler was sleepy from the medication and still sore. (80 RT 16996.) They played peek-a-boo, did "raspberries," where Tyler would make spit bubbles with his mouth, and she stood him up on her lap. (80 RT 17209, 16998-16999.) It was a typical day. (80 RT 17000.) When

Shari changed Tyler's diaper, she grabbed his legs, held them up, and wiped his bottom. (80 RT 16997.) She did not see anything wrong with Tyler's legs and there were no deformities or floppiness. (80 RT 16997-16998.) The only grimacing or pain Tyler exhibited occurred when Shari picked him up in the chest area. (80 RT 16997.)

Regina came over during the morning while appellant was gone. (80 RT 17204; 80 RT 16996; 82 RT 17566-17567.) Tyler was in the den sleeping in his swing. (80 RT 17204; 82 RT 17566-17567.) Shari and Regina both sat on the couch in the den, watching Tyler. (82 RT 17578.) Regina went over to look at Tyler and spoke to him; he stirred but did not wake up. (82 RT 17567.) Regina stayed for 30 to 45 minutes and Tyler slept the entire time. (82 RT 17567.) Tyler was dressed in a sleeper that covered his arms and legs; the only skin she could see was his head. (82 RT 17576.)

Appellant came home in the afternoon. (80 RT 17000-17001.) Shari changed Tyler's about diaper 15 minutes before appellant arrived and his legs were normal. (80 RT 17218.) Shari put Tyler down in his crib and he started playing peek-a-boo with the bumper pad. (80 RT 17005.) Shari could hear Tyler making cooing noises and playing in his crib. (80 RT 17006-17007.)

Appellant went next-door to Daniel Cepeda's house, for about 30 to 40 minutes and then returned home. (80 RT 17007-17008.) Appellant and Shari argued about bills. (80 RT 17008, 16995.) Shari told appellant that she was going to need some money to pay bills and that if he was going to live with her then he would have to help with the bills. (82 RT 17522.) Appellant said, "[Y]eah, whatever." (82 RT 17522.) Shari told him, "[I]t's not whatever. It's something important." (82 RT 17522.) Appellant

brushed it off, as if he did not care and told her he was not going to pay anything. (82 RT 17522; 80 RT 17009.) Appellant said that Brian should be paying about $300 a month in child support. (80 RT 17009.) Appellant told Shari to call Brian and tell him that if he did not pay, then he could not see Tyler. (80 RT 17009-17010.) Tyler was still in his crib. (82 RT 17523.)

Albert called at 3:30 p.m. to check on Tyler. (79 RT 16902.) Shari and appellant raced to the phone and appellant answered it. (80 RT 17011; 79 RT 16902.) It was Shari's father, so appellant handed her the phone. (80 RT 17010; 79 RT 16902.) Shari sat down at the dinette table, and she and Albert discussed Tyler's health. (80 RT 17011-17013.) Albert testified that Shari seemed calm and concerned about Tyler. (79 RT 16903.) Through the phone, Albert could hear Tyler crying loudly in the background and then it grew fainter. (79 RT 16903.) It sounded as though Tyler was moved into another room, and then the crying stopped. (79 RT 16903-16904, 16928-16929.)

During the phone conversation, Shari watched appellant go into the living room and pick up Tyler. (80 RT 17014.) Tyler had not been crying. (80 RT 17014.) However, when appellant picked him up, Tyler started to whine and cry. (80 RT 17014, 17232.) Shari saw appellant physically motion to the master bedroom and Shari assumed that appellant wanted to put Tyler down in their bedroom. (80 RT 17014-17015.) Shari regularly situated Tyler in her bed with pillows around him if they were being too loud in the living room during his naps. (80 RT 17015.) Tyler cried while appellant carried him to the master bedroom. (80 RT 17233.) His cry sounded like he was scared and uncomfortable. (80 RT 17273-17274.) Appellant went out of her sight into the master bedroom. (80 RT 17016.) Shari still heard Tyler crying. (80 RT 17014.)

Almost immediately after taking Tyler into the bedroom, appellant came back out into the living room. (80 RT 17016-17017.) Tyler was still crying. (80 RT 17016-17017.) Shari was listening to her father on the phone. (80 RT 17017.) Shari saw appellant walk back into the master bedroom two or three times. (80 RT 17238, 17017.) She heard the creak in the floor at the threshold to her bedroom. (80 RT 17018.) Tyler was crying the entire time Shari was on the phone. (80 RT 17273, 17018.) His cries sounded like a cranky-type of cry. (80 RT 17273, 17016.)

Tyler's cries changed when appellant went back into the master bedroom for the second or third time, growing louder, more robust, and Shari thought they sounded "more painful." (80 RT 17019-17020, 17273-17274.) Then Shari heard a type of cry she had never heard before. (80 RT 17273-17274.) She heard a creak in floor again and then Tyler stopped crying. (80 RT 17019.)

Shari told her father that Tyler had stopped crying and said that maybe Tyler finally had gone to sleep. (80 RT 17019.) Within seconds, appellant called out her name. (80 RT 17019.) Shari yelled back, "What?" (80 RT 17020.) She did not hear anything for several seconds and then told her father to hold as she put the phone down. (80 RT 17020.) Shari walked toward the bedroom and suddenly appellant started yelling, "Call 9-1-1!" (80 RT 17020.) Albert testified three to four minutes after he last heard Tyler crying, he heard appellant yell, "Quick, call 9-1-1, Tyler quit breathing." (79 RT 16904-16905.) Shari pointed questions at appellant while she was calling 9-1-1, but appellant was not answering. (82 RT 17524.) Shari had not yet seen Tyler. (80 RT 17020.)

Shari told the 9-1-1 operator that there was something wrong with her baby. (80 RT 17022.) The 9-1-1 operator asked what the baby looked like and Shari told her to hold on because she had to go into the back bedroom

to see him. (80 RT 17021.) Shari saw Tyler unconscious on the bed and appellant trying to do CPR. (80 RT 17022.) Appellant forcefully pushed down on Tyler's chest and started pounding his fists on Tyler's chest. (80 RT 17022.) Shari could not see Tyler's color so she turned on the light and noticed that he was bluish-purple. (80 RT 17022-17023.)

Shari picked up the phone in the master bedroom to speak to the 9-1-1 operator. (80 RT 17252.) She told the 9-1-1 operator that Tyler looked bluish-purple and the operator told her how to perform CPR. (80 RT 17023.) Shari repeated the CPR instructions to appellant, but he did not follow them and continued to strike his fists on Tyler's chest. (80 RT 17023.) The operator said to push on the chest only with the fingers. (80 RT 17023-17024.) Appellant continued to beat on Tyler's chest with his fist. (80 RT 17024.) Shari was shocked and yelled at appellant to stop, but he did not. (80 RT 17024.) The operator said to put his whole mouth over Tyler's nose and mouth, but appellant was holding Tyler's nose. (80 RT 17024.) The operator told Shari to move Tyler to a hard surface and appellant listened and moved Tyler to the dining room table. (80 RT 17024.) The operator told her to wipe Tyler's mouth, to stick in her finger just in case he was choking. (80 RT 17024-17025.) Appellant followed that instruction. (80 RT 17025.)

Appellant kept pounding on Tyler's chest with his fist and with both hands while Shari was screaming at him to stop. (80 RT 17025.) It was CPR unlike anything Shari had ever seen. (80 RT 17025.) Shari previously attended a CPR class and knew how to perform infant CPR correctly. (80 RT 17025-17026.) She kept yelling at appellant to stop hammering on Tyler's chest and to let her perform CPR on Tyler. (80 RT 17026.) Appellant would not let her; he continued to stand over Tyler and

would not let her get close enough to try. (80 RT 17026.) When the paramedics arrived, appellant immediately stopped pounding on Tyler's chest. (80 RT 17026-17027.)

(1) Paramedics Arrive

On November 15, 1994, at 4:40 p.m., Richard Sturm, a firefighter and paramedic in Bakersfield, responded to a call involving the respiratory arrest of a five-month-old baby. (81 RT 17427-17431.) They arrived within two minutes. (81 RT 17431-17432.) Sturm and the engineer, Kevin House, knocked on the front door and identified themselves as the Fire Department. (81 RT 17432.) Shari answered the door after 15 to 20 seconds, which Sturm thought was a long time for a respiratory distress call. (81 RT 17433.) He explained that typically, with these types of calls, Sturm was met at the curb by a frantically waving parent. (81 RT 17433.)

Sturm walked in and saw Tyler in a diaper lying on his back on top of on the dining room table. (81 RT 17433-17434.) Appellant was seated next to Tyler with his hand resting on his arm or shoulder area. (81 RT 17424.) Appellant was not performing CPR, was not assisting the baby in any way, and appeared to be calm. (81 RT 17435.) As Sturm approached Tyler, appellant got up and walked away into the kitchen with Shari. (81 RT 17435.)

Sturm assessed Tyler as critical because he was unconscious and nonresponsive. (81 RT 17436.) Tyler was breathing agonally, only three to five breaths per minute. (81 RT 17437.) Normal breathing for a five-month-old infant is 30 breaths per minute. (81 RT 17437.) Tyler's pulse was 70 to 80 beats per minute and the normal range is 120 for an infant his age. (81 RT 17437.) Tyler's pupils were fixed in mid range, indicating a serious oxygenation problem or some kind of central nervous system or

head injury. (81 RT 17437.) After his initial examination, Sturm assessed Tyler's airway as open and clear and put a tube down his throat to ventilate him. (81 RT 17437.) When Sturm put the oral airway tube in Tyler, he did not choke or have any gag reflex, which indicated a serious central nervous system dysfunction. (81 RT 17437-17438.) Tyler's coloring was cyanotic -- he was beginning to turn blue from lack of oxygen. (81 RT 17441.) Sturm was so concerned with the critical status of Tyler's breathing that his first assessment did not go below the chest area. (81 RT 17440.)

The ambulance transported Tyler to Kern Medical Center as Sturm assisted Tyler. (81 RT 17449-17450.) The heart monitor registered a pulse of 30 to 40 beats per minute, which is agonal and inadequate for survival. (81 RT 17442.) Strum and the paramedics continued chest compressions and attempted to hook up an intravenous line (IV), but it was not successful. (81 RT 17443-17444.) Instead, they attempted an intraosseous line (IO), which is corkscrewed into the shinbone marrow for venous access. (81 RT 17444.) Sturm went to Tyler's right leg for the IO line, noticed a severe deformity and a little bit of swelling making the leg slightly larger than the unaffected leg, but no bruising. (81 RT 17445, 17474.) Sturm did not notice any deformity in Tyler's leg until he picked it up at the knee and saw the tibia and fibula were broken, snapped in half. (81 RT 17445-17446.) The tibia and fibula were separated, rubbing against each other. (81 RT 17446.) There was not yet any bruising to Tyler's leg. (81 RT 17446.) Only after Sturm noticed the leg fracture, did he notice some slight swelling. (81 RT 17447.) Since there was a problem with Tyler's right leg, Sturm put the IO it into his left leg instead. (81 RT 17449.)

Sturm recalled that Tyler's case was "odd," and he wrote personal notes regarding the case 30 minutes after he returned to his fire station. (81 RT 17465-17466.) Sturm wrote that Tyler's leg had severe swelling. (81 RT 17466-17467.) When Sturm was picking Tyler up, he specifically recalled seeing tears on Shari's face. (81 RT 17470.) However, Sturm put in his notes that Shari and appellant showed no emotion, which was peculiar. (81 RT 17470.) Sturm clarified that normally the parents of infants are hysterical, wailing, and sobbing. (81 RT 17470.) That is what Sturm was referring to as lacking. (81 RT 17471.) Sturm never saw any tears in appellant's eyes. (81 RT 17471.)

Appellant and Shari jumped into the truck to drive to the hospital and appellant hastily drove off. (80 RT 17030.) Shari asked appellant what he was doing because she wanted to wait for the ambulance to leave first and appellant finally stopped the truck. (80 RT 17030.) Shari told appellant that they had to go back and he just sat there for a couple of seconds and finally turned around and went back to the house to wait for the ambulance to leave. (80 RT 17030.)

When Shari got to the hospital, medical personnel did not initially tell her the severity of Tyler's injuries. (80 RT 17030-17031.) Shari spoke to police officers who informed her that Tyler had a broken leg. (80 RT 17031.) Shari was unaware that Tyler was going to die. (80 RT 17031.) She was hoping that he was going to be okay. (80 RT 17031.) Shari did not know at that point in time whether appellant had done anything to injure Tyler. (80 RT 17031.) At the hospital, appellant behaved nervously. (80 RT 17032.)

(2) Dr. Leidheiser

On November 15, 1994, Dr. Leidheiser was working in the emergency room at Kern Medical Center. (77 RT 16288.) At 5:08 p.m., Tyler arrived. (77 RT 16288-16289.) The paramedics had called en route to tell the

emergency room that Tyler was critical, intubated, and they were doing chest compressions. (77 RT 16289.) Dr. Leidheiser correctly intubated Tyler and administered medications he compared to jet fuel in order to restore his heartbeat. (77 RT 16295, 16297.) Tyler's heartbeat resumed, but Dr. Leidheiser noticed Tyler did not have any neurological reflexes. (77 RT 16342.) Dr. Leidheiser performed a detailed examination of Tyler, checking for brain activity. (77 RT 16296.) Tyler did not respond to the tests – touching the whites of his eyes and putting a Q-tip in his nose. (77 RT 16296.) Tyler's pupils did not respond to light, a significant sign that his nervous system had ceased to control vital functions. (77 RT 16296-16297.) Dr. Leidheiser opined Tyler was brain dead, as he had no neurological response. (77 RT 16297.)

Tyler's eyes exhibited retinal hemorrhages, bleeding spots in the back of the eye. (77 RT 16350.) Such bleeding is called pathognomonic and is directly related to shaking causing ruptured blood vessels. (77 RT 16350.) Dr. Leidheiser noted that Tyler had a small area of dark ecchymosis over both his right temple and superior helix, i.e., prominent outermost rim, of his right ear. (77 RT 16366.) There was an IO line in Tyler's left leg behind his knee. (77 RT 16343.) Dr. Leidheiser observed Tyler's right leg had an abnormal deformity in the tibia, midway in his calf. (77 RT 16343-16344.) The right leg was unstable with an area of pink skin, representing increased blood flow, and mild swelling. (77 RT 16344.) Dr. Leidheiser was confident the fracture occurred immediately before Tyler arrived at the hospital. (77 RT 16345.) The freshness was apparent from the pinkness of skin around the injury, indicating immediate increased blood flow during the preliminary stages of healing, combined with mild swelling. (77 RT 16346-16347, 16375-16376.) Dr. Leidheiser concluded that Tyler's leg injuries occurred within one hour or immediately before his arrival at the

hospital. (77 RT 16369-16371.) At the time of the autopsy, Tyler's leg swelled significantly and was purple in the center of the injury. (77 RT 16348-16349.) Dr. Leidheiser recalled when Tyler came into the emergency room his leg was pink in that area, not purple, and only mildly swollen. (77 RT 16349.) Based on Tyler's leg fractures, Dr. Leidheiser opined that it was a child abuse injury. (77 RT 16402-16403.)

Dr. Leidheiser had a very strong independent recollection of Tyler because he had seen Tyler three days before on November 12, 1994; additionally, Dr. Leidheiser's daughter was the same age. (77 RT 16266-16268, 16390.) Dr. Leidheiser agreed that based on the information he obtained on November 15, 1994, the ear and wrist ecchymosis he observed on November 12, 1994, were bruising due to external forces. (77 RT 16388.) Dr. Leidheiser noted one of the hallmarks of child abuse cases is bruising in various stages of healing. (77 RT 16351.)

Dr. Leidheiser interviewed appellant and Shari, both together and separately. (77 RT 16390.) Shari was overcome with grief, did not understand the gravity of Tyler's injuries, and could not process that Tyler was not likely to survive. (77 RT 16391-16392, 16356.) During her interview, she did not talk much and focused on Tyler's condition. (77 RT 16392.) When Dr. Leidheiser asked what happened, Shari said that she was on the telephone and Tyler was crying, then appellant told her to get off the phone and call 9-1-1. (77 RT 16393.) Shari seemed stunned and very upset. (77 RT 16355.)

(3) Appellant's Statements At The Hospital

Appellant was anxious and inquisitive and did not appear overcome with grief when interviewed by Dr. Leidheiser. (77 RT 16391, 16404-16405.) Dr. Leidheiser asked appellant what had happened immediately before Tyler came to the hospital. (77 RT 16257.) Appellant replied Tyler

was crying and appellant was going in and out of the bedroom while Shari was on the telephone. (77 RT 16357.) Appellant said he went to check on Tyler on more than one occasion, and abruptly, Tyler spontaneously stopped crying. (77 RT 16257.) Appellant said that he was in the bedroom with Tyler when Tyler stopped crying and became unresponsive. (77 RT 16357.) Appellant told Dr. Leidheiser that the entire time Tyler was crying until the moment he became unresponsive, Shari was in the other room on the telephone. (77 RT 16358.) Appellant said he told Shari to get off the phone and to call 9-1-1 because Tyler was not breathing. (77 RT 16356-16357.)

Appellant repeatedly stated that he did not know what was wrong with Tyler and kept asking Dr. Leidheiser if he had figured it out yet. (77 RT 16405.) Dr. Leidheiser believed appellant was asking if the doctor had discovered the abuse. (77 RT 16405.) Appellant hounded Dr. Leidheiser numerous times, asking if the doctors had figured it out yet. (77 RT 16355.) Dr. Leidheiser kept repeating that he would inform them as soon as the information was available; they were waiting on tests and x-rays. (77 RT 16355.) After several interactions, Dr. Leidheiser finally instructed appellant to go back to the waiting room. (77 RT 16355.) During these interactions, Shari remained in the waiting room. (77 RT 16355.)

Sergeant Edward Maron of the Kern County Sheriff's Office arrived at the Kern Medical Center on November 15, 1994, at approximately 6:30 p.m., and interviewed appellant. (81 RT 17354-17356.) At that time, Tyler was on life support. (81 RT 17355.) Appellant told Maron that Tyler was crying while Shari was on the telephone speaking to her father. (81 RT 17358.) Appellant said he went into Tyler's room to check on him because

he was crying, and appellant saw that Tyler was having difficulty breathing. (81 RT 17358.) Appellant described Tyler's breathing as panting. (81 RT 17358.) Appellant claimed he left the room. (81 RT 17358.) Appellant said he went back into the room and noticed that Tyler had stopped breathing. (81 RT 17358.) Appellant said he walked into the kitchen and told Shari to call 9-1-1 because Tyler had stopped breathing. (81 RT 17358-17359.) Shari hung up the telephone and called 9-1-1. (81 RT 17359.) Appellant said that Shari relayed instructions on rescue breathing and resuscitation attempts and that he followed Shari's instructions and attempted to resuscitate Tyler. (81 RT 17358.)

n. Appellant's Statements To Shari

When Shari and appellant drove home from the hospital on November 16, 1994, appellant acted paranoid, asking Shari if she was wearing a wire, and felt her body checking for one. (80 RT 17034-17035, 17309-17310.) Shari replied that she did not have a wire on. (80 RT 17035.) Shari was upset, and appellant appeared to be nervous, not upset. (80 RT 17035.) Appellant told Shari "if Tyler didn't get better, that we needed to get the fuck out of Dodge." (80 RT 17035.) Appellant said if Tyler did not make it, that he wanted all of Tyler's belongings packed up and thrown away. (80 RT 17035.) Appellant told Shari that they had to have the same story. (80 RT 17036.) Appellant asked Shari to lie to police officers and say that Tyler was not on the bed, but was on the floor. (80 RT 17035-17036, 17028.) Appellant told Shari to say that he had not touched Tyler. (80 RT 17036, 17028.) Appellant told her to lie and to say that he did not perform CPR. (80 RT 17028.) Shari told appellant that she had already told officers the truth. (80 RT 17036.)

o. Tyler's Condition

Dr. Parameswaran Aiylam was a physician specializing in pediatrics at Kern Medical Center, and on November 16, 1994, he evaluated Tyler. (76 RT 16095-16097.) Tyler was on a respirator and was nonresponsive to any painful stimuli. (76 RT 16097.) His anterior fontanel (soft spot) was bulging. (76 RT 16097.) Tyler's pupils were dilated, fixed, and did not react to light. (76 RT 16097.) Tyler had no spontaneous respirations and Dr. Aiylam could not elicit any reflexes except for Tyler's right hand. (76 RT 16098.) He had hemorrhages in his eyes and in the fundus, bleeding in both retinas, and he was very flaccid. (76 RT 16098.) There was bluish-purple bruising on the top of Tyler's right ear both in front and in back. (76 RT 16099.)

Dr. Gregg Bogost was a physician-radiologist and medical doctor at Kern Radiology Medical. (77 RT 16409-16411.) A brain death study was performed on Tyler on November 16, 1994, and Dr. Bogost interpreted it. (77 RT 16416, 16412.) Tyler's brain death study was compatible with brain death. (77 RT 16414-16415.) Dr. Aiylam also opined that Tyler was clinically brain dead. (76 RT 16100.) Dr. Aiylam concluded that Tyler had suffered total and irreversible cessation of brain function. (76 RT 16103.) Dr. Bogost agreed. (76 RT 16106; 77 RT 16416.)

Dr. Aiylam talked to Tyler's parents and told them there was nothing more that could be done for Tyler and he recommended that they turn off the respirator. (76 RT 16105.) Shari and Brian agreed. (76 RT 16105.) On November 16, 1994, Dr. Aiylam turned off Tyler's respirator at 3 p.m. and he was pronounced dead ten minutes later when his heart stopped. (76 RT 16106-16107.) Shari stayed with Tyler when he died. (80 RT 17037.) Dr. Aiylam diagnosed Tyler's cause of death as brain edema, or

swelling of the brain. (76 RT 16112.) Dr. Aiylam's discharge diagnosis included child abuse, multiple rib fractures, right tibia and fibula fractures, liver hematoma, bilateral hemothorax, subdural hemorrhages, and increased intracranial pressure. (76 RT 16112.)

Dr. Bogost found shear injuries, or diffuse axonal injuries from deceleration, and a subdural hemorrhage in Tyler's November 15, 1994, brain CT scan. (77 RT 16417-16418.) Such injuries are common in car accidents. (77 RT 16419.) Dr. Bogost opined Tyler suffered from diffuse axonal injury. (77 RT 16419.) Tyler was neurologically impaired from the moment the injury occurred. (77 RT 16419-16420.)

Dr. Bogost examined Tyler's leg x-rays which showed his right tibia and fibula x-were had nondisplaced fractures. (77 RT 16422, 16426, 16427.) Tyler's fibula suffered a buckle fracture. (77 RT 16426.) Dr. Bogost opined, based on the x-rays, that Tyler's leg fractures occurred sometime between ten minutes and possibly two to three days before the x-ray. (77 RT 16428.) The fractures could have occurred from someone grabbing the knee and ankle and then twisting the leg, or from a fall or a drop from a significant height. (77 RT 16430.)

p. Shari's Interviews With Detectives

Kern County Sheriff Detectives Ronald Taylor and Eugene Brown interviewed Shari on November 15, 1994, when Tyler was on life support, and again on November 16, 1994, after Tyler had died. (81 RT 17481-17482, 17478-17479.) Shari was cooperative during the interview and answered all questions. (81 RT 17483.) Taylor and Brown asked repetitive questions to see if Shari changed any part of her story. (81 RT 17484.) Her responses were consistent. (81 RT 17488.) Shari's one inconsistency was whether appellant told her he was taking Tyler to the back room or if she

asked appellant to take him. (81 RT 17489.) Detective Taylor never suspected Shari caused Tyler's fatal injuries. (81 RT 17493.) Shari told the detectives at least three times that she wanted to know what happened to her baby and who had caused his injuries. (81 RT 17494.)

Shari told detectives that the last time Brian had custody of Tyler was the weekend of November 4 to November 6, 1994. (81 RT 17501.) When Tyler came back, he had bruises on his wrist, fingers, and both ears. (81 RT 17501-17502.) Shari thought the bruises were about one day old. (81 RT 17502.) Shari told detectives that Tyler had bruises on his back that were not there when she got him back from Brian. (81 RT 17502.) Shari said that Tyler did not incur any new bruises except for a little one on his eye. (81 RT 17502.) Shari never thought Brian caused the bruises. (81 RT 17506.)

Shari did not blame appellant or Brian for Tyler's death during the first interview. (81 RT 17492-17493.) Shari never suggested that appellant had hurt Tyler, and told detectives that she was going home with him that night. (81 RT 17495.) She told detectives that she did not think appellant had hurt Tyler and that perhaps it was an accident. (81 RT 17495.) Shari said appellant was a "nice guy" who treated Tyler well in her presence. (81 RT 17496.)

Detective Taylor pointed out that Tyler's bruising began when appellant moved in. (81 RT 17502.) Shari told the detectives that Tyler had been bruising easily and had fingertip bruises on his back, possibly from being lifted up. (81 RT 17503.) Shari thought the fingerprint bruises were probably from her picking Tyler up, not appellant. (81 RT 17505.) Shari asked Detective Taylor if Tyler had injuries to his ribs and Detective Taylor affirmatively told her Tyler had many rib injuries. (82 RT 17511.)

Shari said Tyler had a sore chest and sore ribs since he had a respiratory infection beginning about week after Halloween. (81 RT 17504.) Shari noted that Tyler's chest was pained the past couple of days. (81 RT 17504.) Shari said she knew there was something wrong with Tyler's chest due to appellant's CPR attempts. (82 RT 17512.) Shari noticed Tyler was unusually cranky for the past week, but thought it was from teething because his gums were swollen. (82 RT 17519.) Detective Taylor asked Shari how long Tyler had been cranky when appellant was around him, and she said, [A]ll the time." (82 RT 17520.) She clarified Tyler was not cranky around appellant at first, just when he got sick later on. (82 RT 17520.)

Detective Taylor asked if anyone had been "messing with" Tyler and Shari said that appellant would go over and kiss him and she would tell appellant to leave Tyler alone so he could sleep. (82 RT 17509.) Shari told Detective Taylor that on one occasion when appellant came home, he started kissing Tyler's face and Tyler started crying. (82 RT 17510.) Shari recalled that whenever appellant kissed Tyler, Tyler would cry. (82 RT 17510.) Shari said appellant was not alone with Tyler very often because they went to bed at the same time, but appellant would wake up first in the morning and would check on Tyler. (82 RT 17527.)

Shari described how appellant performed CPR. (82 RT 17524-1726.) Shari said appellant pinched Tyler's nose and breathed into his mouth. (82 RT 17524.) Shari said appellant started pushing hard on Tyler's chest and then began slapping it. (82 RT 17524.) Appellant then struck Tyler's chest very hard with his fist about five times. (82 RT 17525.) Shari yelled at appellant to stop and listen to her CPR instructions, but he kept pounding on Tyler's chest. (82 RT 17525.) Shari said appellant was doing

everything so fast. (82 RT 17525.) Shari wanted to perform CPR because she was certified. (82 RT 17525-17526.) She told appellant not to pinch Tyler's nose but put his whole mouth over Tyler's nose and mouth; appellant did not do it. (82 RT 17526.)

Detective Taylor asked Shari if she had noticed his broken leg and she said, "No!" (82 RT 17511.) Shari was shocked and did not know how it happened. (82 RT 17511.) She had not dropped Tyler that day and had never put him in a situation where it could have happen. (82 RT 17511.) Shari said she had not seen anything wrong with Tyler's leg when she changed his diaper before appellant arrived home. (82 RT 17512.) The first time Shari heard that there was something wrong with Tyler's leg was from a police officer at the hospital. (82 RT 17512.)

On November 16, 1994, Detective Taylor told Shari during their second interview that appellant had been arrested. (82 RT 17529.) Shari again told Detective Taylor that she wanted to know who hurt her baby. (82 RT 17529-17530.) Shari said that she saw how swollen Tyler's leg was at the hospital and it was not like that when she changed his diaper. (82 RT 17540.)

Shari said she was trying to figure it out for herself and asked Deputy Taylor numerous questions. (82 RT 17530.) In her second interview, Shari said that on November 15th, when she went to see Tyler, appellant stayed in the hall. (82 RT 17536.) Brian was with Tyler and Shari said she could tell that Brian had not caused Tyler's fatal injuries. (82 RT 17536-17537.) Shari said that left one person. (82 RT 17536-17537.)

Shari told Detective Taylor about a prior incident in which appellant had told her that he had awakened in the night to find that Tyler was not breathing. (82 RT 17538.) Appellant told her that he performed CPR on

Tyler, resuscitating him. (82 RT 17538.) Shari said she did not observe the incident, appellant had only told her about it. (82 RT 17538.) Shari said after appellant woke her up, she found Tyler on the floor in the den. (82 RT 17538.) Appellant told Shari he had woken up several times that night to tend to Tyler. (82 RT 17539.) Shari told appellant that if there was ever anything wrong with Tyler, no matter what, he was to wake her. (82 RT 17539.) Afterward, Shari recalled that she just sat at the kitchen table drinking a cup of coffee, unsure if appellant was lying and whether she should believe him. (82 RT 17539.) Shari said it did not click in her head that Tyler could have stopped breathing. (82 RT 17539.)

Shari told Detective Taylor about the conversation she and appellant had the night before, when they got home from the hospital. (82 RT 17529.) Shari said that appellant had asked her if she was wearing a wire. (82 RT 17542.) Appellant told Shari that they were going to "get the fuck out of Dodge." (82 RT 17541.) Appellant pointed at Shari and told her that she better tell him the truth. (82 RT 17541.) Detective Taylor asked Shari to whom did she have to tell the truth? (82 RT 17541.) Shari answered, appellant; he had wanted to know everything that she had told police, and the look appellant had given her was frightening. (82 RT 17541-17542.) Appellant asked Shari to lie to police and tell them that he had only gone to check on Tyler two times, not three. (82 RT 17541-17542.) Appellant asked Shari to lie and say that they had been together the whole time, and that she must have been mistaken when she told them otherwise during her first interview. (82 RT 17542-17543.) Appellant told Shari that if Tyler died, he wanted all of the baby stuff out of sight immediately. (82 RT 17542.)

Shari never stated at any time, even after appellant was arrested, that appellant was responsible for killing her child. (82 RT 17544.) Detective Taylor noted that it was not until the end of the second interview that Shari realized appellant could have killed Tyler. (82 RT 17543.)

q. Shari's Testimony

Shari testified she did not squeeze Tyler's chest and did not violently shake Tyler. (80 RT 16999.) Shari testified she did not harm Tyler in any way and did not break Tyler's leg. (80 RT 16999.) Shari testified she loved Tyler and had never harmed him. (80 RT 17038.)

r. Regina Turney

There were times that Regina thought Shari was not acting like a good mother. (82 RT 17568.) When Regina was interviewed by defense counsel investigators and said negative things about Shari, she was angry, disgusted, and distraught about what happened. (82 RT 17580.) Regina had recently had her own baby, was under stress, and on an emotional roller coaster when interviewed. (82 RT 17580-17581.) Regina was acutely affected by Tyler's death because she had visited him the day he died and she felt guilty that she had not held him. (82 RT 17580.) Regina was angry that Shari had let appellant move into her house. (82 RT 17580.)

Regina did not recall telling the investigators that Shari did not appear to be happy about having a child or being pregnant. (82 RT 17569.) Regina did recall that Shari smoked during her pregnancy. (82 RT 17569.) Throughout the time Regina has known Shari, she thought Shari was lazy. (82 RT 17581.)

In February of 1994, Shari and Tyler spent a night at Regina's house. (82 RT 17569.) The following morning, Tyler woke up next to Shari crying, but Shari did not pick him up and appeared to continue to sleep. (82 RT 17569-17570, 17572-17575.) Regina picked Tyler up and fed him a bottle. (82 RT 17569-17570.) Regina said that if her baby had screamed that loudly, she would not have been able to ignore it. (82 RT 17570.) Regina felt the family was irritated that Shari was not an attentive mother. (82 RT 17571.) Regina was bothered that Shari never showed any grief at Tyler's funeral. (82 RT 17572.) Shari just talked about suing appellant for money. (82 RT 17572.)

The day that Shari told Regina about appellant reviving Tyler with CPR, Regina called later to check on Tyler and see what the doctor had said. (82 RT 17584.) Shari said she could not take Tyler to the doctor because appellant's truck was not running. (82 RT 17584.)

s. Tyler's Autopsy

On November 18, 1994, Dr. Dollinger performed an autopsy on Tyler. (79 RT 16786-16787.) He had previously done autopsies on infants where the cause of death was Shaken Baby Syndrome. (79 RT 16786.)

Tyler's height and weight were average at 25.5 inches long and 15.75 pounds; he appeared to be well fed and properly nourished. (79 RT 16787-16788.) During Tyler's autopsy, Dr. Dollinger removed all of the organs and weighed them. (79 RT 16796.) The brain was swollen and weighed at the upper limit of normal, but still within the normal range. (79 RT 16796.) There was no evidence, besides slight pneumonia related to the chest wall trauma, that Tyler suffered from any disease that attributed to his death. (79 RT 16796.)

Externally, Tyler's body presented with notable swelling on the right leg and an apparent fracture. (79 RT 16790.) Tyler's leg fractures were very recent. (79 RT 16801-16802.) Dr. Dollinger initially thought in 1994 that the leg fractures were over 72 hours old, but he revised his opinion. (79 RT 16802.) Dr. Dollinger noted that the yellowing in the leg fractures could be seen as early as 18 hours after the injury, while he initially thought in 1994 the yellowing he found occurred three to four days after the injury. (79 RT 16802-16803.) It was possible that Tyler's leg injury occurred immediately before coming to the hospital, approximately 22 hours before Dr. Dollinger saw him for the autopsy. (79 RT 16804.)

There was a small area of bruising to the right shin, tibia and fibula. (79 RT 16793.) There was a very small area of ecchymosis on Tyler's left eyelid, measuring eighth one of an inch. (79 RT 16794.) Dr. Dollinger did not describe the ecchymosis in Tyler's ear in the autopsy report because he thought it was from postmortem lividity. (79 RT 16791, 16812.) Dr. Dollinger could not determine at the autopsy whether Tyler's left ear was bruised. (79 RT 16791-16792.) However, based on the medical reports from November 12 and 15, 1994, he concluded Tyler's left ear was consistent with a bruise as opposed to postmortem lividity. (79 RT 16792.)

There was evidence of a blow to the back of Tyler's left side of the skull, reported as a contusion. (79 RT 16814.) Tyler's scalp had a contusion on the left side. (79 RT 16851.) It likely occurred when Tyler was shook and the left side of his head made contact with a hard object. (79 RT 16851.)

The internal head examination revealed a bruise on the left posterior scalp and a subdural hemorrhage in the cranial vault. (79 RT 16794.) A subdural hemorrhage occurs beneath the dura but on the surface of the brain. (79 RT 16795.) Tyler suffered a hemorrhage around his optic

nerves right up to his eyeballs. (79 RT 16795.) On the base of the temporal area, there was also a subarachnoid hemorrhage, which occurs in the thin membranous covering of the brain and is directly on the brain itself. (79 RT 16795.)

Tyler suffered retinal hemorrhages. (79 RT 16796.) Dr. Dollinger explained that the retina triggers nerve impulses in the back of the eyeball. (79 RT 16787.) Characteristically, in an infant, retinal detachment causing hemorrhaging occurs in Shaken Baby Syndrome because of the back and forth movement with the eyeball on the end of the optic nerve, which acts like a yo-yo. (79 RT 16797.) Such a hemorrhage occurs in the optic nerve where it ramifies out on the back of the eyeball. (79 RT 16797.) The retinal hemorrhages were not grossly apparent and were seen later in microscopic findings. (79 RT 16805.) The optic nerve damage was obvious based on a surface view. (79 RT 16805.)

Tyler's brain was swollen and generally softened, commonly seen in brain death when the brain is severely damaged. (79 RT 16805.) Dr. Dollinger took some brain tissue for microscopic slides. (79 RT 16805-16806.) Dr. Dollinger found hemorrhages on the back and base of Tyler's brain in the left and right parietal and occipital areas. (79 RT 16834-16835, 16840.) Dr. Dollinger opined that Tyler's subdural bleeding continued once inflicted and did not stop. (79 RT 16837-16838.)

The internal examination of Tyler's chest revealed numerous rib fractures, 19 fractures to his left side, and 21 fractures to his right side. (79 RT 16794.) Dr. Dollinger removed Tyler's rib cage and directly observed the fractures. (79 RT 16797.) The rib fractures tended to be bilateral, symmetrical on both sides of the rib cage. (79 RT 16799.) Dr. Dollinger explained he would defer to a forensic anthropologist for the

precise dating of Tyler's rib fractures. (79 RT 16798, 16820.) However, he would not necessarily defer the amount of rib fractures, which Dr. Dollinger found to be 40. (79 RT 16821.) Dr. Dollinger observed areas where Dr. Walker, a forensic anthropologist, had failed to note a rib fracture, and some areas where Dr. Walker noted fracture that Dr. Dollinger did not. (79 RT 16832.)

Dr. Dollinger did a general dating finding three periods in which the rib fractures occurred: 1) fresh fractures, no more than two days old; 2) fractures three to four days old; and 3) fractures seven to ten days old. (79 RT 16801, 16798.) Dr. Dollinger made this conclusion without microscopic examination, just a surface view. (79 RT 16801.) Two rib fractures near the spine, the tenth and eleventh ribs, were fresh fractures with brand-new hemorrhages. (79 RT 16798.) The other fractures to the back and front of the rib cage were several days old, showing yellow discoloration - 72 hours or older, in Dr. Dollinger's opinion. (79 RT 16798-16799.) Numerous rib fractures on both sides were healing fractures with thickened callus formation, which demonstrates a variable age differential, but likely seven to ten days old, the oldest of the fractures. (79 RT 16799.) Dr. Dollinger explained that when a rib is fractured, the soft tissue has varying degrees of hemorrhage, helping to age the fractures. (79 RT 16797-16798.) As the bone heals, it develops a callus, a thickened swelling of the bone. (79 RT 16798.)

The mechanism of Tyler's rib injuries was from adult fingertips pressing his rib cage causing fractures and the thumbs on the front causing fractures. (79 RT 16800-16801.) As the chest was compressed, fractures also occurred on the lateral portion of Tyler's ribs. (79 RT 16801.) When there is multiple squeezing of a child's chest, it is possible to cause

different fractures to different areas. (79 RT 16801.) Based on the amount of rib fractures Tyler had, Dr. Dollinger said he would be surprised if there was no evidence of physical pain displayed by Tyler along with whimpering or crying. (79 RT 16833-16834.)

In 1994, Dr. Dollinger had opined that Tyler's leg fractures were over 72 hours old. (79 RT 16815.) That is, 72 hours from the time of injury to the time Tyler's heart stopped beating. (79 RT 16815.) At the time of trial, Dr. Dollinger opined Tyler's leg fractures were consistent with having occurred immediately before presenting at the hospital because there was no apparent bruise on Tyler's leg when he arrived. (79 RT 16815-16817.)

In 1994, Dr. Dollinger concluded Tyler's cause of death as traumatic encephalomalacia due to subdural hemorrhage from blunt-force trauma consistent with shaking, closed-head trauma. (79 RT 16804.) However, in 1994, when he conducted the autopsy and report, Dr. Dollinger was not familiar with the term "diffuse axonal injury." (79 RT 16806.) Several pathologists were unaware of diffuse axonal injury in 1994. (79 RT 16811.) Dr. Dollinger first became familiar with diffuse axonal injury literature from 1996 to 1997. (79 RT 16845.) Dr. Dollinger testified that in retrospect, if he signed the death certificate at the time he testified in 2000, instead of stating that the brain injury was due to a subdural hemorrhage, he would conclude that the brain injury and subdural hemorrhage were due to blunt-force trauma consistent with shaking. (79 RT 16808.) Based on the newer information on diffuse axonal injury, Dr. Dollinger explained that Tyler would have become unconscious immediately after the shaking and the diffuse axonal injury caused the respiratory failure in Tyler. (79 RT 16180-16181, 16844.) Dr. Dollinger opined that the term Shaken Impact Syndrome, as opposed to Shaken Baby Syndrome, is more applicable to Tyler because he had a contusion on his scalp along with a hemorrhage. (79 RT 16847.)

t. The Forensic Pathologist

Dr. Frank Sheridan was board-certified in neuropathology and forensic pathology and had performed over three thousand autopsies. (74 RT 15724, 15694.) Dr. Sheridan had performed many autopsies on infants or children who suffered from Shaken Baby Syndrome and testified many times regarding the syndrome. (74 RT 15731.) Dr. Sheridan prepared his report regarding Tyler on November 6, 1997. (74 RT 15801.) Dr. Sheridan was not present for Tyler's autopsy and did not personally view his body. (74 RT 15781-15782.)

Dr. Sheridan explained that Shaken Baby Syndrome is the collection of particular injuries in the head area that are indicative of the child having been shaken violently. (74 RT 15728.) The injuries are caused by a rapid acceleration/deceleration of the head and the intracranial structures of the head, generally the brain. (74 RT 15728.) First, there is a subdural hematoma or subdural hemorrhage, followed by a subarachnoid hemorrhage, which is a layer deeper in the dura. (74 RT 15728.) There is often injury to the eyes in the form of a retinal hemorrhage in the optic nerve at the back of the eye. (74 RT 15728.) Most importantly, there is injury to the brain itself, called diffuse axonal injury. (74 RT 15728.) These groups of injuries are often found together and are indicative of the head being put through a severe, violent acceleration/deceleration. (74 RT 15728.) In a majority of cases, there is also evidence of impact to the head, at least one blow, and typically to the back of the head. (74 RT 15728.) The victims are usually very small children, with a great majority being under six months old. (74 RT 15731.) The basic concept is that the child is picked up, typically by the torso under the armpits forward facing, and then shaken violently backwards and forwards. (74 RT 15732.) The result is

the head is whiplashed back and forth at a certain velocity, which is the acceleration/deceleration. (74 RT 15732.) When there is also an impact to the head, there is considerable rise in the G force, greatly exacerbating the situation. (74 RT 15732-15733.)

The dura membrane adheres to and lines the inside of the skull; it is a tough, parchment-like membrane. (74 RT 15733.) After the dura is the arachnoid, a very smooth and thin membrane lining the brain. (74 RT 15733-15734.) In other words, starting from the outside you have the skin, scalp, skull, dura, arachnoid, then the brain. (74 RT 15734.) The arachnoid is attached to the brain and the dura is attached to the inside of the skull. (74 RT 15734.) The only other connections inside the skull are blood vessels or bridging veins that go from the top of the brain up and out to the dura to the central vein or sinus. (74 RT 15734.) When the head is subjected to such violent movement, the brain, not being attached to the inside of the skull, is also moving violently. (74 RT 15734.) Dr. Sheridan analogized the movement to being inside a vehicle and slamming on the brakes – you move inside the car in relation to the vehicle's movement. (74 RT 15734.) This causes the brain to move violently and pulls on the veins, causing them to drag or pull out of their normal positions and bleed. (74 RT 15734.) Torn bridging veins results in bleeding in the subdural space between the dura and arachnoid. (74 RT 15735.) In shaken baby cases, a majority of the bleeding occurs in the subdural space, causing a subdural hematoma. (74 RT 15735.)

This type of injury is documented from direct observation during the autopsy, and the injury is apparent when you open the skull because there is blood in a layer where none should be. (74 RT 15735-15736.) If there is an accompanying subdural hemorrhage, small dots appear along the

bridging veins. (74 RT 15736.) Dr. Sheridan described it as very recognizable. (74 RT 15736.)

In Shaken Baby Syndrome, eyes suffer from retinal hemorrhage or optic nerve hemorrhage. (74 RT 15736.) The retina is the light sensitive part of the eye. (74 RT 15736.) It lines the back of the eye and transmits light back to the brain. (74 RT 15736.) Shaking the head severely pulls on the optic nerve's blood vessels, causing hemorrhage in the retina and along the nerve. (74 RT 15737.) In order to document retinal hemorrhage, one removes the eyes, which is a standard part of a child autopsy for trauma. (74 RT 15737-15738.) Damage to the optic nerve and retina is significant in the diagnosis of Shaken Baby Syndrome because it is observed in a great majority of cases and is explainable from the acceleration/deceleration. (74 RT 15738.) The subdural hemorrhage, optic nerve hemorrhage, and retinal hemorrhage are not the cause of death in Shaken Baby Syndrome. (74 RT 15739.)

The third area of damage is to the brain itself, which leads to fatal injury. (74 RT 15739-15740.) The fatal injury to the brain occurs because infants have softer brains than adults due to higher water content. (74 RT 15740.) Dr. Sheridan analogized the brain to a plate of Jell-O that has not set very well. (74 RT 15740.) Subjecting the malleable Jell-O to violent deceleration action causes it to become deformed and temporarily distorted. (74 RT 15740-15741.) The deeper parts of the brain are made of billions of axons and nerve fibers, which run up and down from the outer part of the brain converging towards the brain stem. (74 RT 15741.) The axons are very delicate fan-like structures. (74 RT 15741.) The stress and distortion from the shaking tears numerous axons over much of the brain all at once, causing severe and widespread neurological injury. (74 RT 15741.) The

child typically dies day within a day or so after receiving such an injury, and the brain will have swollen because of the injury. (74 RT 15741.) During the autopsy when the brain is sectioned and examined under a microscope, there are tiny hemorrhages or injuries to the capillaries, or small blood vessels, running amongst the axons throughout the brain. (74 RT 15741-15742.)

The stress of acceleration/deceleration in Shaken Baby Syndrome tears the axons disrupting the flow of information. (74 RT 15743.) If the blood vessels in the area of the brain are torn, then the axons are also likely torn. (74 RT 15743.) This injury immediately disrupts the function of axons, leading to unconsciousness. (74 RT 15744.) There result is major disruption of brain function and widespread injury, and then, over a period of time, the brain will swell resulting in cerebral edema. (74 RT 15744.) Fluid exudes out into the spaces between the axons, and it is this cerebral edema, the swelling of the brain, which is fatal. (74 RT 15744.) If the child dies within 24 hours after the initial injury, then the autopsy will reveal a swollen brain. (74 RT 15745.) If the child survives a few days after the injury, then the axons will attempt to repair themselves as the broken part dies off and disintegrates – these are referred to as axon balloons. (74 RT 15745.) Tyler had no axon balloons because he died so soon after the injury. (74 RT 15766.)

The shaking must be violent and inflicted with a great deal of speed and force to produce such injuries. (74 RT 15749.) Shaken Baby Syndrome is never an accident. (74 RT 15749-15750.) In a majority of cases, there is no injury to the child's neck because the neck is not fully developed and is floppy. (74 RT 15750.) As soon as this injury occurs, there is a disruption of the axonal system, causing major and immediate

impairment of neurological function. (74 RT 15755.) The child will immediately lose consciousness and becomes semi-comatose. (74 RT 15756.) Injuries consistent with Shaken Baby or Shaken Impact Syndrome include some type of squeezing or holding onto the child in the chest area. (74 RT 15803.)

Dr. Sheridan opined that Tyler's fatal injuries occurred from Shaken Impact Syndrome, with diffuse axonal injury as the mechanism of death. (74 RT 15761.) There were impact injuries to Tyler's left side of his scalp, behind and slightly above his ear. (74 RT 15800.) Tyler's injuries included a subdural hemorrhage, subarachnoid hemorrhage, swollen brain, hemorrhage around the optic nerves, and retinal hemorrhage. (74 RT 15800, 15762.) Dr. Sheridan opined shaken impact syndrome defined the cause of Tyler's death. (74 RT 15801.)

Dr. Sheridan testified Tyler did not have a lucid interval and would not have cried in any normal manner after he was shaken. (74 RT 15761.) All of Tyler's injuries were clearly fresh and he was pronounced dead within 24 hours of the 9-1-1 call. (74 RT 15762.) The photograph of Tyler's subdural space around his brain was significant because it showed blood in the subdural space and a swollen brain. (74 RT 15762.) Dr. Sheridan saw partially clotted blood dispersed in his subdural space – the blood was fresh. (74 RT 15775-15776.) There were several small areas of subarachnoid hemorrhage extending over the top of both cerebral hemispheres, between them, and around the sides. (74 RT 15776-15777.) Tyler's subdural space was typical for a child who dies so quickly; it was spread out and not big enough to form a big mass depressing the brain. (74 RT 15763.)

Polymorphonuclear leukocyte (PMN) cells are the beginning of inflammation, and the body's first reaction to an injury; they form within hours, but not immediately. (74 RT 15789.) Dr. Sheridan did not see prominent PMN cells in Tyler's microscopic slides. (74 RT 15789, 15791.) The presence of hematoma in the one skeletal slide indicated that the injury was more than a day or two old, but there was also fresh blood in that area too. (74 RT 15792-15793.) That slide indicated an old injury, at least a few days old, along with a new injury. (74 RT 15794-15794.)

When Tyler was admitted to the emergency room, he had to be reintubated because the initial intubation tube done by the paramedic was inserted into his esophagus, eating pipe and not his breathing pipe. (74 RT 15845.) Dr. Sheridan did not believe that mistake made any difference in Tyler's case because his condition was so poor when the paramedics arrived and the severity of his head injuries made survival unlikely. (74 RT 15845.)

There were no old injuries on the microscopic slides of Tyler's brain. (74 RT 15846.) Some injuries to Tyler's ribs were more than a few days old. (74 RT 15847.) Based on the autopsy report, one rib had previously been fractured and then fractured again later. (74 RT 15847.) Based on Dr. Sheridan's expertise and experience, he opined that the most common cause of abusive death in infants is from Shaken Baby Syndrome. (74 RT 15772.) Tyler's death falls into the most common kind of fatal child abuse for children his age. (74 RT 15773.)

u. The Forensic Anthropologist

Dr. Phillip Walker was a physical anthropologist. (79 RT 16686-16687.) He specialized in researching forensic anthropology on traumatic skeletal injuries associated with child abuse and interpreting the evidence in

order to reconstruct what happened to the child. (79 RT 16689-16690.) Dr. Walker had examined how bones heal and change in thousands of skeletons, many of them infants. (79 RT 16776.)

Dr. Walker was consulted in 1997 to study Tyler's bones to try to determine when the rib and leg fractures occurred. (79 RT 16698-16699.) To do this, Dr. Walker would perform maceration, that is, cooking the remains at a low temperature until the soft tissue is removed and he can see the surface of the bone. (79 RT 16699-16700.) He explained that radiologists are not able see the actual changes that bones undergo; they see only a two-dimensional shadow of the bones, whereas he looked at Tyler's actual bones. (79 RT 16726.) Dr. Walker studied bones to determine the various stages of healing around fractures. (79 RT 16700.) A child's bone fracture repairs more rapidly than adults bone fracture. (79 RT 16708-16710.) The older a fracture becomes the less accurate the dating. (79 RT 16730.) When a person dies immediately after a fracture, there will be no remodeling of the bone whatsoever; it will be a fresh break. (79 RT 16700.)

Dr. Walker examined Tyler's ribs, but not the entire rib cage. (79 RT 16702.) He did not macerate all the ribs, but created a chart of the rib fractures. (79 RT 16702-16703.) Dr. Walker grouped Tyler's ribs into four categories: recent fractures with minimal healing, older fractures with gross healing, ribs with new bone forming but without a fracture, and greenstick fractures with signs of healing. (79 RT 16704-16705.) Greenstick fractures are fractures that do not go all the way through the bone, which is common in children because their bones are flexible. (79 RT 16705.)

Dr. Walker opined that Tyler's rib fractures occurred when someone grabbed and compressed his chest, and shook him. (79 RT 16714.) Tyler's rib fractures were classic from multiple squeezing or shaking abusive injury. (79 RT 16715, 16773.) Some of Tyler's recent rib fractures varied in age showing more evidence of healing. (79 RT 16733.) Dr. Walker opined that the recent fractures had occurred within a few days of death. (79 RT 16707.) There was some healing in Tyler's rib fractures, but no healing in the leg fractures, which indicates that the rib fractures occurred sometime before the leg fractures. (79 RT 16741.)

Dr. Walker opined that Tyler's tibia fracture was an angular fracture that went all the way through the bone, and is commonly found in child abuse cases. (79 RT 16716.) The fibula had a greenstick fracture that did not go all the way through the bone. (79 RT 16717.) Tyler's fibula was bent, and retained that bend when Dr. Walker examined it. (79 RT 16717.) Dr. Walker opined that there was no evidence of healing in the tibia or fibula. (79 RT 16718.) He concluded that the tibia and fibula fractures occurred immediately before Tyler entered the hospital. (79 RT 16718-16719.)

v. Tyler's X-rays

(1) Dr. Donal Cornforth

Dr. Donald Cornforth was a diagnostic radiologist who studied radiographic procedures and films, such as x-rays. (76 RT 16070-16077.) Dr. Cornforth read Tyler Ransom's chest x-ray from his emergency room visit on August 10, 1994, and prepared a report. (76 RT 16075-16076.) Tyler's diagnosis from his treating physician indicated that he was suffering from congestion. (76 RT 16076.) Dr. Cornforth concluded that Tyler's

x-ray indicated normal bony and soft tissue structures, but the lung markings indicated congestion along with mild pneumonia. (76 RT 16077.) The diagnosis was a lower respiratory tract infection. (76 RT 16078.) All of Tyler's rib bone structures were normal. (76 RT 16078.)

On September 28, 1994, five weeks later, Tyler Ransom visited the emergency room again and was given another chest x-ray. (76 RT 16078-16079.) Tyler was suffering from breathing problems and the x-ray indicated lung markings. (76 RT 16079.) Dr. Cornforth compared the August 10, 1994, and September 28, 1994, x-rays, and opined that the findings were identical – the ribs, spine, and bone structures were normal and unchanged. (76 RT 16080.) Dr. Cornforth found no fractures or injuries on Tyler's two x-rays. (76 RT 16081.)

Dr. Cornforth examined an additional x-ray of Tyler's chest from November 12, 1994. (76 RT 16089-16090.) He noticed an apparent new rib fracture on the sixth lateral rib, but there were no healing fractures from an earlier injury. (76 RT 16090-16091.) In other words, if there had been a fracture on September 28, 1994, there would have been a noticeable healing callus on the November 12, 1994, x-ray. (76 RT 16091.) Based on the November 12, 1994, x-ray, Dr. Cornforth opined that there were no prior rib injuries in the September 28, 1994, x-ray. (76 RT 16091.) The only rib fracture Dr. Cornforth saw on the November 12, 1994, x-ray was to Tyler's sixth lateral rib; it was displaced and was not very obvious. (76 RT 16091-16094.) Dr. Cornforth said there may have been more fractures, but he was not able to see them because if they had occurred several days earlier, they would not be noticeable on the x-ray at the time because the healing process had not begun. (76 RT 16092.) In children, the callus or healing process can take from five days to two weeks to begin. (76 RT 16092-16093.)

(2) Dr. Kevin Rice

Dr. Kevin Rice was a board-certified radiologist who examined images from x-ray films, ultrasounds, CTs, and MRIs in order to make a diagnosis. (76 RT 16187-16188.) Dr. Rice personally remembered reading Tyler's x-rays because of the extent and severity of the injuries. (76 RT 16189-16190.) After reviewing Tyler's x-rays and medical chart, Dr. Rice became aware it a child abuse case. (76 RT 16196.) Dr. Rice had separate bone x-rays taken after Tyler died in order to look for child abuse fractures. (76 RT 16198-16199.)

Tyler's postmortem x-ray of his right leg showed a transverse fracture through the mid-shaft of the tibia and a buckle fracture through the mid-shaft of the fibula. (76 RT 16200-16201.) The fractures were consistent with child abuse. (76 RT 16202.) Typically, such fractures would be caused by a direct blow or, less likely, by twisting. (76 RT 16202-16203.) The leg fracture was acute and less than 10 to 14 days old. (76 RT 16212.)

Tyler suffered multiple rib fractures. (76 RT 16210.) His right side had fractures on the third, fifth, sixth, seventh, ninth, and tenth ribs. (76 RT 16210.) There was also pleural effusion, i.e., fluid between the ribs and lungs. (76 RT 16210.) The left side also had multiple fractures, including the ninth rib. (76 RT 16209.) Typically, these rib fractures are caused by an adult squeezing the baby's chest. (76 RT 16211.) Dr. Rice opined that the rib fractures were recent and less than eight weeks old. (76 RT 16211.)

Dr. Rice also looked at a CT scan of Tyler's brain and abdomen. (76 RT 16213.) The CT scan revealed that Tyler had pleural effusion between the lung and right ribs. (76 RT 16216.) His ninth and tenth ribs were fractured posteromedially, that is, in the back and close to the spine. (76 RT 16216.) Tyler's liver suffered from either a hematoma or a

laceration. (76 RT 16216.) The liver injury could have occurred from blunt force trauma. (76 RT 16217.) Tyler's head CT scans showed an extensive subdural hematoma, meaning blood underneath the dura or one of the coverings of the brain, on the left side of the tentorium cerebella (back part of the brain or cerebellum). (76 RT 16218.) There was also a subdural hematoma on the left posterior or upper back part of Tyler's skull. (76 RT 16218.) There were no skull fractures. (76 RT 16219.)

(3) Dr. Ronald Cohen

In 1998, Dr. Ronald Cohen, a pediatric radiologist, reviewed Tyler's chest x-rays and medical records. (77 RT16299-16304.) Dr. Cohen opined that on November 12, 1994, Tyler had numerous rib fractures. (77 RT 16315.) The November 12, 1994, x-ray of Tyler showed swelling or fluid along Tyler's right chest wall along with several fractures. (77 RT 16305.) There was a fracture to the sixth left lateral rib, fractures of the right, third, fourth, and fifth ribs, and a subtle fracture of the right fourth rib posteriorly. (77 RT 16305.)

Dr. Cohen also opined that on November 15, 1994, Tyler had numerous newer rib fractures. (77 RT 16315.) The November 15, 1994, x-ray of Tyler's chest showed some evidence of healing or callus formation to the right lateral fractures. (77 RT 16305-16306.) Callus formation or periosteal new bone is first seen at seven to ten days after an injury. (77 RT 16306.) It was easier to see the healing on November 15, 1994, than on November 12, 1994, making it consistent with an injury approximately 10 to 14 days earlier. (77 RT 16305-16306.) Dr. Cohen explained that after a fracture occurs there is a healing response and new bone connects at the fracture site concentrically around the rib. (77 RT 16307.) The healing begins subtly, but over a few weeks, it becomes more pronounced. (77 RT 16307.) In Dr. Cohen's opinion, the lateral rib fractures occurred 10 to 14 days before November 15, 1994. (77 RT 16308.)

Tyler's rib fractures where in various states of healing, which indicated that he was squeezed on more than one occasion. (77 RT 16322.) There was also some sign of early periosteal new bone in the rib fractures, but not in all of them, indicating healing was already occurring, and the injuries occurred at least seven to fourteen days before the x-rays. (77 RT 16322-16323.) The November 12, 1994, x-ray showed at least three or four right lateral rib fractures, at least one fracture of the right posterior rib, and several fractures of the left lateral ribs. (77 RT 16323-16324.) Dr. Cohen testified that the rib fractures occurred several days earlier, based on the amount of swelling in the soft tissues and the fluid in the lungs. (77 RT 16325-16326.)

The chest x-rays indicated fractures that are common in child abuse. (77 RT 16313.) Such injuries commonly result from a squeezing by adult hands. (77 RT 16313.) Dr. Cohen explained that when an infant's chest is squeezed, there is a fulcrum that causes the ribs to bend in various locations, either in the paraspinal region or posteriorly. (77 RT 16313.) Occasionally, the lateral ribs and anterior rib ends can be fractured. (77 RT 16313.) When an infant is held and squeezed, there can be more than one fracture that occurs down the rib cage. (77 RT 16313.) Tyler's chest x-ray injuries were consistent with such child abuse squeezing. (77 RT 16313.) Dr. Cohen has found in his practice that child abuse squeezing and shaking are typically found in unison. (77 RT 16313-16314.) Dr. Cohen was not able to determine how many times Tyler was squeezed. (77 RT 16323.) Tyler's rib fractures were not consistent with CPR injuries, even if CPR had been performed improperly. (77 RT 16314.) The rib fractures along the spine do not occur from CPR because when a child is lying flat, there is anterior pressure and there is no fulcrum to cause the posterior rib fractures. (77 RT 16314.)

The November 16, 1994, x-ray indicated Tyler's right tibia and fibula were deformed. (77 RT 16309.) Dr. Cohen pointed out that the mid-shaft of the right tibia was fractured with some mild deformity in the posterior angulation, and some lateral angulation of the lower segment. (77 RT 16310.) The fibula was fractured through one side of the cortex, or outer layer of tissue. (77 RT 16310.) Such injuries are caused by bending or twisting and can be seen often in child abuse cases. (77 RT 16310.) The x-ray of Tyler's leg fractures had no sign of periosteal new bone or callus formation, indicating that the injuries were less than two weeks old. (77 RT 16312.) Dr. Cohen explained that at approximately seven to ten days after a bone fracture, periosteal new bone begins to appear. (77 RT 16310.) Dr. Cohen testified that the x-ray is consistent with Tyler's leg fractures occurring between 22 hours to 7 days before he died. (77 RT 16312.)

Tyler's right leg fractures where inflicted injuries and it was unlikely they were caused by falling. (77 RT 16317-16318.) The injuries likely caused by someone holding the leg above and below the fracture site and then turning, twisting or bending it in half. (77 RT 16318, 16339.) Alternatively, although less likely, the injuries may have occurred from someone bashing Tyler's leg across something. (77 RT 16339.) It is common in child abuse to never know the actual mechanism of an injury. (77 RT 16338-16339.) It would require a moderately large amount of force to fracture Tyler's leg in that location. (77 RT 16319-16320.) Tyler's leg was bent enough to cause a crack down the middle of the bone resulting in deformities. (77 RT 16320.) Tyler could not have caused his fractured tibia and fibula injuries to himself. (77 RT 16339.) Dr. Cohen opined that it was a violent injury. (77 RT 16340.)

w. Evidence Concerning Shari's Second Child

After Tyler's death, Shari and Brian reconciled and had a daughter named Taylor. (80 RT 17039, 17041.) Taylor was born on July 14, 1995. (80 RT 17041.) When Shari testified in 2000, she was 24 years old and pregnant again. (80 RT 16939, 17040.) The father of Shari's unborn child was Julian Holquin. (80 RT 17047.)

Several weeks before she testified, Shari had some problems at her apartment. (80 RT 17041.) Shari's bother, Brian Turney, and his girlfriend had moved in with Shari and Taylor. (80 RT 17040.) Shari used methamphetamine that her brother gave her while she was pregnant. (80 RT 17041-17042.) Shari took methamphetamine only once during her pregnancy. (80 RT 17046, 17106-17107.) Shari also smoked marijuana for several weeks while pregnant. (80 RT 17041.) Shari said that she used drugs because she was having financial difficulties and was under enormous stress about having to go through appellant's trial a second time. (80 RT 17108-17110.) Shari admitted that her illegal drug use was not a good choice. (80 RT 17042.)

Shari lived next door to a woman named Mary Reid and Reid's boyfriend, Eddie Smith (Smith. (80 RT 17042.) Shari and Smith had an affair for several weeks. (80 RT 17042.) When the affair ended, Smith moved back in with Reid. (80 RT 17042.) Reid was very jealous of Shari. (80 RT 17043-17044.) After Smith moved out, Holquin moved back in to Shari's apartment. (80 RT 17047-17048.)

Sandy Childers was a social worker for Child Protective Services (CPS). (81 RT 17317.) On April 5, 2000, Childers responded to an anonymous call regarding Shari using drugs in her home and neglecting her four-year-old child, Taylor. (81 RT 17317-17318.) Childers became aware

that Shari was the mother of Tyler, a child who had been murdered, which heightened her attention to the case. (81 RT 17319-17320.) The house was filthy and had cockroaches. (81 RT 17336.) There were dirty dishes and spoiled food in the kitchen, the entire floor in Taylor's bedroom was covered with toys, clothing, food, and dishes. (81 RT 17321, 17336.) Childers told Shari the condition of the home was unacceptable and that it needed to be cleaned. (81 RT 17323.) Smith was also living at the home. (81 RT 17320.) Childers discovered that Smith was not the biological father of Shari's unborn child and she was concerned there was a man in the house that was not the father. (81 RT 17324.)

Childers observed Shari and Taylor interact on numerous occasions and had no concern about physical abuse. (81 RT 17325, 17329-17330.) Childers stated that there was no evidence that Taylor was abused by Shari. (81 RT 17345.) Childers observed the relationship was a normal mother-daughter relationship and they had a good bond. (81 RT 17335.)

Childers asked Shari for a drug test and Shari took one the following day. (81 RT 170322-17323.) Shari told Childers that she had no problem taking a drug test because it would be clean. (80 RT 17095.) Shari testified that was a lie. (80 RT 17095.)

Childers went back to the home on April 13, 2000, because Shari's drug test results were positive for marijuana and amphetamines. (81 RT 17328; 80 RT 17048.) Childers brought a police officer with her. (80 RT 17047.) The officer arrested Shari for being under the influence (Health & Saf. Code, § 11550), misdemeanor child endangerment (§ 273a, subd. (b)), and had her tested for being under the influence. (80 RT 17063; 81 RT 17331.) Shari's drug test came back negative. (81 RT 17330-17331.) Shari was never charged for being under the influence of methamphetamine. (80 RT 17049.)

Childers noticed a different man, Holquin, was living at the house. (81 RT 17328.) In the house, Childers saw forks, pens, straws, and roach clips within the reach of the four-year-old child. (81 RT 17350.) Childers took Taylor into her custody that day because of Shari's prior positive drug test, the condition of the home, and because she was concerned about different men living in the home. (81 RT 17330.) Shari told Childers that she was clean and had not used drugs. (81 RT 17330.) Shari had a contested dependency hearing pending at the time she testified at appellant's trial. (80 RT 17088-17089.) She stated that she needed to show that she was a fit parent so she could be reunified with Taylor. (80 RT 17088-17089.)

On April 13, 2000, Taylor picked up a small object resembling an ice pick and threatened to stab Childers' co-worker. (81 RT 17327.) Childers described Taylor as strong-willed and a difficult child. (81 RT 17327-17328.) Taylor was a hyperactive and ornery. (80 RT 17078.) Taylor was also headstrong and sometimes difficult to deal with. (80 RT 17078-17079.) Taylor attended the Richardson Center for developmentally challenged children. (80 RT 17078.)

Shari's method for disciplining Taylor was with a verbal warning and if Taylor misbehaved again, she went into timeout. (80 RT 17079.) If Taylor repeated the behavior, Shari put her in the corner, and if Taylor repeated it a third time, she got a spanking. (80 RT 17079.) Shari spanked Taylor with an open hand on her buttocks. (80 RT 17079.) Shari never hit Taylor in the head, hip, or eye. (80 RT 17122-17123.) Shari never hit Taylor with an object and never caused any bruising. (80 RT 17122-17123.) Shari had never spanked Tyler. (80 RT 17125.)

Shari's apartment was near a main street and she did not allow Taylor to go outside alone because Taylor had a habit of running off. (80 RT 17079, 17080.) One time, Shari grabbed Taylor by the arm and yanked her back to stop her from running out of the house into the street. (80 RT 17080-17081.) It caused Taylor to run into the doorknob. (80 RT 17081.)

Rita Sites, Taylor's grandmother, saw Taylor on April 4, 2000, and noticed that Taylor had bruises on her hip and lice. (81 RT 17404-17406, 17409.) Rita was concerned enough to take pictures of the bruises which looked like they were not from a fall, but from a strap or something. (81 RT 17407-17408.) Rita took the pictures because she was worried that someone might accuse her of causing the bruises. (81 RT 17417.)

C. Dylan Vincent's Murder

1. People's Case

Dylan Ross Vincent was born on September 19, 1992, In New Zealand to Diane Borgsdorf. (72 RT 15416-15417.) In 1994, Borgsdorf and Dylan moved to the United States to join her brother, Ross Vincent, and his family. (72 RT 15418; 74 RT 15649, 15659-15660, 15650-15651.) Borgsdorf testified that Dylan fell often, tripping on his own feet and running into things, incurring numerous bruises. (72 RT 15476, 15479-15480.) Borgsdorf thought that Dylan veered to the left when he walked, and he commonly bumped into doorframes. (72 RT 15480.)

In 1996, Borgsdorf and four-year-old Dylan moved into an apartment with Tracey Crawford and Crawford's eight-year-old son, Zachery. (74 RT 15659-15660; 72 RT 15422, 15417.) Crawford and Borgsdorf needed help packing and moving into their apartment, so they went to the singles group at a church to ask for help. (72 RT 15424.) It was the first time appellant

was there and he and several others offered to help them move. (72 RT 15424-15425.) Crawford invited appellant over to the apartment "all the time." (72 RT 15426.) In July of 1996, Borgsdorf and appellant began a romantic relationship and he moved into the apartment. (72 RT 15426-15427.) Appellant babysat Dylan and Zachery on numerous occasions. (72 RT 15502-15503.) During that time, Borgsdorf never had any indication that appellant was abusing Zachery or Dylan. (72 RT 15503.)

In August of 1996, Borgsdorf and Dylan moved into an apartment with appellant. (72 RT 15429; 80 CT 24208.) After they moved in together, Borgsdorf said she noticed that Dylan became very quiet, had "accidents," and began to have numerous bruises. (72 RT 15474-1575, 15481; 80 CT 24254, 24232.) Borgsdorf noticed bruising on Dylan's upper body, neck, face, forehead, back, legs, ankles, and the sides of his torso. (72 RT 15474-1575, 15481; 80 CT 24231-24234, 24213, 24253.) Each time Borgsdorf asked appellant about the bruising, appellant always had an excuse, such as Dylan fell over or hit something. (80 CT 24231.) Appellant kept Dylan home from preschool often because he did not want the teachers to see Dylan's injuries. (72 RT 15483-15484.)

Borgsdorf recalled that appellant put a red mark on Dylan's neck once. (72 RT 15531.) Borgsdorf was sitting in the living room and Dylan and appellant were in the kitchen. (72 RT 15531.) Dylan misbehaved and appellant escorted him into the living room with his hand around the back of Dylan's neck telling him to tell his mother what he had done. (72 RT 15531.) Borgsdorf saw red finger imprints on Dylan's neck and she got into an argument with appellant about it. (72 RT 15531.)

On several occasions, Borgsdorf went into Dylan's bedroom during the night and found appellant with him. (72 RT 15490.) One time, appellant was sitting with Dylan while Dylan was pretending to read a

book. (72 RT 15490.) Borgsdorf told appellant to leave Dylan alone and let him sleep. (72 RT 15490.) Dylan referred to appellant as his buddy and Borgsdorf thought they had fun together. (72 RT 15528-15529.) Borgsdorf never saw any problems when Dylan and appellant interacted. (72 RT 15529.) There were times when Borgsdorf noticed that Dylan was afraid of appellant, mostly when she argued with appellant. (72 RT 15529.) Appellant was jealous of Borgsdorf's relationship with Dylan. (72 RT 15476.) Appellant told Borgsdorf he thought she babied Dylan; she noted that appellant was antagonistic when she prioritized Dylan over him. (72 RT 15476.)

About two weeks before he died, Dylan began asking his mother daily if she was okay. (72 RT 15531.) Borgsdorf thought it was another cute saying he had picked up. (72 RT 15531-15532.)

a. Townsend Design

In 1996, Borgsdorf was working as a tailor at Townsend Design. (72 RT 15421; 74 RT 15658-15659.) Borgsdorf's brother, Ross Vincent (Ross), was a supervisor there. (72 RT 15440.) Appellant had worked at Von's grocery store, but told Borgsdorf that he had quit because one of the supervisors was on a power trip and the work was too hard. (72 RT 15435; 80 CT 24209.) Borgsdorf was paying all of the bills. (80 CT 24209.)

In July or August of 1996, Borgsdorf often came into work and talked to her co-worker, Betty Rivas, about Dylan's injuries. (75 RT 15942-15943, 15948-15949, 15963.) Borgsdorf said that Dylan was clumsy and always falling and appellant told her about the falls. (75 RT 15949.) Borgsdorf said that Dylan had bruises, that they never went away, and that Dylan looked like a battered child. (75 RT 15950.) Borgsdorf told Rivas that appellant would not take Dylan to preschool because he knew the

police would be contacted regarding Dylan's bruises. (75 RT 15953.) Borgsdorf told Rivas that appellant wanted to be a stay-at-home dad, but when appellant would drop her off for work, Dylan would start crying. (75 RT 15952-15953, 15955.)

Borgsdorf told Rivas that one day she came home from work and found Dylan naked and sunburned in the backyard. (75 RT 15962, 15954.) Appellant said he had cut Dylan's hair and did not want Dylan inside getting hair all over the apartment. (75 RT 15954.) Borgsdorf told her that appellant would sometimes get mad at Dylan and take him into a room alone with the door closed to discipline him. (75 RT 15954-15955.) She said that appellant wanted to discipline Dylan his own way because he felt Borgsdorf treated Dylan like a "sissy." (75 RT 15955.) When she testified, Borgsdorf denied making such comments to Rivas. (72 RT 15485-15486.)

Rivas never told anyone else what Borgsdorf had disclosed. (75 RT 15965.) Rivas never told Borgsdorf to contact the authorities about appellant, even though she thought the incidents and bruising were serious. (75 RT 15965-15966.) Rivas did tell Borgsdorf that she should leave appellant if she did not trust him. (75 RT 15969.) Rivas did not think it was any of her business to call police. (75 RT 15969.)

b. Ross And Leslie Vincent

Ross Vincent and his wife, Leslie, stated that when Dylan lived at their house, they never observed any abnormal bruises on Dylan, and they never saw him walk into doorframes, walls, or anything of that nature. (74 RT 15656, 15660, 15663-15664.) Dylan walked normally and was not accident-prone or clumsy. (74 RT 15660, 15652.) Dylan was behind in his speech, his words were not audible or always intelligible. (74 RT 15652, 15660-15661.) Leslie observed that Borgsdorf was a good, loving mother to Dylan and she did not lose her temper with him. (74 RT 15649, 15651.)

During August and September of 1996, Borgsdorf and Ross had a good, close relationship. (74 RT 15654.) Leslie said that about six weeks before Dylan's death, Borgsdorf and Ross had a conflict. (74 RT 15654.) Borgsdorf said she got into a big fight with her brother about her jumping into a relationship with appellant so quickly. (80 CT 24218.) Ross told Borgsdorf that she was on her own and that he did not want anything to do with her. (80 CT 24218.) Ross told Borgsdorf that she had better hope the relationship with appellant worked out because he would not help her anymore, and he told her not to call. (80 CT 24219.) Borgsdorf told detectives that when she realized that Dylan was scared of appellant, because her brother had cut her off, she had nowhere to go and felt that she could not get out. (80 CT 24219.) However, Ross testified that before Dylan's death, they did not have a dispute or disagreement about Borgsdorf's relationship with appellant. (74 RT 15662.)

About one month before Dylan's death, Leslie saw Dylan and appellant sitting in appellant's pickup truck at Townsend Design. (74 RT 15655-15656.) She waved and got out of her car to say hello. (74 RT 15655.) Leslie noticed that Dylan had an abrasion on his forehead and a fat lip. (74 RT 15656.) No one discussed Dylan's injuries. (74 RT 15656.)

c. Little Life Preschool

In 1996, Joni Gaunt and Janelle Webb were preschool teachers at Little Life Preschool, and they worked with four-year-old Dylan from August through October. (74 RT 15881-15882, 15885-15886, 15899-15901.) Dylan's attendance was sporadic. (74 RT 15883, 15903.)

The teachers did not characterize Dylan as accident-prone or having lots of falls or bumps and bruises. (74 RT 15884, 15901.) Dylan did not fall down an unusual amount compared to the other children, he did not

walk into walls or doors, and they never observed him veer to the left when he walked. (74 RT 15884; 75 RT 15901-15903.) Gaunt said that Dylan moved very slowly and deliberately. (74 RT 15891.) Webb did not notice anything unusual about Dylan's physical agility. (75 RT 15902-15903.)

Gaunt never noticed any bruises on Dylan's body and never saw any signs of abuse. (74 RT 15884-15885, 15891, 15893.) Webb observed occasional bruises and bumps on Dylan's forehead. (75 RT 15902.) About one week before Dylan's death, Webb noticed Dylan had a fading, yellow bruise on the right side of his chin. (75 RT 15902-15903.) Appellant told Webb that Dylan fell getting out of the truck, hurt his left ankle, and bruised his chin. (75 RT 15910-15911.) Appellant told Webb that Borgsdorf was taking Dylan to the doctor to check his equilibrium. (75 RT 15911.)

Gaunt characterized Dylan as an incredibly sweet child, very soft spoken, and one of her best students. (74 RT 15585.) Gaunt recalled that Dylan was typically dressed inappropriately in long pants and warm long-sleeve shirts. (74 RT 15886.) She felt sorry for him because he would get hot and she thought he needed to be in shorts and tee-shirts. (74 RT 15886.)

On October 18, 1996, Dylan went to the restroom at preschool and when he came back, he pulled down his pants and told Webb that his penis hurt. (75 RT 15904, 15886.) Webb did not notice any bruises and pulled his pants back up. (75 RT 15904.) During his nap, Dylan went to the bathroom again and, upon returning did the same thing, pulled his pants down and told Webb that his penis hurt. (75 RT 15904.) When Borgsdorf came to pick Dylan up that evening, and was told about it, she said it was a good thing Dylan had a doctor's appointment that Monday. (74 RT 15887.) The preschool teachers thought Dylan might have a bladder infection. (74 RT 15889.)

d. Ben Alvarez

Ben Alvarez (Ben) is appellant's father. (75 RT 15970.) Ben helped appellant and Borgsdorf financially. (75 RT 15984-15985.) Dylan and Ben had a close relationship and saw each other almost every day. (75 RT 15985; 72 RT 15530.) Ben testified he babysat Dylan once and thought he seemed like a typical little boy, but was clumsy and tripped a lot. (75 RT 15993-15994.)

One time, Ben noticed bruises on Dylan's lip and the side of his mouth, but not his cheeks. (75 RT 15978-15979.) Ben asked appellant and Borgsdorf how Dylan got the bruises. (75 RT 15978-15979.) Appellant said Dylan tripped and hit a rug. (75 RT 15980.) Borgsdorf and appellant told Ben that Dylan was accident-prone. (75 RT 15979-15980.)

About three weeks before Dylan's death, Ben saw that Dylan had a fat lip, and he asked Dylan what had happened. (75 RT 15997, 15980-15981.) Dylan shyly said, "Daddy," and told Ben that appellant did it. (75 RT 15980-15981.) Ben testified Dylan mumbled when he answered, was slightly incoherent, and flip-flopped about what exactly happened. (75 RT 15980.) Ben asked appellant if he caused Dylan's fat lip and appellant responded that Dylan was clumsy and lost his balance and bumped into things. (75 RT 15981.) Ben thought Dylan was very small, frail, and "light as a feather" and, as such, would not hurt himself if he fell down. (75 RT 15982, 15979.) Ben told appellant and Borgsdorf to take better care of the "little guy." (75 RT 15980-15981.)

Bakersfield Police Department Detective William Bailey interviewed Ben on October 24, 1996. (71 RT 15241; 75 RT 15995-15996.) Ben testified he did not remember telling Detective Bailey that Dylan would have to be running and hit something blind in order to cause such bruising

to his lip, but acknowledged he may have said it. (75 RT 15982.) Ben did not remember telling Detective Bailey that he saw the bruise on Dylan's lip approximately two and a half to three weeks before Dylan's death. (75 RT 15997, 15982-15983.) Ben told Detective Bailey that he also saw bruises on Dylan's cheeks, but testified that he did not mean cheeks. (75 RT 15983.) He saw bruises only on Dylan's lips. (75 RT 15983.)

e. Monica Alvarez

Monica Alvarez (Monica) is appellant's older sister. (76 RT 16054.) Monica first met Borgsdorf and Dylan one month before Dylan's death. (76 RT 16054.) Monica saw Dylan several times a week. (76 RT 16055.) Dylan played with Monica's two-year-old son, Tyler. (76 RT 16055.) Monica thought Dylan was a happy little boy. (76 RT 16069.)

Appellant told Monica that Dylan had an equilibrium problem and Borgsdorf concurred. (76 RT 16057-16058.) Throughout the time Monica knew Dylan, he always had bruises or injuries. (76 RT 16058.) Dylan had a lot of fingernail marks on the back of his neck and, generally, numerous bruises on his forehead or cheeks. (76 RT 16057-16058.) Monica specifically recalled seeing injuries or bruises on Dylan three times. (76 RT 16066-16067.) One time Dylan had a scabbed nose and lip. (76 RT 16058.) Around September 30, 1996, Monica saw a bruise on Dylan's forehead, and his ankle was swollen and bruised. (76 RT 16067-16068.) Monica asked Dylan how he acquired the bruises and injuries, and Dylan repeated whatever she asked him, and then said that he fell. (76 RT 16059-16060.) Monica then asked Dylan how many times appellant had hit him and Dylan responded, "four times." (76 RT 16060.) Dylan's speech was slow for a four-year-old, but Monica was able to understand him. (76 RT 16057.)

Borgsdorf told Monica that Dylan was not regularly attending pre-school school because his bruises and injuries might arouse suspicion. (76 RT 16058.) Monica confronted appellant about Dylan not attending school the last time she saw Dylan and appellant together. (76 RT 16058-16059.) Appellant confirmed that Dylan was not attending preschool because they did not want the bruising to cause any suspicion. (76 RT 16059.)

f. Linda Persinger

On October 17, 1996, Monica brought Tyler and Dylan over to Linda Persinger's house for several hours. (76 RT 16056, 16049-16050.) Persinger and Monica watched Dylan play. (76 RT 16050, 16056-16057.) Dylan was running around the front yard, playing ball and was not unusually clumsy for his age; he did not fall down or run into anything. (76 RT 16050-16051, 16056-16057.) Persinger saw a round bruise the size of a half dollar on Dylan's forehead and a few bruises on the back of his neck. (76 RT 16051.) The bruises on Dylan's neck looked like fingerprints from someone grabbing him. (76 RT 16051.)

g. October 21, 1996 - Pediatrician

On October 21, 1996, Borgsdorf took Dylan to the pediatrician, Dr. Vincent Maddela. (80 CT 24211; 72 RT 15512, 15514, see 82 RT 17589-17615.) The doctor had Dylan completely undress, listened to his chest, and noticed Dylan was getting a throat infection. (72 RT 15514-15515.) Borgsdorf did not see any bruises on Dylan. (72 RT 15515; 80 CT 24296.) Borgsdorf asked for a complete physical, told the doctor about Dylan pulling down his pants in preschool saying his penis hurt, and said she was worried about his clumsiness. (72 RT 15514-15515.) The doctor told her that Dylan was fine, aside from the throat infection. (72 RT 15515.)

Borgsdorf explained that Dylan kept having accidents and falling, so the doctor had Dylan walk back and forth without his pants and noticed Dylan favored one side of his foot when he walked. (80 CT 24297; 72 RT 15515-15517, 15506-15507.) The doctor told Borgsdorf that Dylan possibly had a vision problem. (72 RT 15519.) The doctor scheduled an appointment two weeks later to check Dylan's vision. (72 RT 15519.) The doctor also gave Borgsdorf a prescription for Dylan's throat infection. (72 RT 15519.)

h. October 22, 1996

On October 22, 1996, when Borgsdorf got home from work appellant called for her from the kitchen; she ignored him and followed Dylan into his room to get him undressed. (72 RT 15451; 80 CT 24215.) It was the last time Borgsdorf saw Dylan naked and she did not notice anything out of the ordinary. (80 CT 24220.) Appellant became furious, screaming and cursing at her in Dylan's room because he had wanted to undress Dylan. (72 RT 15451; 80 CT 24215, 24250.) Borgsdorf told appellant to get out of her life because she had had enough. (80 CT 24216.) She told appellant to get out of the apartment and get away from her; he responded that she needed to move, not him. (72 RT 15451; 80 CT 24219.) Borgsdorf had nowhere to go and said she was "stuck." (80 CT 24219.) Appellant pushed Borgsdorf down on Dylan's bed. (80 CT 24216.) She got up and pushed him back, appellant pushed her down again, calling her stupid. (80 CT 24216.)

After the fight, appellant admitted to being very jealous of Dylan and asked her to give him just a little bit of the attention that she gave to Dylan. (80 CT 24257, 24215.) Appellant talked to Borgsdorf about her not trusting him with Dylan because every time appellant is in a room with

Dylan she was always there watching over him. (80 CT 24223.) Borgsdorf told appellant that she did trust him with Dylan. (80 CT 24223.) Appellant calmed down and told her to get ready for their dinner guests to arrive. (72 RT 15452.)

Appellant's friends, Jeff Moody and Theresa Hall, arrived for dinner. (75 RT 15913-15914, 15927.) Hall spent most of the time in the living room with Dylan watching television. (75 RT 15914-15915.) When appellant left the living room, Dylan came over to talk to her. (75 RT 15915.) When appellant came back into the living room, Dylan went back to the living room floor facing the television, moving his eyes in both directions looking for appellant. (75 RT 15917-15918.) Dylan acted very scared. (75 RT 15919.)

When appellant left the room again, Dylan smiled while showing Hall and Moody the bruises on his right neck, elbow, and left ankle; Dylan tried to say the word, "owie." (75 RT 15916, 15929-15930, 15935, 15921.) Appellant walked in and asked what they were doing. (75 RT 15932.) Moody replied that Dylan was showing them his bruises. (75 RT 15932.) Appellant explained that Dylan was rambunctious, always running around, falling, and hitting himself. (75 RT 15931-15932.) When Dylan showed Hall his neck, appellant walked over to Dylan, tilted Dylan's head to the side and put his hands over the side of Dylan's neck, covering it. (75 RT 15921-15922.)

After dinner, appellant instructed Dylan to give everyone a kiss good night. (75 RT 15920.) Dylan freely gave Moody, Hall, and his mom a hug and kiss on the cheek. (75 RT 15920.) Appellant forced Dylan to hug and kiss him too. (75 RT 15920.) Hall noticed Dylan was very scared when he walked up to appellant; Dylan pulled back, but reluctantly kissed him. (75 RT 15920.) Borgsdorf put Dylan to bed at 9 p.m. after changing him

into shorts and a tee shirt. (72 RT 15453.) She did not notice any bruises. (72 RT 15453-54.) Borgsdorf went to bed at 10 p.m. and was not sure what time appellant came to bed. (72 RT 15454; 80 CT 24274.) He was on the couch watching television. (80 CT 24274.) Borgsdorf woke up that night around 12:30 a.m. and noticed appellant was in bed with her. (80 CT 24275.)

i. October 23, 1996

The following morning everything seemed to be fine between Borgsdorf and appellant, and appellant was in a "lovey dove[y] mood." (80 CT 24276, 24222.) Appellant told Borgsdorf that he would take Dylan with him to meet his father at the mall and buy Dylan new pants. (72 RT 15455-15456.) It was too cold for Dylan to walk to preschool in shorts. (72 RT 15455.) Appellant assured Borgsdorf that he would drop Dylan off at preschool at 1 p.m. (72 RT 15455-15456.) Appellant insisted that Borgsdorf not wake Dylan up because Dylan would get upset if he knew he was not going to preschool, which he loved to attend. (80 CT 24276-24277.) Borgsdorf was running late for work and Dylan and appellant were both still in bed when she left at 7:30 a.m. (72 RT 15454; 80 CT 24222.) She did not see Dylan. (80 CT 24222.)

On her way to work, Borgsdorf stopped at the Little Life Preschool and told them that Dylan would not be in until later that afternoon because appellant was taking him shopping for winter clothes. (75 RT 15905.) Borgsdorf arrived at work at 8 a.m. (72 RT 15457.)

Appellant planned to meet his father at the mall around 10:30 or 11:00 a.m. (75 RT 15975.) At approximately 12:20 p.m., appellant called Monica trying to get a hold of their father. (76 RT 16060-16061; 75 RT 15977, 15988.) Appellant said he had been at the mall waiting for

approximately 30 minutes. (76 RT 16061.) Monica thought the background noises from appellant's phone call sounded like he was at the mall. (76 RT 16063-16064.) At Ben's request, Monica lied and said that Ben had already left for the mall, even though he was running late and still at her house. (76 RT 16061.) Appellant asked if Ben was still there and Monica admitted that he was. (76 RT 16064.) Appellant told Monica that he had something to take care of and would come back to meet Ben. (76 RT 16061-16062.) Appellant sounded impatient, as if in a hurry. (76 RT 16062.) Ben arrived at the mall at 1 p.m. and appellant and Dylan were not there. (75 RT 15977-15978, 15989-15990.) Ben stayed at the mall for approximately 35 minutes and never saw appellant. (75 RT 15990.)

During her lunch break, Borgsdorf wrote a letter to her niece in New Zealand describing Dylan as a battered child from his numerous bruises. (75 RT 15950; 72 RT 15482-15483.) Borgsdorf called home at 12:50 p.m. to see if appellant had dropped Dylan off at preschool, but no one answered. (72 RT 15533, 15500-15501; 80 CT 24222.) She clocked back into work at 12:56 p.m. (72 RT 15500, 15533-15534.)

(1) Appellant's Emergency Phone Call

On October 23, 1996, just before 2 p.m., Katie Consani was working at Townsend Design when Josie Smith, the receptionist, asked her to contact Borgsdorf regarding a telephone call from appellant. (74 RT 15673-15674.) Smith said that appellant claimed he needed to talk to Borgsdorf because it was an emergency. (74 RT 15674.) Consani delivered the message to Borgsdorf. (74 RT 15674.) Borgsdorf told Consani to tell appellant that she was busy. (74 RT 15674-15675.) Borgsdorf did not think it was a real emergency because appellant

commonly claimed there was an emergency so that she would come home. (72 RT 15524.) Consani told her she needed to take the call. (74 RT 15675.) Borgsdorf obliged and noticed appellant was panicked, telling her to hurry up and get home, it was an emergency. (72 RT 15461.) Borgsdorf said appellant screamed, "Get home! You need to get home! This is big time! You need to get home!" (80 CT 24226.) Borgsdorf could tell from his voice that something serious had happened. (80 CT 24226.) She dropped the phone and ran back to her department. (80 CT 24227.) Borgsdorf told her coworkers that something was wrong with Dylan, that she needed to go home, and asked Consani for a ride. (74 RT 15675.) Consani agreed and they left within two minutes. (74 RT 15675-15676.)

On the way, Borgsdorf told Consani that appellant had said something was wrong with Dylan that and he might need to go to the hospital. (74 RT 15677.) Borgsdorf told Consani that she took Dylan to the doctor a few days earlier because he had bruises, was tripping, and his vision needed to be tested. (74 RT 15677-15678.) Borgsdorf explained Dylan was walking pigeon–toed and she believed it was causing him to trip. (74 RT 15678.) The drive to the apartment took approximately 15 to 20 minutes. (72 RT 15464-15465.) When Consani dropped Borgsdorf off in front of the apartment, Consani looked at her automobile clock and noticed it was 2:09 p.m. (74 RT 15677.) On the way back to Townsend, Consani saw an ambulance. (74 RT 15684.)

(2) Borgsdorf Arrives

When Borgsdorf arrived home, the door was slightly ajar. (72 RT 15524, 15463.) She walked into the apartment and appellant was in the living room and panicked; he told her to call 9-1-1. (72 RT 15465, 15524-15525.) Borgsdorf wanted to go check on Dylan in his bedroom, but

appellant would not let her get near him, he pushed her away, and kept telling her to call 9-1-1. (72 RT 15465, 15469, 15527; 80 CT 24267-24268.) When Borgsdorf went to the phone in the living room, she noticed appellant had already called 9-1-1, and that the operator was on speakerphone. (72 RT 15465-15466, 15524-15525.) Borgsdorf had no idea what had happened to Dylan, and at appellant's direction, she began talking to the 9-1-1 operator. (72 RT 15466.) Appellant called out from Dylan's bedroom that Dylan was not breathing. (72 RT 15466.) Appellant said that Dylan was congested and could not breathe. (72 RT 15466-15467.) Borgsdorf was relaying this information to the operator. (72 RT 15466.) Appellant was panicked, talking fast and running back and forth. (72 RT 15527.)

The operator told Borgsdorf to tell appellant to bring Dylan out to the living room near the telephone. (72 RT 15467.) Appellant refused. (72 RT 15467; 80 CT 24268.) Appellant said Dylan was breathing, but barely. (72 RT 15467.) Appellant then told her that Dylan was not breathing. (80 CT 24266; 80 CT 24267.) Borgsdorf was repeating everything appellant said to the 9-1-1 operator. (80 CT 24267-24268.)

(3) 9-1-1 Recording

Appellant said, "We were playing. We're not in court. I was holding him up on my knees and, uh, talk to the ambulance . . . talk to the ambulance." (80 CT 24186.) Borgsdorf asked the 9-1-1 operator for an ambulance because her son was not breathing. (80 CT 24186.) The 9-1-1 operator asked her to bring Dylan to the phone. (80 CT 24187.) Borgsdorf said Dylan was breathing but his lungs were congested. (80 CT 24187.)

The operator asked, "What happened?" (80 CT 24189.) Borgsdorf said she did not know, because appellant called her at work and she just arrived home; Borgsdorf asked appellant what happened. (80 CT 24189.) Appellant said,

> Nothing. (unintelligible). He's been in bed. I've been tending to him all day long. And then all of a sudden he just, like - - I gave him something to drink and then after I gave him something to drink I went back out and he says, uh - - he didn't say nothin'. He didn't really say nothin'. He just stood there.

(80 CT 24189.)

The 9-1-1 operator asked if Dylan was breathing and Borgsdorf said yes. (80 CT 24190.) The operator asked about Dylan's coloring. (80 CT 24190.) Appellant said, "His lips are losing color." (80 CT 24190.) The operator asked if Dylan was awake or unconscious. (80 CT 24190.) Appellant said, "He's gone unconscious but he's breathing." (80 CT 24190.) The operator told Borgsdorf to pay attention to his coloring and let her know if his lips and nose get blue. (80 CT 24190.) Borgsdorf said, "It's starting to get blue." (80 CT 24190-24191.)

Borgsdorf asked appellant, "You sure he's breathing?" (80 CT 24191.) Appellant replied, "Yes, he's breathing." (80 CT 24191.) Borgsdorf asked appellant, "Is he having trouble breathing, Frank?" (80 CT 24191.) Appellant replied, "Yes he is." (80 CT 24191.) Appellant said, "It's worse." (80 CT 24192.) Appellant yelled, "Diane, come here! (unintelligible). Still breathing." (80 CT 24193.) Then appellant said, "No, he's not." (80 CT 24193.)

(4) Police Arrive

On October 23, 1996, at 2:10 p.m., Bakersfield Police Officer James Moore was dispatched to an apartment where a four-year-old child was not breathing; he arrived one to two minutes later. (71 RT 15152-15155.) Officer Moore arrived and saw Dylan on a toddler's bed. (71 RT 15157-15158, 15167.) Officer Moore observed that Dylan was naked and his skin was "slightly bluish" and he "had bruises from his neck to his hips," and a

large bruise on his forehead. (71 RT 15159.) Officer Moore immediately approached Dylan, touched him and noticed that his arm and torso were cool to the touch, and that he was not breathing. (71 RT 15159.) Borgsdorf dropped the phone, followed Officer Moore into Dylan's room, and she saw Dylan's lips were purple. (72 RT 15468-15469, 15527.) Appellant was rambling about how Dylan bruised very easily. (72 RT 15527.)

Officer Moore asked if anyone attempted CPR. (71 RT 15160.) Appellant said that he did not know how. (71 RT 15160.) Officer Moore checked Dylan for a pulse, found none, and started CPR. (71 RT 15160.) While performing CPR on Dylan, Officer Moore noticed a small amount of blood dripping from Dylan's penis. (71 RT 15161.) Appellant was behind Officer Moore while he was performing CPR and said, "Dylan bruises easily." (71 RT 15162.) Officer Moore was not successful in resuscitating Dylan. (71 RT 15161.)

Two minutes after Officer Moore started CPR, ambulance paramedic Marla Nunn arrived and saw Dylan on the bed naked and "lifeless." (71 RT 15161, 15202-15205.) Initially, Nunn thought Dylan was dead; if he was breathing, it was only two to three times per minute. (71 RT 15205.) Nunn immediately intubated Dylan to assist his breathing. (71 RT 15206.)

Borgsdorf noticed Dylan was covered in bruises, none of which she had seen the night before when she put him in bed. (72 RT 15469; 80 CT 24269.) Borgsdorf looked at appellant and asked him how Dylan got so many bruises. (72 RT 15470; 80 CT 24269.) Appellant replied that he had been playing with Dylan, throwing him in the air, and Dylan kept hitting his forehead. (72 RT 15470; 80 CT 24240.) As appellant was describing it, he gestured toward the coffee table, as if Dylan had hit its edge. (72 RT 15471-15472.) Borgsdorf had never seen appellant play with Dylan that way before. (72 RT 15470; 80 CT 24240-24241.)

Appellant grabbed Borgsdorf, dragged her out of Dylan's room, and told her that she had to say that she had put those bruises on Dylan or they were going to put him in jail. (72 RT 15470.) He said, "You gotta tell 'em that you did that to him, don't do this to me. I'll go to jail again." (80 CT 24240.) That was the first time that appellant told her that she had to say she put the bruises on Dylan. (80 CT 24309.)

Officer Moore noticed that appellant appeared nervous, was pacing back and forth, and speaking in an accelerated manner. (71 RT 15162.) Appellant kept repeating that Dylan bruised easily, and "walks into walls and falls down a lot." (71 RT 15162) Officer Moore asked appellant what happened. (71 RT 15162.) Appellant said, "Dylan [and I] had been playing earlier in the day." (71 RT 15162.) Appellant commented that if Dylan had received any injuries, he would have noticed. (71 RT 15162.) Appellant told Officer Moore that Dylan had called out to him "Daddy, I have to go to the bathroom." (71 RT 15162.) Appellant said he walked into the bedroom and found Dylan barely breathing. (71 RT 15162.) Appellant never told Officer Moore that he had left the apartment at any point that day and Officer Moore did not ask appellant about his whereabouts. (71 RT 15163, 15168.)

Bakersfield Police Officer Damon Youngblood was the second police officer on the scene, arriving after medical personnel. (71 RT 15176-15177.) Officer Youngblood noticed appellant kept repeatedly saying that Dylan "bruises real easily" and "walks into walls." (71 RT 15180.) Officer Youngblood observed that appellant was acting "abnormal" for the situation, considering most parents are concerned about the child and just want to see the child. (71 RT 15181-15182.) Medical personnel told Officer Youngblood that "the child was bruised from head to toe" and, in their opinion, "it was a child abuse case." (71 RT 15182.)

(5) Emergency Room

On October 23, 1996, at 2:30 p.m., Dr. Peter Ellis treated Dylan in the emergency room at the Memorial Hospital in Bakersfield. (71 RT 15329-15332.) Dylan was in full arrest, had no vital signs, and showed no evidence of life. (71 RT 15332-15333.) He was gray in color, had no blood pressure or pulse, and his abdomen was extremely distended. (71 RT 15333.) Dr. Ellis "did just about everything humanly possible to restart his heart." (71 RT 15335.) At 3:17 p.m., Dr. Ellis pronounced Dylan dead. (71 RT 15336.)

Dr. Ellis recalled that Dylan was "dead on presentation." (71 RT 15340.) He noted that there was agonal rhythm, which could mean that Dylan did not have a long "down time," but he could have had very low blood pressure for a prolonged period. (71 RT 15340-15341.) Dylan was in moribund condition and it was possible that he was "down" for several hours. (71 RT 15341.) Dr. Ellis' stated that Dylan may have been injured for a few hours. (71 RT 15342-15343.) Dr. Ellis concluded that Dylan had sustained a significant injury to his abdomen causing distention. (71 RT 15334.) There was blood in Dylan's abdominal cavity due to trauma that likely caused full cardiac arrest. (71 RT 15334.) Dr. Ellis also found a large amount of air in Dylan's abdomen. (71 RT 15334.)

Dylan had "many, many bruises" all over his body. (71 RT 15333.) Dylan had numerous bruises on his head, including a patterned square or rectangle bruise on his forehead. (71 RT 15333.) Dylan had numerous bruises across his trunk, abdomen, buttocks, and back and his mouth had been bleeding. (71 RT 15333.) Ellis noted an unusually shaped mark in Dylan's midback that appeared to have been inflicted by some type of implement. (71 RT 15337.) Dr. Ellis described Dylan's bruising as "a variety of [a] large amount of bruises." (71 RT 15333-15334.)

j. Investigation

Bakersfield Police Sergeant Donald Duchene arrived at the apartment at approximately 2:27 p.m. (71 RT 15222.) Sergeant Duchene observed appellant and Borgsdorf embrace. (71 RT 15224.) When he discovered who they were, Sergeant Duchene ordered Officer Youngblood to separate them. (71 RT 15224.) Sergeant Duchene overheard appellant "rambling." (71 RT 15236.) Appellant said Dylan had been sick for a long time, that he bruised easily and everybody knew it, and that Dylan often got dizzy and fell into the wall. (71 RT 15225.) Appellant also said that Borgsdorf sometimes "tells me not to play with him too hard. I don't mean to bruise him. Maybe I'm too rough sometimes, but I don't mean to be." (71 RT 15225-15226.)

Appellant told Sergeant Duchene that Dylan had been sick all day and he had tried to give him some orange juice earlier. (71 RT 15226.) Appellant said he heard Dylan call for him saying that he had to go to the bathroom. (71 RT 15225.) Appellant said he went to assist Dylan because Dylan had been dizzy and could not stand on his own. (71 RT 15226.) Appellant said he helped Dylan into the bathroom, holding him over the toilet when appellant felt something fall on his foot; he looked down and saw blood dripping from Dylan's penis. (71 RT 15226-15227.) Appellant claimed he said, "Oh, my God," and then Dylan fell unconscious. (71 RT 15226.) Appellant told Sergeant Duchene that he called Borgsdorf at work, and then called for emergency medical help. (71 RT 15226-15227.) Sergeant Duchene noted appellant was wearing sandal-type shoes and he did not see any blood on appellant's feet or shoes. (71 RT 15227.)

Sergeant Duchene noticed Borgsdorf went back into the apartment to use the restroom. (71 RT 15227.) He followed her inside, knocked on the

door, and told her to come out immediately, which she did. (71 RT 15227-15228.) He did not hear the toilet flush or any water running. (71 RT 15238.) When he looked in the bathroom upon her exit, he noticed a bloody towel on the countertop; he could not recall if it was there before Borgsdorf entered the bathroom. (71 RT 15228.)

Bakersfield Police Detective William Bailey of the juvenile sex crime unit responded to the apartment to investigate. (71 RT 15242.) While at the apartment, Detective Bailey discovered Dylan had died at the hospital. (71 RT 15243.) Detective Bailey went to the hospital in order to inspect Dylan's body for signs showing a cause of death. (71 RT 15243-15344.) He noticed Dylan "was bruised all over his body and there were several impressions left on his skin" from some instrument. (71 RT 15244.)

Criminalist Jeanne Spencer from the Kern County Regional Crime Lab participated in executing a search warrant. (71 RT 15300-15303.) Spencer noted there was a small bloodstain in Dylan's bedroom on the wall, adjacent to the bed lengthwise. (71 RT 15305, 15322.) It was human blood but the tests were inconclusive as to whose. (71 RT 15319.) A pillowcase, bedding, sleeping bag, and various towels also had bloodstains. (71 RT 15305.) All of the blood on the bedroom linens matched Dylan and did not match appellant or Borgsdorf. (71 RT 15316.) Blood from a bloodstained towel in the bathroom sink, matched Dylan and did not match appellant or Borgsdorf. (71 RT 15306, 15313.) Semen was not detected on Dylan's bed linens. (71 RT 15308.) On the passenger floorboard of appellant's truck there was a white towel that had a large rust-colored stain that tested positive for human blood, but the stain could not be matched to anyone. (71 RT 15320-15322.)

Bakersfield Police Detective Charles Coodey examined Dylan's body at the hospital and he thought the bruises were in various stages of healing, indicating a pattern of child abuse. (73 RT 15608-15611.) Detective Coodey spoke to Borgdorf's brother, Ross, at the hospital. (80 CT 24197.) Ross told him that he had been trying to convince Borgsdorf that she should be concerned about appellant. (80 CT 24197.) Ross told Detective Coodey that he noticed from the beginning that appellant was a control freak. (80 CT 24199.) Appellant had to have control over Borgsdorf all the time and he could not even leave her alone at work. (80 CT 24199.) Ross said that appellant constantly called Borgsdorf at work claiming there was an emergency to get her on the phone or back home. (80 CT 24199.)

k. Borgsdorf's Interview With Detectives

Detectives Coodey and Steve Ramsey interviewed Borgsdorf on October 23, 1996. (72 RT 15495, 15567-15570.) They informed Borgsdorf that Dylan was dead after she kept asking about his condition. (72 RT 15496; 80 CT 24195.) Borgsdorf was upset and could not recall much of the interview. (72 RT 15496-15497, 15484; 80 CT 24196.) Borgsdorf agreed that based on her state of mind, that she would have said anything during the interview, and would have believed anything. (72 RT 15496-15498.)

Detectives told Borgsdorf that Dylan's bruises were in various stages of healing, up to 10 days in age, indicating that he was a victim of long-term abuse. (72 RT 15497-15499; 80 CT 24197-24198, 24210.) Borgsdorf said she had never seen bruises on Dylan like she ones she had just seen. (72 RT 15497.) Borgsdorf told the detectives that when she changed Dylan's clothes the night before, she did not see anything out of the ordinary on his body. (80 CT 24220.) Detective Ramsey asked her what

she thought happened to Dylan if he did not have any bruises yesterday. (80 CT 24221.) She replied that appellant obviously had done something to Dylan today. (80 CT 24222.)

Borgsdorf told detectives that she never saw appellant hit her son. (80 CT 24200-24202, 24230.) Borgsdorf said that appellant told her that Dylan had a lot of accidents and she said she was "stupid enough to wanna trust him to believe him . . .." (80 CT 24202.) Borgsdorf had not seen any bruises on Dylan the week leading up to his death, but there were bruises the week before on his back that looked like hand marks as well as smaller bruises on his abdomen. (80 CT 24253-24254.) Borgsdorf had asked appellant about the bruises and he replied that kids were clumsy. (80 CT 24254.)

Borgsdorf first noticed marks around Dylan's neck and asked appellant how they got there. (80 CT 24213.) Appellant admitted that he did not know the strength of his own hands when he held Dylan's shoulders and neck. (80 CT 24213.) Borgsdorf said when appellant would discipline Dylan he would put him in the corner and hold him around the neck. (80 CT 24214.) Borgsdorf screamed at appellant to let Dylan go and then they would fight. (80 CT 24214.) She said appellant would not strangle Dylan, but his grip caused marks and bruising on his shoulder area. (80 CT 24214.) Borgsdorf noticed when she bathed Dylan that he had knots on the back of his head and bruises on his back. (80 CT 24248-24249, 24252-24253.) She said appellant always had an excuse as to how the injuries occurred, which she believed. (80 CT 24249.) When she would ask Dylan about the bruises, he responded that he was fine and it was okay. (80 CT 24253.) Dylan never said that appellant hit him. (80 CT 24253.)

Borgsdorf said there were only two big "accidents:" - the first occurred with Dylan's foot when he fell out of the truck, and the second when Dylan tripped and scraped his face on the carpet. (80 CT 24280.) The foot incident occurred after she and appellant had a fight, and appellant did not want her to take Dylan to preschool. (80 CT 24255.) Borgsdorf responded that Dylan was going to go to preschool because he had been absent too often. (80 CT 24255.) Borgsdorf walked Dylan to preschool in the morning and she discovered that appellant picked him up from preschool a half an hour later when appellant came to meet her at lunch. (80 CT 24255.) Appellant told her not to be scared or shocked when she saw Dylan, because he tripped when he got out of the truck and twisted his foot. (80 CT 24255.) Dylan's foot was badly bruised and he missed three weeks of preschool due to the injury. (80 CT 24255.) Borgsdorf admitted that it seemed like a strange coincidence that appellant took Dylan out of preschool without her knowledge and then Dylan suffered a major accident. (80 CT 24255-24256.)

The second "accident" occurred when appellant was watching Dylan. (80 CT 24229.) Appellant had told Borgsdorf that he and Dylan were playing and Dylan was running around when he tripped and scratched his face on the carpet, causing an abrasion on his nose. (80 CT 24229.) Borgsdorf thought that the abrasion looked like a carpet burn, but there were numerous marks on his face. (80 CT 24229.) Borgsdorf never told appellant that she did not accept his stories because he had a hot temper and she was afraid of him. (80 CT 24281.) Borgsdorf admitted that she saw bruises on Dylan often, and that appellant did not want Dylan to attend preschool because he did not want the teachers to see his bruises. (80 CT 24290.)

Borgsdorf told detectives that every time she and appellant got into a fight, Dylan seemed to be in the middle of it. (80 CT 24256.) Borgsdorf said that when she and appellant argued, he would take it out on Dylan, and the bruises coincided with the arguments she had with appellant. (80 CT 24288, 24256.) During an argument, appellant would grab and hold Dylan, and then she would step in and tell him to leave Dylan alone. (80 CT 24288.)

There were a few times when Dylan would wake up in the morning with new bruises. (80 CT 24290.) Borgsdorf recalled one time when appellant and Dylan picked her up for lunch and Dylan had abrasions on his face; appellant told her Dylan woke up with the abrasions. (80 CT 24290-24291.) Borgsdorf told detectives it became a nightly occurrence for appellant to sneak into Dylan's room while she was sleeping. (80 CT 24313, 24311, 24319.) She said she could hear appellant open Dylan's door because the sound of the door opening frequently woke her up. (80 CT 24313.) When Borgsdorf would hear Dylan's door open, she would call out to appellant. (80 CT 24313.) Appellant typically responded that he was just checking on Dylan. (80 CT 24313.) Later in the same night, appellant would return to Dylan's room, waking her again. (80 CT 24313.) Borgsdorf complained regularly to appellant that she had to get up at 5:30 a.m. to go to work, and he was keeping her up until 2 a.m. checking on Dylan. (80 CT 24313.) Borgsdorf told appellant that Dylan was fine, to stop checking on him, leave him alone and just let him sleep. (80 CT 24313.) She told appellant she did not want him in Dylan's room anymore. (80 CT 24311.) Borgsdorf slept lightly out of fear that appellant was hurting Dylan during the night. (80 CT 24318.) However, Borgsdorf stated she never thought appellant was hurting Dylan because many times when she would wake up and remove appellant from Dylan's room, Dylan would still be sleeping. (80 CT 24314.)

Borgsdorf said occasionally she would wake up to Dylan screaming, she would jump out of bed and run into Dylan's room and to find appellant there. (80 CT 24314.) Dylan was frightened, but she stated she never caught appellant doing anything. (80 CT 24314.) Borgsdorf asked appellant what happened and had he done? (80 CT 24314.) She thought it was as if appellant knew when she was coming, when she walked into Dylan's room appellant would only be watching Dylan or talking to him. (80 CT 24311.) Appellant was always clothed, wearing his pajama pants. (80 CT 24315.)

About three weeks before Dylan's death, Borgsdorf had noticed Dylan's penis was dark and bruised. (72 RT 15491.) Borgsdorf said that Dylan had once complained that his penis was sore when he was in the bath. (80 CT 24271.) Borgsdorf said she never thought appellant was sexually abusing Dylan. (80 CT 24318, 24299-24301.)

In the week before Dylan's death, Borgsdorf said she heard Dylan cry out in the middle of the night three times. (80 CT 24320.) When Dylan cried out, Borgsdorf jumped up and ran into Dylan's room. (80 CT 24320.) However, Borgsdorf testified she did not remember telling the officers Dylan cried out from his bedroom during the night. (72 RT 15489.)

Borgsdorf finally admitted to catching appellant with his hands around Dylan's neck in the middle of the night telling Dylan to shut up. (80 CT 24318.) She said she caught appellant doing this "a couple of times," and woke up when Dylan "yelped." (80 CT 24318.) Borgsdorf ran into Dylan's room and saw appellant with his hands around Dylan's neck. (80 CT 24318.) However, Borgsdorf testified she did not remember telling officers that on three different occasions in the week before Dylan's death she found appellant with his hands around Dylan's throat telling him to be quite. (72 RT 15490.) Borgsdorf did not hear Dylan's door or appellant go into Dylan's room the night before he died. (80 CT 24317-24318.)

Borgsdorf told detectives that whenever she asked Dylan about appellant abusing him, Dylan would say, "It's okay" and "I'm fine." (80 CT 24278.) Then Dylan would ask Borgsdorf if she was fine and she responded, "Yes." (80 CT 24278.) Borgsdorf accepted Dylan's answer because there always seemed to be a story behind his marks and bruises. (80 CT 24279.) Sometimes Dylan would say that it was an accident, or that a kid at preschool had done something, then he would change his story, and finally tell her he was fine. (80 CT 24279.)

Borgsdorf told detectives that appellant told her that he had been in jail twice. (80 CT 24237.) He told her he was arrested for murdering a two- or three-year-old child. (80 CT 24237.) Appellant told her about the murder before they moved in together. (80 CT 24238.) Borgsdorf said she trusted appellant because he was so forthcoming about his past. (80 CT 24238.) Detective Coodey asked, "He told you that he had been arrested for murdering a child in the past and you trusted him with your child?" (80 CT 24238.) Borgsdorf replied, "They had proven that he didn't do it." (80 CT 24238.) Borgsdorf claimed that appellant was found innocent. (80 CT 24238.) Borgsdorf stated, "I don't know why I wanted to trust him so much." (80 CT 24239.) Borgsdorf never saw appellant shake Dylan. (80 CT 24214.)

Borgsdorf agreed that appellant was a smooth talker and threatening person. (80 CT 24239.) Appellant threatened Borgsdorf in the past, saying that if she did anything to get him in trouble with the law, or if he went to jail again, she would go down more so than he would. (80 CT 24239.) Borgsdorf told officers that she thought appellant would blame Dylan's death on her. (80 CT 24251.)

Borgsdorf admitted to being too scared to confront appellant because he has such a dreadful temper, and that he screamed at her, scaring her. (80 CT 24252.) Borgsdorf said appellant was the first man she has had a relationship with where she could not get out; she had tried to leave him twice. (80 CT 24294, 24239, 24257.) Appellant told her one week before Dylan's death that she had better not think about leaving him; considering his father had just bought her new rugs, could she imagine what that would do to him. (80 CT 24308.) Appellant would get very angry, lean over her or pat her on the head and tell her not to get any ideas about kicking him out. (80 CT 24295.)

When confronted by officers that she knew appellant was abusing Dylan, Borgsdorf responded that she did not know what to do, and she was too scared, especially since her fight with her brother. (80 CT 24258.) Detective Coodey said, "If you think you were afraid, think of how your four-year-old son felt . . . can you imagine the terror your son went through every time he saw [appellant] come into the room and close the door?" (80 CT 24281.) Borgsdorf admitted that Dylan's death happened because she was so scared of appellant and she let him control her. (80 CT 24260.) Detective Coodey asked Borgsdorf if something "went off" when she suspected that appellant was abusing Dylan and because she knew that appellant had been arrested for murdering a child before. (80 CT 24282.) Borgsdorf responded that she was trapped and could not get out. (80 CT 24282.) Borgsdorf told detectives, "I don't have a doubt in my mind that [appellant] physically killed my son today, killed my son." (80 CT 24317.)

Borgsdorf never hit Dylan with her hand or any object. (80 CT 24232, 24311, 24202, 24221.) However, she had spanked his bottom on Friday morning for jumping off the couch. (80 CT 24232.) Borgsdorf said

she never laid a hand on her son and never hurt him. (80 CT 24287.) Detectives Coodey and Ramsey informed Borgsdorf that she might have violated the law by failing to protect Dylan. (80 CT 24200.) Borgsdorf stated she understood it was her responsibility to take care of Dylan. (80 CT 24200.) Borgsdorf said that she was the one that left Dylan with appellant -- it was her fault. (80 CT 24322.) When asked if she had done anything wrong, Borgsdorf replied that she left her son there and should not have. (80 CT 24304.)

l. October 24, 1996

After being placed into custody, Borgsdorf spoke to Bakersfield Police Officer Hajir Nuriddin. (72 RT 15538, 15487.) Officer Nuriddin stated Borgsdorf told her, "I hate him. I should have been able to protect my baby, but I was so afraid. He made me feel like I was nothing. Now Dylan's gone." (72 RT 15488, 15544.) Borgsdorf told Officer Nuriddin that appellant had raped her. (72 RT 15544.)

m. Borgsdorf's Plea Agreement

On July 3, 1997, as part of a plea agreement, Borgsdorf pleaded guilty to five counts of child endangerment for failing to protect Dylan and was sentenced to 14 years in prison. (72 RT 15498, 15534, 15498-15500.) Borgsdorf was never promised anything in return for her testimony against appellant and was serving her prison sentence when she testified. (72 RT 15534.) After she entered her plea, Borgsdorf learned that the autopsy report showed that the bruises on Dylan were inflicted the day he died. (72 RT 15499-15500.)

n. Autopsy Of Dylan

On October 24, 1996, Dr. Armand Dollinger conducted an autopsy on Dylan. (71 RT 15348.) The cause of Dylan's death was exsanguinating

intra-abdominal hemorrhage: Dylan bled to death due to blunt force trauma that caused transection of the duodenum, that is, the first part of the small intestine, transection of the pancreas, and laceration and bleeding in the mesentery, or, the membranous folds attaching the small intestine to the posterior body wall. (71 RT 15370, 15383.) The blood coming from Dylan's penis was the likely the result of an abdominal hemorrhage, and there could have been injury to the kidneys or gastrointestinal tract that was not grossly evident. (71 RT 15385-15386.) Dr. Dollinger opined Dylan could have died within a matter of minutes or possibly could have survived a couple of hours, but no longer than three to four hours. (71 RT 15370-15371.)

The significant findings of the autopsy were in Dylan's abdomen. (71 RT 15364.) There were 700 milliliters, or one and one-half pints, of dark blood in his abdominal cavity. (71 RT 15364, 15729). The duodenum and pancreas were transected, and there was a four-centimeter laceration in his mesentery. (71 RT 15364.) Dylan's mesentery sustained torn blood vessels that were a part of his major blood supply. (71 RT 15368-15369.) Such injuries are likely caused by blunt force impact to the abdomen causing the duodenum and pancreas to be impinged upon the spine. (71 RT 15364.) The instrument used to inflict such force, such as a fist, a foot, the end of a baseball bat, or a broom handle, must be focused to a particular area in order to drive the organs back against the spine. (71 RT 15366-15367.) It takes a considerable amount of force and impact to cause such injuries, which are most commonly seen in motor-vehicle accidents from impact with the steering column. (71 RT 15367.) Dr. Dollinger defined blunt-force trauma as described in Dylan's case as "an impact over the area of the abdomen, either a blow or his body being forcibly thrown against a

protruding object." (71 RT 15384.) Based on these injuries, Dr. Dollinger explained Dylan likely immediately went into hypovolemic shock because his blood volume was greatly decreased. (71 RT 15369.)

Dr. Dollinger counted approximately 70 to 75 bruises on Dylan's body. (71 RT 15352.) On Dylan's abdomen, there were 20 to 30 bruises and 10 bruises on his lower right chest. (71 RT 15360-15361.) Dylan also had injuries to his back and buttocks consistent with the infliction from a fist; however, kicks or blows with a blunt instrument were also likely. (71 RT 15362.) On Dylan's back there was one bruise that was not consistent with a fist – it was shaped in a rectangle. (71 RT 15397-15398.) Dr. Dollinger opined that the bruises to Dylan's abdomen and back were most likely caused by a fist. (71 RT 15362, 15394-15395, 15397.) Dr. Dollinger concluded based on the pattern of bruises that Dylan likely sustained a minimum of 30 blows. (71 RT 15395.) This took into consideration that the bruises caused by a fist formed a line of three to four bruises from the knuckles. (71 RT 15395.) Dylan had multiple bruises around his face, throat, upper back, lower back, buttocks, and abdomen. (71 RT 15356.) Dr. Dollinger concluded the bruises and injuries were inflicted by blunt-force trauma. (71 RT 15357.) Dr. Dollinger opined these bruises were recent blows and occurred within two hours of his death. (71 RT 15355.) Dr. Dollinger stated a substantial amount of force was necessary to inflict such injuries. (71 RT 15363.)

Dylan sustained multiple bruises to his head. (71 RT 15356.) Dylan had a patterned bruise on his right forehead, and a bruise on his back that also matched the same pattern. (71 RT 15352-15353.) Dylan had a rectangular patterned bruise on the right side of his forehead. (71 RT 15357.) There was a very large bruise on the left side of his head and two

bruises on the back of his head. (71 RT 15356.) Fists or an object could have caused the bruising to Dylan's forehead. (71 RT 15399.) Dylan's brain was swollen, but there was no hemorrhage or apparent injuries to the brain. (71 RT 15363.) Dr. Dollinger did not detect a skull fracture, which surprised him considering the bruise and injuries on the left side of Dylan's head. (71 RT 15363.)

Dylan had numerous bruises around his neck and cheeks. (71 RT 15372.) Dylan had a bruise on his cheek and two confluent bruises along with numerous smaller bruises around his right-jaw. (71 RT 15372-15373.) There was a fresh laceration to the back of Dylan's upper lip. (71 RT 15357-15358.) Dr. Dollinger opined the bruises around Dylan's mouth were consistent with blows or pressure from fingers, such as a hand forcibly covering the mouth forcing the lip against the teeth. (71 RT 15357.) Dylan also had petechial hemorrhages on his epicardium, or heart tissue, and on the surfaces of his lungs. (71 RT 15371.) Petechial hemorrhages indicate asphyxia, or they could result from shock. (71 RT 15371.) Dr. Dollinger opined that based on the injuries and bruises around his mouth, Dylan's airway was obstructed. (71 RT 15371.) Dr. Dollinger noted that based on the internal petechiae, the laceration to Dylan's inner lip and facial bruising are consistent with an individual grabbing Dylan's face and mouth area and holding it tightly. (71 RT 15400.) There was also an old injury inside Dylan's mouth to his labial frenulum, or the little fold of tissue under the lip, which was scarred and virtually absent. (71 RT 15371). Dr. Dollinger testified that this lip injury likely occurred weeks before Dylan's death. (71 RT 15392.) Dylan's right ear had a darkened area and Dr. Dollinger was not able to determine whether it was a bruise or postmortem lividity. (71 RT 15359-15360.)

Dr. Dollinger microscopically examined bruised tissue from Dylan's abdominal wall and three different tissue samples from his back in order to attempt to determine the age of the bruises. (71 RT 15387.) All of the samples showed the injuries appeared to be recent – within two to four hours before death. (71 RT 15388.) Dr. Dollinger's best estimate regarding the time the bruises were inflicted on Dylan was within minutes to two hours before death, and possibly up to three to four hours before death. (71 RT 15407.)

o. The Forensic Pathologist

In March of 1998, Dr. Frank Sheridan, a forensic pathologist was retained by the Kern County District Attorney to review Dylan's medical records. (74 RT 15689, 15694.) He was also provided with investigative reports of Dylan's death, the autopsy report, photographs taken from the autopsy, and microscopic slides from the autopsy. (74 RT 15695.) After reviewing those materials, Dr. Sheridan provided a report on March 18, 1998, summarizing his opinions. (74 RT 15695-15696.) The 9-1-1 call occurred at 2:15 p.m. and Dr. Sheridan opined that that the major lethal injury inflicted upon Dylan likely occurred two to three hours, at most, before the 9-1-1 call. (74 RT 15823-15824.) He determined that the injuries could not have occurred more than two hours before the 9-1-1 call. (74 RT 15722-15723.)

Dr. Sheridan noted the front of Dylan's abdomen had several bruises that were consistent with a hand punching the abdomen multiple times, especially when considering the internal injuries he sustained. (74 RT 15709.) The appearance was very consistent with knuckles. (74 RT 15710.) The internal examination showed that there was a severe, fatal injury to Dylan's abdomen. (74 RT 15710.) Dylan's pancreas was split in

half. (74 RT 15710.) The duodenum was torn and with blood vessel injuries that resulted in a major internal hemorrhage into the abdominal cavity and the retroperitoneal space behind the abdomen. (74 RT 15710.) Dr. Sheridan determined Dylan's fatal abdominal injuries were recent based on their severity and the hemorrhage. (74 RT 15722.)

Dr. Sheridan concluded that based on the internal injuries in conjunction with the external visible wounds, the injuries were from impacts to the abdomen caused by a fist because the blows were in the midline of the abdomen, just below the rib cage. (74 RT 15710.) The damaged internal structures were in the midline of the abdomen in front of the vertebral column. (74 RT 15710.) Dr. Sheridan testified that he was "sure" the impact object was a fist because it indented the abdominal walls and fatally crushed Dylan's internal organs against his spine. (74 RT 15710-15711.) The immediate fatal injury was the damage to the blood vessels in the abdominal area, leading to amplified hemorrhaging. (74 RT 15711.) Either a single or multiple blows from a fist could have caused the tearing and transection damage to Dylan's abdominal organs. (74 RT 15711.) It took, "considerable force" to inflict such damages. (74 RT 15711.) Dr. Sheridan described the force as a "strong punch such as a reasonably strong adult could do . . . straight into the abdomen." (74 RT 15711.) The punches had to be of sufficient force to push the entire abdominal wall back into the spine, resulting in a crushing injury to the organs located at the back of the abdomen. (74 RT 15712.) The force of the blow had to overcome the resistance that the body has by virtue of the protective abdominal tissues and the elasticity of the abdominal wall. (74 RT 15712.) Dr. Sheridan testified that such abdominal blows would be painful to endure. (74 RT 15712.)

Dr. Sheridan pointed out injuries consistent with his conclusion that Dylan suffered an attempted smothering. (74 RT 15702.) Dr. Sheridan noticed an injury to the inside of Dylan's lip and concluded that the injury occurred from an attempted suffocation with a hand over Dylan's mouth. (74 RT 15696-15697.) He concluded that suffocation was not the cause of death, but an injury sustained from a child old enough to resist. (74 RT 15696-15697.) From the autopsy report, Dr Sheridan noticed petechial hemorrhages on the surfaces of Dylan's lungs, which indicated an airway obstruction. (74 RT 15696.) Dylan had grasp-type bruise marks from a hand on his face and chin with several clustered along his jaw line. (74 RT 15697, 15702.) There were two bruises along Dylan's jaw line close to his chin, one on his upper neck just below the jaw line, and one on his cheek. (74 RT 15701-15702.) Based on these findings interpreted together, Dr. Sheridan concluded that these injuries occurred from a smothering-type action, resulting in a temporary but complete obstruction of the airway. (74 RT 15696.) Dr. Sheridan had seen these smothering injuries before in other cases, but those children actually died from smothering. (74 RT 15699.) Dr. Sheridan explained the suffocation would be very distressing because Dylan would be trying to breath and unble to do so, which would cause panic more than pain. (74 RT 15712.)

Dr. Sheridan concluded that Dylan suffered numerous impact injuries to his head. (74 RT 15702-15703.) First, just below his hairline on his forehead, there was a large, rectangular patterned bruise. (74 RT 15702.) Dr. Sheridan was not able to form any conclusion as to what instrument formed the rectangular patterned bruise on Dylan's forehead. (74 RT 15704.) There was a faint crosshatch in the center of the bruise, which could have been caused by some type of fabric, like a piece of furniture. (74 RT 15704.)

Dr. Sheridan noticed numerous scalp contusions at the back of Dylan's head. (74 RT 15702, 15704-15705.) They did not have a particular pattern and each one simply represented an individual impact. (74 RT 15705.) They were at the back of Dylan's head extending down onto his neck. (74 RT 15705.) Numerous blows caused these contusions. (74 RT 15705.) Dylan did not have any fatal head injuries and there was no sign of any internal hemorrhage inside Dylan's head. (74 RT 15703.)

Dylan sustained injuries to his right ear. (74 RT 15703, 15705.) The center of the ear itself was bruised, but there was no impact or abrasion mark. (74 RT 15705, 15703, 15838-15839.) The color of the ear looked like a bruise - it was a strong color standing out from the surrounding skin. (74 RT 15706.) In Dr. Sheridan's opinion, Dylan's inner ear bruise was a well-defined injury from an impact. (74 RT 15706, 15708.) Dr. Sheridan concluded this was a bruise and was not due to lividity. (74 RT 15706.) Dr. Sheridan did not see any evidence of postmortem lividity in Dylan's face, ear, or skin surrounding his ear, and if the ear injury were from lividity, he would expect to see it in the surrounding areas. (74 RT 15708-15709.)

Dr. Sheridan noted that Dylan had numerous blunt force injuries and bruises to the back of his torso, chest, abdomen, and particularly to his buttocks. (74 RT 15713.) Most of these bruises had abrasions associated with them, he was unsure if there was a pattern in the bruises or abrasions. (74 RT 15713.) The abrasions and bruises to Dylan's buttocks indicated they occurred when he was unclothed. (74 RT 15861.) Dr. Sheridan opined that the injuries to Dylan's back and buttocks were clearly inflicted by multiple blows, not a single blow. (74 RT 15713-15714.) Dr. Sheridan determined that Dylan had sustained multiple impacts from blows to the

back of his body. (74 RT 15713.) Dr. Sheridan reached this conclusion because there were several discrete, non-overlapping injuries, each requiring a separate impact. (74 RT 15714.) Based on these abrasions, Dr. Sheridan concluded that these injuries caused by an object, not a hand. (74 RT 15713.) However, since there was no definite pattern, Dr. Sheridan could not conclusively identify the object, but thought it may have been a stick or some type of hard object, or possibly more than one object. (74 RT 15713-15714.) The bruises to Dylan's back and buttocks had abrasions, indicating the object used had a rough surface that scrapped the skin. (74 RT 15715.) Dr. Sheridan explained that when injuries are inflicted with a hand, abrasions are not seen. (74 RT 15715.)

Dr. Sheridan also examined the microscopic slides taken from Dylan's bruises at the autopsy. (74 RT 15716.) He concluded that the fatal injuries were new injuries and that once inflicted, would cause death within several hours. (74 RT 15716.) Dylan may not have survived that long based on his two major hemorrhages, both related to the same injury. (74 RT 15716-15717.) The microscopic examination of the injuries showed no vital reaction, which would determine whether an injury was older. (74 RT 15717.) Vital reaction is the body's reaction to an injury, that is, the inflammation and beginning of the repair process while the body is still alive. (74 RT 15717.) There was no sign of any vital reaction in relation to Dylan's major injuries because death occurred too soon after the injuries were inflicted. (74 RT 15717.) All injuries sectioned into microscopic slides at the autopsy were fresh – inflicted within one day of Dylan's death. (74 RT 15718-15720.)

There was no evidence Dylan had ITP, a condition where platelets in the blood are not produced in adequate quantity causing easy bruisability,

and multiple petechial hemorrhages all over the skin. (74 RT 15862, 15863.) It is similar to a rash. (74 RT 15863.) Usually, there is additional evidence to support an ITP diagnosis, particularly in the spleen. (74 RT 15863.) Dylan's spleen was examined and it was normal. (74 RT 15863.) ITP does not cause tearing of the duodenum, pancreas, and mesentery. (74 RT 15875.) Dr. Sheridan explained such injuries are without a doubt major blunt force injuries. (74 RT 15875.)

Dr. Sheridan testified the most common cause of abusive death in four-year-old children is blunt force injury to the body, generally the abdominal area. (74 RT 15773.) Dylan's death fell into this most common kind of fatal child abuse for his age. (74 RT 15773.)

D. Defense's Case

1. Appellant's Testimony Regarding Tyler

Appellant denied killing Tyler. (85 RT 18218.) On November 15, 1994, appellant left the house at 8:10 a.m. for a physical therapy appointment and returned around 1:30 p.m. (84 RT 17955.) Appellant did not handle or feed Tyler that morning. (84 RT 17956.) Appellant testified that he returned in a relaxed mood after getting a massage during physical therapy. (84 RT 17956.)

Appellant testified that he parked in the garage and heard Tyler crying when he opened the door. (84 RT 17957.) Shari greeted him at the door, giving him a hug and asking about his day. (84 RT 17957.) Appellant saw Tyler on couch without a diaper because Shari was in the middle of changing it. (84 RT 17957-17958.) Appellant kissed Tyler, and Shari finished changing his diaper. (84 RT 17958.) Appellant testified that Tyler stayed on the couch while he and Shari went into the kitchen to discuss

$450 worth of bills that had accumulated before appellant moved in; Shari asked appellant to pay the bills. (84 RT 17961-17963.) The utility bill indicated they were scheduled to be disconnected. (84 RT 17963-17964.) Appellant asked why he should pay Brian's bills, stating that Brain was weaseling out of them. (84 RT 17961-17962.) Appellant claimed that he did not get upset; rather Shari got extremely upset and angry with Brian. (84 RT 17963.) They talked about her calling Brian to ask him to help pay the bills. (84 RT 17963.) Appellant testified that he offered to pay for food and his portion of the bills from the two-and-a-half weeks that he had lived there. (84 RT 17963.)

Appellant testified that he spent an hour outside with Daniel Cepeda barbecuing and discussing appellant's truck. (84 RT 17964-17967.) Appellant said he went back inside and saw Tyler crying in the crib in the living room while Shari was in the kitchen. (84 RT 17967-17968.) The phone rang. (84 RT 17968.) It was Shari's father. (84 RT 17968.) Appellant testified that he sat at the kitchen table, but Shari told him to take Tyler into the back room. (84 RT 17968-17969.) Shari wanted to do the dishes and talk on the phone but did not want the noise to keep the baby awake. (84 RT 17969.) Appellant carried Tyler into the master bedroom as Shari had asked. (84 RT 17969.)

Appellant testified that Tyler continued to cry after appellant picked him up from the crib and carried him to the master bedroom. (84 RT 17970.) He claimed Tyler's cries sounded normal while in his crib and that Tyler was wide awake, and not sleepy or groggy. (85 RT 18200.) Appellant claimed he did not notice any bruises on Tyler. (85 RT 18200-18201.) Appellant testified that he did not see anything wrong with Tyler's leg and there were no abnormalities. (84 RT 17960.)

Appellant placed Tyler in the middle of the bed with pillows on both sides to protect him from falling off. (84 RT 17970-17971.) When he was in the master bedroom, appellant could vaguely hear Shari talking on the phone. (84 RT 17971.) Appellant claimed he was in the master bedroom for only a minute at most. (84 RT 17971.) Appellant testified that while in the master bedroom with Tyler, he did not do anything to injure Tyler. (84 RT 17971.) Appellant denied shaking Tyler. (84 RT 17972.) Appellant also claimed that he did not drop Tyler or hurt his leg in any way. (84 RT 17972.)

Appellant testified that he walked out of the master bedroom, and returned to the kitchen table and sat next to Shari. (84 RT 17971.) He could still hear Tyler crying. (84 RT 17972.) Appellant claimed that when Tyler stopped crying about two or three, or possibly ten to fifteen minutes later, he went back to check on Tyler because he thought Tyler might have fallen off the bed. (84 RT 17972-17973.) Appellant testified anything could have happened to Tyler. (84 RT 17973.)

Appellant testified that he looked around the corner into the master bedroom, because he did not want to scare Tyler, and saw that Tyler's chest was not moving up and down. (84 RT 17973.) Appellant testified he went into the bedroom, and saw that Tyler was not breathing and he immediately yelled at Shari to call 9-1-1. (84 RT 17973.) Appellant claimed that he stood over Tyler and picked him up. (84 RT 17974.) He testified that Tyler was white and lifeless as he carried him down the hall. (84 RT 17974.) When he was walking down the hallway, Shari was already on the phone with 9-1-1, so he put Tyler on the floor, but Shari told him to put Tyler on the kitchen table. (84 RT 17974.) Appellant testified that Shari was relaying what the 9-1-1 operator was saying, and appellant followed her directions. (84 RT 17975.)

Appellant testified that he did not know CPR. (84 RT 17976.) He claimed he pressed "a little" on Tyler's chest, but not according to CPR methods. (84 RT 17975.) Appellant claimed he never hit Tyler's chest, but "pushed on it like breathe, breathe." (85 RT 18190.) Appellant claimed Shari was wrong when she that testified he had attempted to perform CPR because he was not doing CPR. (85 RT 18190.) However, appellant also testified that he was following instructions for CPR based on the 9-1-1 operator's instructions. (85 RT 18193.) Appellant testified that when the paramedics arrived, he was standing over Tyler performing CPR, trying to get him to breathe. (85 RT 18194-18195.) Appellant testified that when emergency personnel arrived, he had his hands over Tyler, trying to comfort him. (84 RT 17977.)

Appellant testified that when he and Shari got in the truck, he hastily drove away because he wanted to beat all the red lights. (84 RT 17977.) Shari told him to stop and turn around. (84 RT 17977.) Appellant testified that at the hospital, medical personnel were "hush-hush" about everything, but appellant found out that Tyler had a broken leg and some fractured ribs. (84 RT 17978.) Appellant claimed that when he was interviewed by law enforcement, he tried to cooperate by giving a statement. (84 RT 17979.) Late that night, appellant and Shari left the hospital together. (84 RT 17979.) Appellant denied that he told Shari that they needed to "get out of Dodge." (84 RT 17979.) Appellant testified that he never attempted to flee. (84 RT 17979-17980.) Appellant testified that he told officers he would not torture, beat up, and kill a baby because the baby was sick. (85 RT 18207-18208.) Appellant used the term "torture" when discussing Tyler's injuries with police. (85 RT 18209.) Appellant testified that on November 16, 1994, Shari asked him to give her a ride to the hospital to see Tyler, but he could not because he had a physical therapy appointment. (84 RT 17980-17981.)

Appellant testified that he did not tell officers that Shari had asked him to take Tyler into the master bedroom, but told them instead that he decided to Tyler into the bedroom. (85 RT 18205.) Appellant testified he went into the bedroom "once" when he first placed Tyler on the bed and a second time to check on him after he had stopped crying. (84 RT 17973.)

Appellant claimed he never performed CPR on Tyler on November 8, 1994. (85 RT 18191.) He denied ever reviving Tyler with CPR. (84 RT 17976.) Appellant denied removing the distributor cap from his truck to prevent Shari from taking Tyler to the hospital because he did not want to the doctor's to see his injuries. (85 RT 18166-18167.)

Appellant testified that Shari was an attentive mother who never hurt Tyler in any way, and he told detectives she was a very good mother. (85 RT 18168-18169.) Appellant testified his relationship with Shari was good, except for the bills. (85 RT 18192.) Appellant testified he thought Brian Ransom had something to do with Tyler's death because he was with Tyler the night before. (85 RT 18227.) Appellant admitted that he was the last person physically with Tyler he died. (85 RT 18228.)

Appellant denied seeing Melinda Andrews at the post office in 1996 and did not attack her, but he could have gone a little too far with her. (84 RT 17987-17988.) Appellant testified his hands just got a little frisky. (84 RT 17987.)

Appellant claimed his relationship with Michelle Edwards was consensual. (84 RT 17988.)

2. Neighbors

Cepeda, an auto mechanic, recalled that on November 15, 1994, he spoke to appellant about appellant's truck. (83 RT 17628-17629, 17631.) Appellant came over for about 15 or 20 minutes while Cepeda was

barbecuing and they drank beer together. (83 RT 17635.) Appellant only drank half of a beer. (83 RT 17652.) During his conversation with appellant, Cepeda did not notice appellant to be agitated or angry; he appeared normal. (83 RT 17642.) Appellant left and went back to his house and about 10 to 30 minutes later, the ambulance arrived. (83 RT 17636, 17638, 17653-17656.)

On April 13, 2000, District Attorney Investigator, Walter Newport, went to Shari's house to investigate Shari's recent arrest. (83 RT 17822-17823.) Smith told Newport that he saw Shari hit Taylor with an open hand on the back of the head. (83 RT 17827.) Smith told Newport that the hit knocked Taylor off balance and off her feet. (83 RT 17828.) However, Smith testified he never saw any hitting, swatting, or abuse of Taylor. (83 RT 17780-17781.) Smith testified he saw Shari spank Taylor twice, but not out of anger, only when Taylor ran out into the street and along with a time-out in her room. (83 RT 17781.) Reid never saw Shari hit Taylor. (83 RT 17751.)

Steve Holland is Reid's uncle, and was also a neighbor to Reid and Shari. (83 RT 17745, 17659-17660.) Holland never saw Shari physically abuse Taylor, but testified that Shari was verbally abusive. (83 RT 17661-17663.)

3. Defense Investigator James Larma

On February 21, 1995, defense investigator James Larma, interviewed Regina. (83 RT 17674-17675.) Regina talked about Shari's inappropriate behavior and thought Shari gave the impression that her pregnancy with Tyler was an aggravation and inconvenience. (83 RT 17674-17675, 17790-17792, 17804.) Regina said most of Shari's family thought she was lazy, if not neglectful with Tyler's care. (83 RT 17793-17794.)

Regina said the most disturbing incident was when appellant told Shari he performed CPR on Tyler and supposedly revived him. (83 RT 17806.) Regina was upset that Shari did not seek medical treatment for Tyler or do anything else to protect him. (83 RT 17806.) Regina never said that Shari physically abused Tyler. (83 RT 17808, 17691.)

4. CPS Case Regarding Shari's Daughter, Taylor

On April 13, 2000, Kern County Sheriff Deputy William Hakkar assisted Childers of CPS at Shari's home. (83 RT 17704-17705.) He observed a dirty house and saw two cockroaches. (83 RT 17707-17709.) There were two plastic drinking straws cut down to 1/2 to 2.5 inches in length, commonly used on the streets for snorting narcotics. (83 RT 17709.) He did not seize the straws to determine if they contained drug residue. (83 RT 17726-17727.) He thought the house contained dangerous items including a knife, drill, spade, and ink pen. (83 RT 17726.) Shari denied using narcotics, but Deputy Hakkar told Shari that he was aware that she had tested positive for methamphetamine and marijuana. (83 RT 17713.) Shari finally admitted to snorting methamphetamine the Monday before her previous urine test for CPS. (83 RT 17714.) Shari admitted taking methamphetamine one time and mainly using marijuana. (83 RT 17734.) Shari told the truth 10 minutes after she lied about using drugs. (83 RT 17731.)

Deputy Hakker arrested Shari for child endangerment because the unclean house was unfit for a child, and for being under the influence. (83 RT 17716, 17712.) Even though Shari's urine test came back negative, Deputy Hakkar testified he still thought Shari was under the influence. (83 RT 17719, 17712, 17721.) Had Deputy Hakkar not formed the opinion

that Shari was under the influence, he would not have arrested her, he would have only written a citation for the unclean house. (83 RT 17725.)

After the urine test came back negative, Deputy Hakker released Shari on the under-the-influence charge and only charged her for child endangerment for the dirty house. (83 RT 17732.) The fact that Shari was Tyler's mother and his murder trial was currently going on "may have entered" into Deputy Hakker's determination to charge her with child endangerment. (83 RT 17733.) The deputy testified that he was "hypersensitive" to the fact that Shari's first child had been killed. (83 RT 17733.)

5. Rebecca And Sheri Herron

Rebecca testified that between January and April of 2000, she twice noticed injuries on Taylor. (83 RT 17834.) Taylor had a faint, black bruise in the corner of one eye. (83 RT 17835.) Rebecca asked Taylor what had happened to her eye and Taylor replied that her mother gotten mad and hit her because she ran outside. (83 RT 17837.) Rebecca said that Taylor supposedly fell into a door but that was not what Taylor told her. (83 RT 17837-17838.) There were bruises on Taylor's stomach and on the back of one leg. (83 RT 17839.) Taylor said she fell on her bedpost causing the bruise on her stomach. (83 RT 17852-17853.) The bruises were never attributed to Shari. (83 RT 17853.) Rebecca testified that she had no physical proof that Shari was abusing Taylor, but had notions of it. (83 RT 17848.) The only information she had about Shari hitting Taylor was the mark on Taylor's eye. (83 RT 17853.)

Rebecca's best friend, Sheri Herron, was engaged to Brian Ransom, Shari's ex-husband. (83 RT 17851-17852, 17855.) According to Herron, Shari was not being cooperative with divorce proceedings. (83 RT 17852.)

Herron recalled seeing a mark and bruise on the corner of Taylor's eye in January of 2000. (83 RT 17856.) She asked Taylor what had happened and Taylor got tears in her eyes and said, "I ran out in the rain and my mama hit me." (83 RT 17858.) Herron did not ask any more questions and did not call CPS. (83 RT 17858, 17866.) Taylor never told Herron that Shari gave her any of the bruises. (83 RT 17868.) Taylor said that she fell. (83 RT 17868.)

E. Appellant's Testimony Regarding Dylan

Appellant denied killing Dylan. (85 RT 18218.) Appellant testified that Dylan was "a nice little guy," but was uncoordinated, and that Dylan's equilibrium appeared to be off; appellant thought Dylan might suffer from a disease. (84 RT 17992-17993.) Appellant claimed Dylan would walk normally while looking at him then suddenly fall to the ground when he turned his head away. (84 RT 17993.) Appellant said that Dylan would not brace himself when he fell, hitting his head or chin on the ground. (84 RT 17993.) Appellant testified with "a little humor" when he said that "Dylan needed to be placed in a little bubble." (84 RT 17993-177994.) Appellant claimed he never beat Dylan. (84 RT 18018-18019.)

Appellant testified that on October 23, 1996, Dylan did not go to preschool but stayed home with him. (84 RT 18017-18018.) Borgsdorf and appellant had discussed the night before that Dylan needed new clothes and appellant offered to take Dylan shopping. (84 RT 18019.) Appellant testified that Dylan awoke that morning with a cold and a fever. (84 RT 18021.) Appellant called Borgsdorf's office at 10 a.m. and left a message for her to come home during lunch. (84 RT 18022-18023.) Appellant intended to go to the mall when she came home. (84 RT 18023.) Appellant testified that he left Dylan, a four-year-old, sick child home alone

while he went to the mall. (84 RT 18017-18018, 18021-18022, 18024-18025.) Appellant claimed he put Dylan down for a nap, and left the apartment at 11:30 a.m. to go to the mall to get a hamburger with his father. (84 RT 18055, 18024-18025, 18050.) Appellant testified he did not speak with Borgsdorf before he left and assumed she would get the message and come home at lunch. (84 RT 18024.)

Appellant testified he arrived at the mall around noon and looked for his father but did not see him. (84 RT 18025.) Appellant used his phone card at 12:23 p.m. to call his father from the mall. (84 RT 18026-18027.) At 12:29 p.m. appellant called his sister and discovered that his father was running late and had not yet left for the mall. (84 RT 18028.) Appellant's sister told him that their father was on the way with her son, but appellant could hear them in the background. (84 RT 18028.) Appellant told his sister that he would wait at the mall, but if he was not there when his father arrived, to tell his father to wait for him to return. (84 RT 18029.) Appellant claimed he assumed Borgsdorf would be at the apartment waiting for him and would be angry, "very hot," if he did not get her back to work before her one-hour lunch break ended. (84 RT 18029.) Appellant claimed he waited at the mall one hour, until 1:30 p.m., before leaving. (84 RT 18029-18030, 18092.) Appellant claimed the traffic was heavier than normal, and that he did not arrive at the apartment until 2 p.m. (85 RT 18093.)

Appellant testified when he arrived at the apartment the front door remained locked and no windows were broken. (84 RT 18031, 18055.) Appellant testified he saw the answering machine light flashing and as he went toward it, he noticed Dylan's door. (84 RT 18031.) Before appellant left, Dylan's door had been slightly ajar, but now it was wide open and

appellant could see Dylan's feet moving underneath his Pac-Man blanket. (84 RT 18031-18032.) Appellant listened to the answering machine message Borgsdorf left asking appellant to pick her up after work. (84 RT 18031.) Appellant testified he thought the message was odd because she was supposed to be home. (84 RT 18031.)

Appellant claimed he went into Dylan's room and saw a large bruise on Dylan's forehead. (84 RT 18032.) Appellant testified he asked Dylan what had happened. (84 RT 18031.) Appellant testified Dylan was focused and alert, looking at him. (84 RT 18031.) Appellant testified he removed Dylan's blanket and saw the bruises covering Dylan's body. (84 RT 18032.) Appellant testified he repeatedly said, "What happened? Where's mommy?" (84 RT 18032.) Appellant testified Dylan did not say a word. (84 RT 18032.) Appellant testified he immediately called Borgsdorf at work, told her it was an emergency, and she needed to come home. (84 RT 18032.)

Appellant testified he went back into Dylan's room and Dylan said, "I need to go to the rest room, Daddy." (84 RT 18032-18033.) Appellant testified he said, "sure," and questioned Dylan about Borgsdorf's location. (84 RT 18032.) Appellant said Dylan was a little woozy and covered in bruises when he got out of bed. (84 RT 18033.) Appellant walked Dylan to the bathroom where Dylan attempted to urinate. (84 RT 18033.) Appellant saw blood in Dylan's urine and he startled Dylan when he yelled Dylan's name. (84 RT 18033.) Appellant said that Dylan fainted but appellant caught him before he hit the floor. (84 RT 18033-18034.) Dylan then urinated blood on a towel on the bathroom floor. (84 RT 18034.)

Appellant testified he carried Dylan back to his bed, immediately called 9-1-1, put the phone on intercom, and went back into Dylan's room. (84 RT 18034.) The phone kept ringing, and then Borgsdorf arrived. (84 RT 18034.) Appellant testified Borgsdorf came into Dylan's room and

asked what happened and inquired about the bruises. (84 RT 18034.) Appellant denied that he physically prevented Borgsdorf from entering Dylan's bedroom. (85 RT 18115.) Appellant testified he told Borgsdorf that he was playing with Dylan in the front room. (84 RT 18035.) Appellant repeatedly told officers and emergency personnel that Dylan bruised easily. (84 RT 18035.) Appellant testified that he did not usually lie while he was in panic mode, but "uncontrollable words" came out of his mouth when he said he was home all day in the 9-1-1 recording. (84 RT 18060-18061.) Appellant testified that he did not tell Borgsdorf or any of the responding officers that he left Dylan home alone. (85 RT 18112.)

Appellant testified he was hysterical and in panic mode, worried because Dylan was covered in bruises and he was concerned what others would think; appellant was upset because he thought he was going to jail. (84 RT 18035.) When appellant saw Dylan's state and the emergency personnel and police officers, he described his emotions as, "I'm going to jail. I was hysterical. Everybody had tunnel vision." (84 RT 18036.) Appellant testified it was more important to him to protect himself than to tell the authorities what had happened to Dylan. (85 RT 18114.)

Appellant claimed he never told Borgsdorf to take the blame; he just told her that "she had better tell what happened to this child and where the bruises came from or [he was] going to jail." (84 RT 18036.) Appellant suspected that Borgsdorf had been home during lunch, and he had no idea that she was not there. (84 RT 18036.) Appellant admitted he was the last person with Dylan before he died. (85 RT 18228.) Appellant called Dylan's death, "déjà vu" because of Tyler Ransom. (84 RT 18035, 18218.)

Appellant testified he "absolutely" believed Brian Ransom, Tyler's father, was responsible for Dylan's death. (85 RT 18219.) Appellant

testified he was unaware that Brian Ransom was at work on October 23, 1996. (85 RT 18223-18224.) Appellant testified he thought Brian Ransom was "involved" in Dylan's death because appellant saw Brian around appellant's apartment a couple days before. (85 RT 18221, 18227.) Appellant claimed that about a week before Dylan's death, he saw Brian Ransom in a vehicle at appellant's apartment. (84 RT 18015-18016.) Appellant alleged that Brian had threatened him many times because of Tyler's death, but only once in person. (84 RT 17996-17997.) Appellant also testified he saw Brian on television threatening him. (84 RT 17998.)

Appellant smiled when asked about pretending to be a correctional or enforcement officer of some kind in 1992. (84 RT 18036.) Appellant testified that he wore his friend's correctional officer uniform a few times because he liked the way it looked, and he liked the way people looked at him when he wore it. (84 RT 18036-18037.) Appellant admitted he did not have a badge, just the uniform. (84 RT 18037.) Appellant liked that he got respect when he wore the uniform and that "people looked up." (84 RT 18037.)

1. Dylan's Pediatrician, Dr. Maddela

Dr. Vincent Maddela examined Dylan on October 21, 1996, for a preschool physical. (82 RT 17589-17592.) Dr. Maddela checked Dylan's height, weight, lungs, throat, lymph nodes, eyes, heart, groin, and belly. (82 RT 17595-17560.) Borgsdorf mentioned she was concerned that Dylan had a cough. (82 RT 17593.) Dr. Maddela noted Dylan had a low-grade fever and an upper respiratory infection. (82 RT 17594.) Borgsdorf was also concerned about Dylan tripping or hitting doors and favoring his left side when he walked. (82 RT 17594.) Dr. Maddela had seen Dylan on five

previous occasions, and there was never any complaint or concern about Dylan walking into walls during these visits. (82 RT 17610-17615.) Dr. Maddela did not recall Borgsdorf complaining of pain or injury to Dylan's penis. (82 RT 17619.)

Dylan removed his pants so Dr. Maddela could observe Dylan's gait as he walked. (82 RT 17601.) Dr. Maddela did not examine Dylan naked, just without his pants. (82 RT 17606.) Dr. Maddela confirmed that Dylan was favoring his left side when he walked, and referred him to another physician to have his vision checked. (82 RT 17602, 17615.) Borgsdorf did not tell Dr. Maddela that Dylan had suffered an injury to his foot when it was slammed in a car door. (82 RT 17617-17618.) If so, Dr. Maddela would have closely examined Dylan's foot checking for injuries. (82 RT 17617-17618.) Dr. Maddela concurred that if Dylan's foot was injured, it would cause him to walk in such a fashion. (82 RT 17617.)

Dr. Maddela lifted up Dylan's shirt to the top of his stomach to check his lungs and heart with the stethoscope. (82 RT 17602-17603, 17620-17621.) He did not observe the upper portion of Dylan's chest or back. (82 RT 17620.) Dr. Maddela noted that when he used his stethoscope on Dylan's chest, he closed in eyes in order to concentrate on hearing the lungs and heart. (82 RT 17621.) Dylan did not have any tenderness or swelling in his abdomen, and did not have any ecchymosis in his ears. (82 RT 17604-17605.) Dr. Maddela never saw Dylan's buttocks or upper portion of his chest or back. (82 RT 17622.)

Dr. Maddela told investigators that when he examined Dylan he did not observe any gross abnormalities or bruises. (82 RT 17606, 17610.) Dr. Maddela testified he did not notice any unusual bruising and did not suspect child abuse. (82 RT 17607-17608, 17603-17604.)

F. Rebuttal Regarding Tyler

1. CPS Case Involving Shari's Daughter, Taylor

Carolyn Titlon was a CPS worker who became involved with Taylor's custody case. (85 RT 18283.) She discovered Taylor could not distinguish between a truth and a lie, i.e., whatever Titlon led with, Taylor would say that was the truth. (86 RT 18289-18290.) Taylor was very rambunctious, moving and running constantly, throwing herself off of furniture and unable to sit still; it was very difficult to interview her. (86 RT 18291-18292.) Titlon testified about a technique used involving holding a child down. (86 RT 18296.) Taylor was in anger management, had threatened a social worker with an ice pick, slapped a teacher at school, and was aggressive with other children and violent. (86 RT 18300-18301.) Titlon disagreed that a photo of Taylor showed that she had suffered a black eye. (86 RT 18320.)

Titlon testified there were charges pending against Shari for failure to protect Taylor from potential sexual abuse by Shari's brother, Brian Turney. (86 RT 18335-18340) Taylor had not been abused, but Shari had been molested by her brother 16 years earlier, the same brother that was living with her and Taylor. (86 RT 18348.) Titlon thought Shari had bad judgment with letting men into her home. (86 RT 18348-18349.)

2. Dr. McCoy Haddock

Dr. McCoy Haddock was a licensed clinical psychologist with a special expertise in the Child Abuse Potential Inventory (CAPI-6). (86 RT 18356-18359.) His dissertation research helped establish the validity and reliability of CAPI-6 in identifying persons who are at risk to abuse children in their care. (86 RT 18359-18630.) CAPI-6 is a test with 160

questions and answered with either "Agree" or "Disagree." (86 RT 18360.) There is a validity scale, which attempts to identify those trying to look too good or bad on the test. (86 RT 18360-18361.) There is a physical abuse scale, which makes a prediction as to whether a person would be at risk to abuse children in their care. (86 RT 18361.)

On October 18, 1998, Dr. Haddock performed the CAPI-6 test on Shari Ransom for CPS in connection with reunification with Taylor. (86 RT 18361, 18365) Dr. Haddock administered a brief medical checklist, social history questionnaire, the CAPI-6, an intelligence test, some personality tests, major mental disorders tests, and other tests and questionnaires. (86 RT 18365, 18367-18368.) He also took into account Shari's abuse of controlled substances. (86 RT 18370-18371.) Dr. Haddock concluded Shari was not at risk to physically abuse children in her care. (86 RT 18362.) Dr. Haddock explained that the test is a statistical prediction. (86 RT 18369.) He testified he was not aware of any case in which his predictions were wrong. (86 RT 18369-18370.) Dr. Haddock rendered an opinion regarding Shari's potential for physical abuse only once. (86 RT 18380.)

G. Rebuttal Regarding Dylan

Borgsdorf never received a message from appellant on October 23, 1996, telling her to come home at lunch and watch Dylan. (87 RT 18669.) Borgsdorf called the apartment shortly before 1 p.m., left a message to see if they got new clothes for Dylan, and asked for a ride home from work because she had a bag of material that was too heavy to carry. (87 RT 18674-18675.) When Borgsdorf got home, appellant would not let her go into Dylan's room and told her to go to the phone. (87 RT 18674.) Appellant told Borgsdorf that she "had better tell them that [she] put the

bruises there or [he'll] go back to jail." (87 RT 18674.) Borgsdorf testified that one time, appellant left Dylan home alone when he came to pick her up at work. (87 RT 18672.) Borgsdorf was very upset and told appellant it was unacceptable to leave Dylan home alone. (87 RT 18672.)

Jena Heilman was the president of Superior Temporary Services, which provided temporary construction labor to contractors. (86 RT 18396.) Brian Ransom was an employee. (86 RT 18401.) On October 23, 1996, Brian Ransom worked construction from 7:00 a.m. to 3:30 p.m. with a half-hour lunch break at noon. (86 RT 18405-18406.)

Cliff Snider was the Assistant Manager at Von's Supermarket and appellant's boss in 1996. (86 RT 18382-18384.) He testified that appellant was great in the interview and sold himself well; and that he was very confident and personable. (86 RT 18385.) Appellant had attendance problems from the beginning and only worked 10 days. (86 RT 18386.) They had a meeting to set expectations, and to give appellant constructive feedback. (86 RT 18387.) Appellant got agitated very quickly, his body language changed, his tone of voice changed, as did his appearance. (86 RT 18387-18388.) Appellant was fired during this conversation. (86 RT 18388-18389.)

H. Other Rebuttal Evidence

1. Michelle Edwards

Michelle Edwards had been married for six years, and had a five-year-old son at the time of trial. (86 RT 18415-18416.) On January 31, 1996, when she was 19 years-old, she met appellant while she was at the mall with her one-year-old son. (86 RT 18416-18417.) Edwards was having marital problems and had initiated divorce proceedings. (86 RT 18418.) As Edwards was pushing her son's stroller in the mall, appellant stopped

her telling her she was beautiful and her son was cute. (86 RT 18422.) When she previously lived in Fresno, she was a model. (86 RT 18421.) Appellant asked her if she was a model in Fresno, which surprised her that he somehow knew her history. (86 RT 18422-18423.) They exchanged phone numbers. (86 RT 18424.)

On February 2, 1996, between 7 and 9 p.m. appellant went to Edwards' home. (86 RT 18430.) Edwards and her son then went to appellant's house. (86 RT 18430.) Appellant was very complimentary to her, and made her feel special. (86 RT 18431.) Her son fell asleep, and she and appellant had consensual intercourse. (86 RT 18432.) Later, when appellant took her home, he acted different, had a weird look, and did not seem right. (86 RT 18433.) He was not angry or violent. (86 RT 18433.)

Edwards decided she wanted to keep her family together and did not want to continue seeing appellant. (86 RT 18433.) On February 3, 1996, appellant called her. (86 RT 18433.) She told appellant she did not want to have a relationship with him. (86 RT 18434.) Appellant refused to accept her desire to end the affair and was forceful about continuing the relationship. (86 RT 18434.) He told her that if she was not with him, she could not be with her husband either. (86 RT 18434-18435.) Appellant called the house numerous times and she hung up on him. (86 RT 18554.) Edwards testified that on the phone, appellant threatened to cause a big scene to destroy her marriage. (86 RT 18556-18557.)

Appellant showed up at her house 30 minutes later and she let him inside so he would not create a scene on her front lawn. (86 RT 18557-18559, 18436-18437.) Appellant barged in and told her to get her things because she was coming with him or he would slit the throats of her and her son. (86 RT 18433-18437, 18438, 18525.) Appellant said if she would not

have a relationship with him, he would kill her son, hurt her, and destroy her marriage. (86 RT 18435-18436.) Edwards believed him and was terrified. (86 RT 18435-18436.) Edwards was afraid appellant was going to kill her, her son, or her husband. (86 RT 18559.)

Appellant proceeded to rape her. (86 RT 18533-18534, 18564.) He threw her down on her bed, removed her pants, and forcibly put his penis in her vagina. (86 RT 18564-18565.) Her son was running around the room while appellant raped her. (86 RT 18565.) Appellant then grabbed large, black trash bags and starting filling them with clothes. (86 RT 18437-18438.) Appellant said she did not belong to her husband anymore, that she belonged to him. (86 RT 18439.) Edwards was crying. (86 RT 18439.) She did not run away or run next door to the neighbors because she was afraid he would kill her. (86 RT 18539-18540.)

Edwards got in appellant's truck and he drove to his house. (86 RT 18439.) She was very scared and she and her son were crying. (86 RT 18440.) Appellant unloaded her things into his bedroom and locked her and her son in there. (86 RT 18440.) Her son cried for two hours. (86 RT 18440.) Appellant forced her to call the Sheriff's Department and tell them she leaving her husband and taking custody of her son and that she was worried if she could get into trouble with her husband. (86 RT 18485-18486.) She did not indicate on the phone that she was having any issues. (86 RT 18487.) She knew appellant was trying to set it up to look like she was voluntarily leaving her husband. (86 RT 18576.) Appellant sat calmly on the bed watching television while she and her son sat on the floor crying. (86 RT 18441, 18443.)

Appellant became upset that her son crying, got off the bed, went over, and twisted his left earlobe until the child started screaming. (86 RT 18441.) Appellant twisted the earlobe as hard as he could. (86 RT 18442.)

After a couple of hours, her son fell asleep on the floor. (86 RT 18442.) Appellant then got on top of Edwards and raped her again. (86 RT 18443.) He put his penis inside her "as hard as he could." (86 RT 18444.) Edwards asked appellant not to rape her and begged him to stop. (86 RT 18444-18445.) He lifted her shirt up and commented that she had, "really nice tits" and said she had a "nice tight pussy." (86 RT 18445.) Appellant thrust his penis in and out of her vagina for ten minutes; she was not sure if he ejaculated. (86 RT 18445.)

Appellant then grabbed her hair and pulled her face up to his penis, touching her lips with it and asked her to open her mouth. (86 RT 18446.) Edwards was crying and told him it hurt and to stop. (86 RT 18446-18447.) She never consented and the intercourse was against her will. (86 RT 18447.) Appellant asked Edwards if she enjoyed it and told her that he had. (86 RT 18448.) That made her sick. (86 RT 18448.) Appellant continued to watch television the rest of the night. (86 RT 18448.) Edwards would look up occasionally and see appellant watching her. (86 RT 18449.)

In the morning, appellant's father called asking him to meet for coffee. (86 RT 18449, 18457.) When appellant left, Edwards told appellant's roommate that she was scared and asked for help. (86 RT 18449, 18497, 18547.) She did not call law enforcement after appellant left the house; she called her mother because she was ashamed that her husband would find out about the affair. (86 RT 18495-18496, 18450.) The roommate took her and her son to a restaurant where she met her mother. (86 RT 18450.) Appellant pulled into the parking lot as she was getting into her mother's vehicle, (86 RT 18451.) Edwards and her mother sped away and drove to Clovis. (86 RT 18451.)

Edwards spoke to the Bakersfield Police Department on February 4, 1996. (86 RT 18505, 18463.) She did not tell officers that she had previously had consensual sex with appellant or that he had raped her at her house before he kidnapped her because her husband was with her. (86 RT 18560, 18452.) She was ashamed, so she lied. (86 RT 18453.) Edwards also lied to police when she said she had never talked to appellant on the telephone. (86 RT 18470.) The next day, on February 5, 1996, Edwards called the Kern County District Attorney's Office and told them the truth about the consensual sex. (86 RT 18454, 18564.) Edwards testified she did not know Shari Ransom, Diane Borgsdorf, Tyler Ransom, Dylan Vincent, or Melinda Andrews. (86 RT 18578.)

Donna Hogan was a sexual assault nurse examiner and on February 5, 1996, she performed a sexual assault exam on Edwards. (87 RT 18626, 18633.) Edwards told Hogan that appellant had raped her. (87 RT 18634-18635.) She said that appellant forced his way into her home while she and her 16-month-old son were home alone. (87 RT 18635.) Edwards told her that appellant threatened to slit her and her son's throats if she did not go with him. (86 RT 18635.) Edwards told Hogan that appellant had pulled off her pants and panties, removed his clothes, lifted up her shirt, unhooked her bra lifting it up, exposing her breasts, and fondling them saying, "you have nice tits." (87 RT 18639.) Edwards said appellant digitally penetrated her vagina and then inserted his penis into her vagina. (87 RT 18639-18640.) Edwards said she told appellant "no" and asked him to stop. (87 RT 18641.) Edwards told Hogan appellant moved up straddling her chest with his knees, and tried to force his penis in her mouth but she did not open it. (87 RT 18641.)

During the exam, Hogan documented injuries and abrasions to Edwards' vagina, consistent with nonconsensual sexual intercourse. (87 RT 18650-18652.) Edwards indicated she felt a stabbing pain and pain when urination. (87 RT 18653.) When asked, Edwards said that she had not had consensual sexual intercourse in the past 72 hours. (87 RT 18642.) Edwards did not disclose she had also been raped at her house and once previously had consensual sex with appellant. (87 RT 18663.)

2. Melissa Andrews

In 1996, Melinda Andrews was about 23 or 24 years old, a student at Bakersfield College, and she had a two-and-a-half year old daughter. (86 RT 18586-18587.) She met appellant on January 23, 1996. (86 RT 18588.) Appellant called out to her as she was walking on campus, told her she was pretty, and said he would like to have dinner with her. (86 RT 18589-18590.) He seemed aggressive, forthright, and flirtatious. (86 RT 18590.) Andrews declined his dinner invitation, but appellant refused to take no for an answer. (86 RT 18592-18593, 18593.) She told appellant she had to leave; he followed her to her vehicle and asked if she was going to pick up her daughter. (86 RT 18593-18594.) Andrews never told him she had a daughter, or even a child. (86 RT 18594, 18592.) She gave appellant her phone number so that she could leave. (86 RT 18595.) Appellant called her later that day forcefully saying that they were going to dinner that night at Marie Callendar's. (86 RT 18595.) She kept telling him "no." (86 RT 18596.) She never told appellant where she lived. (86 RT 18596.)

Later that day at about 4:30 p.m., Andrews drove to the post office alone. (86 RT 18596-18597.) A truck followed her flashing its headlights. (86 RT 18598.) As Andrews was getting back into her truck after

retrieving her mail, she heard a door shut, looked over, and saw appellant. (86 RT 18600.) He got out of the same truck that had followed her flashing its lights. (86 RT 18600.) Appellant again asked her to go to dinner and she again declined. (86 RT 18601.) Appellant grabbed Andrews by the shoulders, spun her around, and pinned her against the driver side door of her truck. (86 RT 18601-18602.) Appellant kissed her, licked her face, and pressed his body against hers. (86 RT 18602.) She could feel he had an erection. (86 RT 18606.) Andrews was frightened and could not move. (86 RT 18602.) She told appellant she wanted to leave but he would not let her; he kept telling her that they were going to dinner, and he began grabbing her breasts. (86 RT 18602-18603.) She tried to hit his hands away and said, "no." (86 RT 18603.)

Andrews then asked appellant what it meant to him when a woman told him "No." (86 RT 18603.) Appellant got agitated and angry, his tone changed, and his grip grew stronger. (86 RT 18603.) Andrews testified it was as if he had suddenly transformed into a different person. (86 RT 18603.) She was terrified and did not know if he was going to hit her. (86 RT 18603.) Appellant said he wanted to look down her pants to see what color her pubic hair was. (86 RT 18604.) Appellant pinched her nipples with both hands. (86 RT 18604.) She tried to call out for help but was petrified and could not make any noise. (86 RT 18605.) An elderly man walked by, but appellant made it look like they were in a lovers' quarrel. (86 RT 18605.) Appellant told her he wanted to get married within one month and skip getting to know her. (86 RT 18622.)

Appellant told her that any woman would want him, he had a lot of money, and he did not understand why she did not want to be with him. (86 RT 18606.) She begged him to let her leave, pleading to get home to

her baby. (86 RT 18606.) Appellant held her with more force each time she tried to push him away. (86 RT 18607.) Andrews somehow maneuvered out from underneath appellant's body and jumped in her vehicle, locked the door, and drove off. (86 RT 18607.) Appellant was yelling at her while she drove away. (86 RT 18608.) When she arrived home, Andrews immediately called the police. (86 RT 18608.) Appellant kept calling her while the police were at her home saying that he was waiting for her at Marie Callendar's and she was supposed to be there. (86 RT 18609.) The police took her to Marie Callendar's to identify appellant, but he was not there. (86 RT 18610.) Within that same week, Andrews saw appellant's vehicle parked across the street watching her as she was picking up her daughter from day care. (86 RT 18610-18612.)

I. Penalty Phase

1. People's Case

a. Tyler

Tyler's paternal grandmother, Rita Sites, testified that Tyler was a sweet baby, giggling and laughing often. (89 RT 19052, 19054.) Rita was at the hospital when Tyler was born, and she was very active and involved in his short life. (89 RT 19053.) Rita called Tyler "liquid sunshine" and described him as a happy baby with a wonderful personality. (89 RT 19053.) Tyler was easy to please, and when he grinned, his little eyes would crinkle. (89 RT 19054.) Tyler never cried when he spent the night at Rita's house, slept through the night, and was very easy to tend. (89 RT 19054.)

Rita had a professional portrait taken of Tyler when he was three months old. (89 RT 19056.) She planned to have more taken when Tyler

turned six months old, but he died at five-and-a-half months of age. (89 RT 19056.) During the portrait session, she thought they would have a hard time getting Tyler to smile, as with most babies. (89 RT 19057.) However, Tyler smiled in every frame without prompting. (89 RT 19058.)

The last time Rita saw Tyler, she was putting him in his car seat, giving him back to Shari. (89 RT 19054.) Rita had not been seeing very much of Tyler after appellant moved in, so she gave him extra "Granny kisses." (89 RT 19054.) She "kissed him and loved him up." (89 RT 19054.) The next time Rita kissed Tyler, he was in his coffin. (89 RT 19054.)

Rita explained that when Tyler died, "the hurt, the loss, it was unbelievable." (89 RT 19055.) At first, she could not believe that something so horrific could happen. (89 RT 19055.) The hardest part for Rita was the realization she would not have Tyler anymore, and she would not see his first anything, first tooth, first bicycle, or first car. (89 RT 19055.) All of it was ripped away from Tyler and from Rita too, because she was deprived of the joy of such occasions. (89 RT 19055.)

At the funeral Rita wanted to pick Tyler up, hold him, and see his smile. (89 RT 19055.) Seeing him in his coffin, cold, dead, and stiff was wrenching. (89 RT 19055.) Rita testified that Tyler's birthday was in nine days and he would have been six years old, going into the first grade. (89 RT 19055.)

b. Dylan

Leslie Vincent, Dylan's aunt, described Dylan as wonderful, different, cute, lively, carefree, and active; everyone doted on him. (89 RT 19042-19044.) Dylan was a happy, normal four-year-old little boy. (89 RT 19044.) Dylan loved playing with his cousins, chasing them. (89 RT 19044.) Leslie said Dylan and his mother were very close. (89 RT 19041.)

At the hospital, Leslie knew Dylan was in serious condition. (89 RT 19044.) The chaplain told Leslie and other family members that the surgeons had cut open Dylan's chest open to massage his heart, trying to revive him. (89 RT 19044-19045.) The doctor told Leslie that they could not save Dylan and, commenting on all of the bruising, that his condition was the worst thing that he had ever seen. (89 RT 19044-19045.) Leslie was enraged when she discovered Dylan was beaten to death. (89 RT 19045.) Dylan's three cousins, Leslie's children, were devastated, had nightmares for several years, and attended counseling. (89 RT 19046.)

The last time Leslie saw Dylan alive was when she went to pick up Ross from work, and saw Dylan in appellant's truck. (89 RT 19044.) Dylan had a "beat-up" face. (89 RT 19044.) The hardest thing for her was looking back, putting the pieces together and thinking that she could have prevented Dylan's murder. (89 RT 19047.)

Leslie thinks about Dylan every day, and has the urn with his ashes in her home. (89 RT 19045.) In honor of Dylan's death, Leslie and Ross became foster parents and adopted two little boys. (89 RT 19050.)

2. Defense Case

a. Family Testimony

Ricardo Alvarez is appellant's older brother. (89 RT 19077.) Ricardo was born deaf. (89 RT 19077.) He lived at home until he turned 13 and lived in a special boarding school for deaf children until he turned 20. (89 RT 19078-19079.) Ricardo returned home for the weekends. (89 RT 19081.) Their father, Ben, would discipline Ricardo with a metal belt buckle whipping it on his back and legs. (89 RT 19079.) Ben had no time for children and beat them in order to gain their respect. (89 RT 19079-19080.) As they got older, their father began to hit them harder and used

his fists. (89 RT 19080.) One time, Ben beat Ricardo with a wrench. (89 RT 19080.) Ricardo testified Ben would beat all four of his boys every day of the week. (89 RT 19080.) Ricardo testified their father beat appellant more than he beat the others. (89 RT 19079.) Ricardo recalled in 1986 the police brought appellant home and after the police left, Ben beat appellant in the driveway, grabbing him by the throat and cutting off his airway. (89 RT 19081.)

Ricardo testified that, when frustrated, appellant would hit his head on the concrete floor or wall until he was about 16 years old. (89 RT 19082-19084.) He commented that appellant liked to be alone. (89 RT 19081.) Appellant would burn himself with cigarettes and poke his fingers with needles causing bleeding. (89 RT 19084-19085.) In 1995, Ricardo saw Ben hit appellant in the stomach and grab his throat, strangling him. (89 RT 19087-19089.) He was afraid for appellant's safety and thought their father was going to kill him. (89 RT 19088.) Appellant never hit their father because he was afraid of him. (89 RT 19089.) One time appellant pulled Ricardo's daughter out of a swimming pool when she started to drown. (89 RT 19093-19094.) Ricardo testified that he loved appellant. (89 RT 19095.)

Bernardo Alvarez is appellant's oldest brother. (89 RT 19097.) Their father punished the boys several times a week by beating them with his hands, belts, sticks, and pool cues. (89 RT 19099.) Their father began hitting appellant when he was around two or three years old, and he hit appellant the most. (89 RT 19106, 19109.) When Ben beat the children, it was always on the backside, sometimes the upper legs or upper back, but mostly on the buttocks. (89 RT 19102.) Ben hit their mother, too. (89 RT 19101.) Once, Ben hit Bernardo with a belt and the belt buckle wrapped

around his body striking him in the face causing a welt on his eyebrow and temple. (89 RT 19103.) His father told him to tell others that he walked into a doorjamb and to say he was a clumsy little boy. (89 RT 19105-19106.)

Bernardo recalled that appellant always wanted to be the center of attention. (89 RT 19118.) Appellant was very rebellious, wanting attention and love. (89 RT 19113-19114.) Bernardo cared for appellant and it hurt him to see appellant in this situation. (89 RT 19121.)

Christina Llanos is appellant's youngest sister. (89 RT 19123.) Their mother physically abused her – punching, slapping, pushing, and grabbing her. (89 RT 19125.) Llanos did not recall their father being physically abusive with their mother. (89 RT 19127.) She did not recall seeing her father hit appellant or any of her other brothers. (89 RT 19137-19138.) She did recall that one time their father had beaten appellant badly breaking some ribs. (89 RT 19128-19130.)

Llanos testified there was always something different about appellant. (89 RT 19132.) Appellant was hyperactive and mischievous. (89 RT 19127-19128.) She testified appellant was a pest, often annoying and embarrassing her. (89 RT 19133.)

Recently, Llanos had had a disagreement with their mother regarding appellant. (89 RT 19130-19131.) Their mother blamed Ben for appellant's legal troubles. (89 RT 19132.) The last time Llanos saw appellant was in 1993. (89 RT 19134.) When their parents separated, their mother took custody of the girls and moved to Colorado, and the boys stayed with their father. (89 RT 19136.)

Diana Kleinsasser is appellant's mother. (90 RT 19154.) The last time she saw appellant was in 1990. (90 RT 19155.) Kleinsasser's father

was in an automobile accident and had lost his left leg before she was born. (90 RT 19155-19156.) Her mother left when Kleinsasser was nine years old, leaving her to care for her ailing father. (90 RT 19156-19159.) She took care of her father until she married appellant's father, Ben, at the age of 15. (90 RT 19159-19160.) Kleinsasser met Ben in a math class; he was a senior and she was a freshman. (90 RT 19160.) She got pregnant, dropped out of high school, married Ben, and had seven children. (90 RT 19160-19161.) Before they got married, they got into an argument and Ben grabbed her arm, twisting it up and behind her until she heard it pop. (90 RT 19162-19163.) He broke her arm and she had to wear a cast for three months. (90 RT 19163.) Ben joined the Marine Corps after they got married. (90 RT 19165-19166.)

Ben physically abused Kleinsasser, and she often had black eyes and bruises. (90 RT 19167, 19172.) Ben broke her arm a second time when he pushed her down a staircase. (90 RT 19208-19209.) When she was pregnant with appellant, Ben punched her in the stomach, arms, and pulled her around by her hair. (90 RT 19172.) Kleinsasser called police five or six times, which only exasperated the situation. (90 RT 19190.) Kleinsasser testified Ben was never arrested, and the police just lectured her about being a good wife. (90 RT 19190.) Ben hit her and the children more severely after she called authorities. (90 RT 19189-19190.) Ben never hit their daughters. (90 RT 19170.)

Ben began hitting their son, Bernardo, when he was two years old. (90 RT 19169.) Appellant was around three years old when Ben started to physically abuse him. (90 RT 19176.) Ben beat appellant about once a month. (90 RT 19200.) Appellant would have black and blue marks on his

buttocks and back. (90 RT 19201.) Ben's beatings of the children never caused any broken bones or necessitated medical treatment. (90 RT 19348.) When appellant was around five or six years old, the beatings decreased in frequency. (90 RT 19199.)

Kleinsasser testified that appellant displayed hyperactive behavior as a child, and he was not able to follow directions. (90 RT 19173-19174, 19176.) In kindergarten, the school asked Kleinsasser to withdraw appellant because he was not able to sit still. (90 RT 19179.) She noticed that appellant was not participating in group activities with other children. (90 RT 19179-19180.) Appellant's next kindergarten teacher insisted that he take Ritalin. (90 RT 19181.) The school tested appellant for learning disabilities and discovered appellant was aphasic, that is, partially unable to articulate or comprehend language. (90 RT 19183, 19176-19177.)

When appellant was in fifth grade, after planning for over two years, Kleinsasser left Ben. (90 RT 19209-19212, 19295.) She ran away with her three daughters to her uncle's ranch in Colorado. (90 RT 19212.) She never said goodbye to appellant. (90 RT 19213.)

Kleinsassar testified that while she loved her son dearly, she saw many of the Ben's negative qualities in appellant. (90 RT 19283.) Ben never wanted to converse, never told the truth, and covered up his emotions and feelings. (90 RT 19283.) Kleinsasser testified appellant always idolized his father. (90 RT 19292.) Kleinsasser testified that, although it sounded strange, appellant loved little children, but she thought he never knew how to treat them properly. (90 RT 19284.) She thought appellant had a beautiful voice that she described as a "gift from God." (90 RT 19295.)

Other than appellant, none of Kleinsasser's seven children had ever been convicted of a serious felony. (90 RT 19302-19304.) Appellant's brothers, Ben and Rick, did not abuse their children. (90 RT 19303.) None of Kleinsasser's other children had ever been convicted of abusing children. (90 RT 19303.)

b. Neuropsychologist Report

Dr. Wesley Sanderson is a clinical psychologist and clinical neuropsychologist. (90 RT 19225.) Dr. Sanderson met with appellant for two days to conduct numerous evaluations and diagnostic tests for a comprehensive neuropsychological evaluation, and issued a report on December 1, 1997. (90 RT 19230-19234.) Dr. Sanderson reviewed appellant's school records and previous neurological assessments performed on appellant when he was a child. (90 RT 19236.) Appellant's childhood assessments found a soft neurological finding – indicating his nervous system was not maturing properly. (90 RT 19237.) Appellant was functioning with a low-average range of intelligence with a significant language learning disability. (90 RT 19239.)

A report from when appellant was eight-years-old indicated appellant felt he was dominated and extensively controlled by his mother. (90 RT 19239-19240.) The report recommended placement in an educationally handicapped classroom for children with learning disabilities, along with strong language emphasis and behavioral management. (90 RT 19240.) The report recommended family counseling, but Dr. Sanderson doubted it had occurred considering appellant's parents divorced shortly after the report was written. (90 RT 19240.)

Dr. Sanderson also looked at a report from 1984, regarding a juvenile disposition hearing for appellant, which indicated appellant possibly suffered from a cerebral dysfunction. (90 RT 19240-19241.) The 1984

report described appellant's behavior as egocentric and antagonistic, with strong oppositional tendencies. (90 RT 19241.) In 1976, appellant's intelligence test score had been low-average, and in 1984, it showed borderline intellectual functioning, the fifth percentile. (90 RT 19242.) In 1997, appellant's intelligence test score was low-average. (90 RT 19243.)

Appellant, in describing his history to Dr. Sanderson, said that he was a "big-time alcoholic" from age 20 to 25. (90 RT 19245.) Appellant admitted to using marijuana and methamphetamine. (90 RT 19245-19246.) Due to inactivity and his heavy drinking, appellant once weighed over 300 pounds, but lost 146 pounds by exercising on his bicycle. (90 RT 19246.) Appellant said that he had been alcohol- and drug-free for five years. (90 RT 19246.)

Dr. Sanderson testified many abusers of children were often abused themselves. (90 RT 19261.) It is common for an abused child to identify with the abuser and to be loyal, never reporting the abuse. (90 RT 19263-19264.) Having been abused as a child is a significant risk factor for abusing children. (90 RT 19264.)

During the 11 hours of evaluation, Dr. Sanderson administered 10 to 12 tests in order to examine all eight areas of appellant's brain. (90 RT 19247.) Dr. Sanderson's evaluation in 1997 was consistent with appellant's previous examinations. (90 RT 19248.) Dr. Sanderson did not consider appellant to be malingering. (90 RT 19248.) Dr. Sanderson described appellant's attitude during his evaluation as minimally cooperative and reluctantly compliant. (90 RT 19254.) Appellant was overly polite, manipulative, and sarcastic with the examiner. (90 RT 19255.) He was trying to gain favor with examiner in hopes that the examiner would be easier on him. (90 RT 19255.) Dr. Sanderson testified it was an ordeal to examine appellant because he expressed reluctance to testing. (90 RT 19255.)

Based on his examination, Dr. Sanderson concluded appellant suffered from organic brain impairment. (90 RT 19248-19249.) He noted appellant had generalized cerebral dysfunction, which means the left, right, front and backsides of the brain showed impairment. (90 RT 19249.) There was mild but definite impairment to brain function in both hemispheres, but appellant's left hemisphere showed more impairment. (90 RT 19249-19250.) Dr. Sanderson explained appellant's brain damage could have occurred at any time, either at birth or from some illness in infancy or childhood. (90 RT 19252.)

Dr. Sanderson testified appellant had a generalized impairment of brain function in the left temporal and parietal lobes. (90 RT 19265-19266.) Appellant's actual organic brain damage scores were all within the brain-damaged range, except for the impairment index. (90 RT 19260.) This suggested appellant had some failures in development because his brain did not properly mature or develop, or possibly appellant had experienced some deterioration of adaptive abilities dependent upon brain function. (90 RT 19260-19261.) Appellant showed the greatest memory impairment in auditory and verbal receptive memory. (90 RT 19256.) Dr. Sanderson explained that appellant's brain impairment or damage did not make him unable to control his behavior, but it could make it more difficult. (90 RT 19270-19271.) Controlling behavior is a combination of factors, which involves desire or motivation. (90 RT 19271.) Dr. Sanderson concluded that appellant's organic brain impairment was one factor of many involved in his behavior. (90 RT 19278.)

Dr. Sanderson described appellant's personality as narcissistic and self-centered. (90 RT 19259.) Dr. Sanderson defined a narcissistic personality as a person who is more concerned about himself than he is

with other people. (90 RT 19273.) In reaction to conflict, many times a narcissistic person will jump to the conclusion that he is right, the other person is wrong, and, because he wants or demands something, he deserves to get what he wants. (90 RT 19273-19274.) There is not enough empathy or feeling for the other party, and there is too much focus on what would be convenient, pleasant, or more comfortable for the narcissist. (90 RT 19274.) Dr. Sanderson testified appellant needed attention, frequent approval, and had an exaggerated sense of personal pride. (90 RT 19258.) Throughout his lifetime, appellant developed a conflict about personal worth when he became aware of his receptive language difficulties, which led to a less effective level of psychological functioning, including significant mood fluctuations. (90 RT 19258.)

Dr. Sanderson reported appellant failed to develop a mature balance between a healthy concern for his own integrity and the integrity of others. (90 RT 19274-19275.) He further noted appellant tended to be less concerned with issues of social acceptability and was more apt to do as he pleased rather than compromise. (90 RT 19275.) Appellant was very self-centered and tended to overestimate his worth, leading to an excessive use of rationalization and denial when his integrity was challenged. (90 RT 19277.)

ARGUMENTS

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR CHANGE OF VENUE

Appellant claims the trial court prejudicially erred in denying his motion for change of venue compelling reversal. (AOB 65-158.) Respondent disagrees.

A. Record

1. Change Of Venue Hearings

a. First Trial

On February 4, 1998, appellant filed a motion for change of venue (4 CT 1186-1189), and on February 23, 1998, the prosecution filed an opposition (5 CT 1465-1474). The hearing began on March 2, 1998 (5 CT 1578; 6 RT 512), and the trial court denied the motion on March 6, 1998 (5 CT 1612; 7 RT 754-758). The trial court found that it was not reasonably likely that appellant could not receive a fair trial in Kern County. (7 RT 755.)

b. Second Trial

On January 13, 2000, appellant filed a motion for change of venue. (44 CT 13135-13144.) The prosecution filed an opposition. (43 CT 12983-12993.) On February 23, 2000, the trial court heard appellant's motion on change of venue. (55 RT 11718-11743.) The trial court denied appellant's venue motion, without prejudice, finding that it was not reasonably likely that appellant could not receive a fair trial in Kern County. (55 RT 11741-11743; 44 CT 13240.) The court addressed the nature and extent of the media coverage, recognizing it was "substantial" and "high profile" (55 RT 11741), stating,

> It's clear to me, at this point in time, in evaluating where are we today with this prospect, that I have not been convinced by the defense that there would be any reason to grant the motion for a change of venue.

> There are no studies having been submitted. There's no indication of the impact of this media blitz, if you will, media coverage of these various matters that would cause the Court to conclude that the defendant, in spite or in the face of this media coverage, that the defendant would be denied a right to have a fair trial before a jury in this community.

(55 RT 11742-11743.)

2. Jury Voir Dire – Second Trial

Voir dire began on February 28, 2000 (56 RT 11871). During voir dire, the trial court read a general statement of the case to the jury panel (56 RT 11876-11880; 44 CT 13280-13284), which was submitted by the prosecution without objection (55 RT 11744-11747; 56 RT 11816-11836, 11829, 11856). Each side had 20 peremptory challenges. (69 RT 14922.) After using only 15 of its 20 peremptory challenges (69 RT 14974-14981), the defense accepted the jury panel (69 RT 14982). After exercising a peremptory challenge, the defense accepted the alternates. (69 RT 14984.) Defense counsel did not challenge any of the final jurors or alternate jurors for cause. Twelve jurors (69 RT 14982-14983; 70 RT 15071) and two alternate jurors (69 RT 14984) were sworn to try the case on April 3 and 4, 2000.

A brief summary of voir dire for the 12 impaneled jurors and 2 alternate jurors is described below.

Juror 200119514 # 1 indicated on her questionnaire that she had heard of appellant. (79 CT 24088.) She heard in the news appellant was "accused of killing girlfriends['] children – first trial resulted in a mistrial or a hung jury." (79 CT 24090.) She wrote that this information did not make her favor either the prosecution or defense because she "did not know any of the facts so [she] could not draw any conclusion." (79 CT 24090.)

She did not regularly follow criminal cases or crime stories in the news. (79 CT 24091.) When asked if she had heard of this case before, she responded, "Yes. I believe I've heard bits and pieces about it." (67 RT 14574.) She heard about the case on television and did not read the newspaper. (67 RT 14574.) Then the following exchange occurred with the trial judge:

> Q. The law requires that the jurors make a decision in these kinds of cases, these criminal cases -- they must make the decision exclusively from information that's presented in the courtroom by way of evidence that is submitted through testimony of witnesses and only from that source and not from any other source.
>
> In other words, if somebody heard something about this case on TV, such as you have in the past, we need to get a full assurance that you can completely disregard that from your function, if you are a juror in this case, and exclusively utilize the information that's presented here in the courtroom.
>
> Can you do that?
>
> A. Yes, I think I can.

(67 RT 14575.) The defense explained that this case involved the death of two young children. (67 RT 14579.) When asked by the defense if based on those allegations, she could be fair to both sides, she responded, "Yes." (67 RT 14581.) She thought that if she were in appellant's shoes, she would get a fair trial from a juror like herself. (67 RT 14581.) Neither the prosecution (67 RT 14579) nor the defense (67 RT 14581) challenged her for cause.

Juror 200231953 #2 indicated on his questionnaire that he had not heard of appellant. (79 CT 23944.) He had resided in Kern County for only 11 months at the time he filled out his questionnaire, having recently

moved from Utah. (79 CT 23938.) He wrote that all he had heard about this case was what the trial judge told them that day in court. (79 CT 23946.) He did not watch television or regularly follow criminal cases or crime stories in the news. (79 CT 23947.) When the trial judge inquired if he had ever heard of this case, he responded, "No." (68 RT 14682-14683.) He assured the trial judge that he would do his best to be fair to both sides. (69 RT 14687.) He stated the only reason he should not be on the jury was that he lived two hours away. (69 RT 14687.) The trial judge asked him if he had any children and explained, "This is a case in which the allegations are that the defendant killed two children, two young children. The fact that you have children yourself, is that going to get in the way of your being a fair and impartial juror in this case?" (69 RT 14689.) He responded, "I don't think so, no." (69 RT 14689.) The trial judge again asked him if he could "assure" the court that he would be a fair and impartial juror and he said, "Yes." (69 RT 14689.) Neither the defense (69 RT 14690) nor the prosecution (69 RT 14691-14692) challenged him for cause.

Juror 20054129 #3 indicated in his questionnaire that he had not heard of appellant. (79 CT 23992.) He wrote that he had heard "nothing" about this case. (79 CT 23994.) He did not regularly follow criminal cases or crime stories in the news. (79 CT 23995.) When asked by the trial judge during voir dire if he had heard of this case before, he said, "No." (57 RT 12233.) He stated he had not learned anything new about the case since the week before when the judge read the general statement of the case. (57 RT 12233.) He assured the court that he could be fair to both sides. (57 RT 12233-12234.) Neither the defense (57 RT 12239) nor the prosecution (57 RT 12242) challenged him for cause.

Juror 200365771 #4 indicated on his questionnaire that he had heard of appellant. (79 CT 23848.) However, he also wrote on his questionnaire that he had not heard anything about this case or about appellant. (79 CT 23850.) When questioned regarding this discrepancy during voir dire, he explained that he had heard of appellant in passing on the radio and that was all; he was not familiar with the circumstances of the case. (65 RT 14030.) He articulated that he did not have any recollection of any specific facts, only appellant's name because he had gone to school with individuals with the same last name, and he thought it might be someone he knew. (65 RT 14030.) He did not regularly follow criminal cases or crime stories in the news. (79 CT 23851.) When asked during voir dire if he had heard of the case before, he stated, "No." (65 RT 14022.) He said he understood that the statement previously read by the judge describing the allegations against appellant was not evidence, and he would not consider it as such. (65 RT 14022-14023.) When questioned about being a juror on a death penalty case, he stated, "I have thought about it, and I do believe that I can be an impartial juror and listen to the evidence as it's presented." (65 RT 14023.) He clarified that he could be fair and impartial in this case. (65 RT 14024-14025.) He felt that jury service was a "privilege and should not be taken lightly." (65 RT 14027.) The defense attorney stated that appellant was charged with two allegations of murdering children and a special allegation of multiple murders. (65 RT 14029.) The defense attorney asked if he thought the death penalty was appropriate in every case of first-degree murder of children. (65 RT 14029.) He responded, "I can't answer that without hearing all the evidence." (65 RT 14029.) The defense (65 RT 14032) and the prosecution (65 RT 14034) passed him for cause.

Juror 200096442 # 5 had not heard of appellant (80 CT 24137) and had heard "nothing" regarding media coverage of this case (80 CT 24139). When asked by the court if the fact that he has 11 children ranging in age from 8 months to 28 years of age would influence his verdict considering appellant's case involved murder allegations of two young children, he responded, "I'm sure it would be depressing, but I don't believe that it would be too much of a problem." (61 RT 13137.) When asked if he could be fair to both the defense and prosecution he replied, "I think so, yes." (61 RT 13138.) In his questionnaire, he wrote that he reads the Bakersfield Californian daily and watches approximately two hours of television per day. (80 CT 24139.) Sports were his favorite types of programs. (80 CT 24139-24140.) He did not regularly follow criminal cases or crime stories in the news. (80 CT 24140.) He did not watch the news on television. (61 RT 13142.) He stated that if selected as a juror he would decide the case based only on the evidence that he heard in the courtroom. (61 RT 13142.) The following exchange with defense counsel occurred:

> Q. In other words, the question is: Can you ultimately decide this case, if you are selected as a juror, only on the facts that you hear in the courtroom and not be influenced by any media coverage? Sometimes they report it right, and sometimes they report it wrong.
>
> A. It definitely wouldn't be from any reading I had done in the paper, no, sir.
>
> Q. I'm talking about all media coverage, basically. What about TV also?
>
> A. I don't watch the news on TV.
>
> Q. So are you giving me your assurance, in other words, that you could decide this case, if you are selected as a juror, only on the evidence that you hear in the courtroom?

A. I would like to think so, yes, sir.

Q. Okay. Thank you for your honesty.

(61 RT 13141-13142.) The prosecution (61 RT 13144) and defense (61 RT 13143) passed him for cause.

Juror 200198330 #6 indicated on his questionnaire that he had not heard of appellant. (79 CT 23968.) When asked by the trial judge if he had ever heard of this case before he responded, "Not until you called me in for the first time." (68 RT 14703.) He said he understood that the introductory summation of the case was not evidence. (68 RT 14703.) During voir dire defense stated, "This case involves allegations of the death, murder basically, of two minor children. You indicated that you didn't know anything about this case on your questionnaire." (68 RT 14707-14708.) He responded, "That's correct." (68 RT 14708.) In 1996, Juror #6 had been convicted of being under the influence of methamphetamine. (68 RT 14709.) Neither the defense (68 RT 14708) nor the prosecution (68 RT 14712) challenged him for cause.

Juror 200109361 #7 indicated on his questionnaire that he had heard of appellant for the first time that morning, February 29, 2000, on the way to jury duty. (79 CT 24016, 24018.) He heard on the radio that the case was going to trial. (79 CT 24018; 62 RT 13401.) He frequently read the Kern Valley Sun's front page, advertisements, and sports pages. (79 CT 24018.) He did not regularly follow criminal cases or crime stories in the news. (79 CT 24019.) When asked by the court if he could disregard anything he had heard from the media about this case, he replied that he would only consider what he heard in the courtroom. (62 RT 13401.) The prosecution (62 RT 134060) and defense (62 RT 13404) passed him for cause.

Juror 200358901 #8 indicated on his questionnaire that he had heard of appellant. (79 CT 24064.) He recalled media coverage from television and the newspaper about this case involving "baby deaths." (79 CT 24066.) He indicated on his questionnaire that this information would make him favor the prosecution because, "[it] seemed that what [he] learned from the news showed he was guilty." (79 CT 24066.) He indicated that he daily reads all portions of the Bakersfield Californian newspaper. (79 CT 24066.) He further indicated that he regularly follows "some" criminal cases or crime stories in the news and when asked which ones, he answered, "depends." (79 CT 24067.) During voir dire, he stated that he is a retired philosophy and English professor. (67 RT 14447.) He stated that he had heard about this case from the Bakersfield Californian a long time ago and from various television news reports. (67 RT 14454.) Then the following exchange with the court occurred:

Q. Have you heard of this case before, Mr. [200358901]?

A. Yes.

Q. And can you briefly tell me on what basis you've heard about this case.

A. Basically, the news media.

Q. And which media, in particular?

A. Well, The Bakersfield Californian. It's been so long, it seems like. I don't know how long ago it was. And the television news reports.

Q. Okay, from both news sources, then, you've heard some of the media coverage of this matter. Is that correct?

A. Yes.

Q. And the rules of the process here in this kind of a case dictate that the jurors only rely upon information that's presented here in the courtroom -- that is, the evidence that's presented here through testimony -- and not from any other source.

And in light of that ruling, could you disregard anything you may have heard of this case from any other source, such as media coverage in the past, and exclusively rely upon the evidence that's presented here in the courtroom to make a decision?

A. Yes.

Q. Feel competent in that, sir?

A. Yes, I would do it, make an effort.

Q. We talk about this as kind of unringing the bell, so to speak, and some people are unable to make that distinction and they can't make that kind of an assurance.

A. Well, I wouldn't read or listen to -- as soon as I saw it would be on, I would cut it off or not read anything to do with it in the media.

Q. Okay. And the question is, is the fact that you have had some exposure to this in the media, is that going to impact on your thought processes in any way in this case?

A. No.

Q. You can disregard anything in that regard.

A. That's what I would intend to do if I got selected, yes.

Q. And you feel you could be fair to both sides if you were a juror in this case, sir?

A. Yes.

Q. Both to the defense and to the district attorney?

A. Yes.

(67 RT 14454-14455.) The prosecution and defense (67 RT 14462) passed him for cause.

Juror 190049175 #9 indicated in his questionnaire that he had not heard of appellant. (80 CT 23872.) He wrote that he had heard "nothing" about the case. (80 CT 23874.) He did not regularly follow criminal cases or crime stories in the news. (80 CT 23875.) He agreed that he could be fair to both sides if he were a juror in this case. (58 RT 12426.) He agreed that he could keep an open mind during the entirety of the case. (58 RT 12426-12427.) When asked by the trial judge during voir dire if he was "familiar at all with this case from any media coverage previously?" (58 RT 12427), he replied, "No, I'm not" (58 RT 12427). The prosecution (58 RT 12432) and defense (58 RT 12435) passed him for cause.

Juror 200290620 #10 indicated on his questionnaire that he had not heard of appellant. (80 CT 24161.) When asked in his questionnaire about what, if any, media coverage he had heard about this case he replied, "[N]othing." (80 CT 24163.) He frequently read the sports, advertisements, and Parade magazine sections of Bakersfield Californian on Sundays. (80 CT 24163.) He watched two to three hours of television a day and his favorite station is ESPN. (80 CT 24163.) He does not regularly follow criminal cases or crime stories in the news. (80 CT 24164.) He said during voir dire that he had never heard of this case before. (66 RT 14261.) He further stated that he would be fair to both sides. (66 RT 14261.) The prosecution (66 RT 14266) and defense (66 RT 14264) passed him for cause.

Juror 190040480 # 11 indicated on her questionnaire that she had not heard of appellant. (79 CT 23920.) However, she wrote that she knew that

this case was a retrial and she thought the first trial might have been overturned due to jury misconduct. (79 CT 23922; 57 RT 12199.) The judge asked her where she learned about the allegations against appellant, and she responded, "Through the media," the newspaper being her primary source as she was an avid reader of the Bakersfield Californian. (57 RT 12200.) During voir dire the following exchange with the court occurred:

> Q. Do you know of any reason why you should not be on this jury?
>
> A. Only my prior knowledge of this from the last time it was tried. I'm well aware of what the case is and I view myself as a child advocate. Just the nature of my position, I believe I am a great child's advocate. I don't know that that would prejudice me in this case or not, but –
>
> Q. Let's talk –
>
> A. -- as a parent and a teacher, that's my first priority.
>
> Q. You have children?
>
> A. Yes, sir, I do.
>
> Q. How old are your children?
>
> A. My children range in age from 12 to 17.
>
> Q. How many?
>
> A. I have four of them.
>
> Q. Four, okay.
>
> Let's talk a little bit about your reference here to having had some knowledge of this case from previous proceedings.
>
> A. Yes, sir.
>
> Q. Where did you learn about those allegations?
>
> A. Through the media. Through the media.

Q. In particular, what media?

A. Usually the newspaper is my primary source.

Q. So I gather you're an avid reader of The Bakersfield Californian?

A. That's my 45 minutes of free time. You betcha.

Q. And having spent 45 minutes on a daily basis reading The Californian, you've had some exposure, then, to this particular case, which is –

A. Some exposure.

Q. -- sometimes referred to as the Alvarez case.

A. Yes, sir.

Q. And in addition to the newspaper, have you had any exposure with the media, the electronic media?

A. Usually television in the evening, but it doesn't have my full attention. It's while other things are going on that is on, but –

Q. How about radio?

A. No, I don't have time.

Q. No time, okay.

This case has had, as you are probably well aware, a significant amount of media attention in the past.

A. Yes, sir, I am aware.

Q. And over a several-year period.

A. Yes, sir.

Q. If you were a juror in this case, [190040480], would you -- could you give us a full assurance, a hundred-percent assurance, that you could completely set aside any impressions or thoughts or ideas that you have had from this media coverage and exclusively utilize the information that's presented here in the courtroom as the basis for making a determination as to the defendant's guilt or innocence?

A. I would give it my best effort, yes, sir.

Q. I need a little more than that.

A. Well, having never done it before, I don't know that I could not, but I don't know –

Q. Let me ask you this question: Will you make every effort –

A. Yes, sir.

Q. -- to disregard whatever thoughts or ideas you may have had in this regard and work diligently to be a juror in this case, if you are one, who could exclusively use the evidence that's presented here in the courtroom as a basis for making a determination of fact?

A. I would give it my best effort, yes, sir.

Q. Let me ask you this kind of a question: Suppose you happen to be unfortunate enough to be a defendant in a case like this and somebody was in the jury who has had the experiences and thoughts that you've had.

Would you feel comfortable with that person being a juror in your case?

A. I don't know. I don't know. I know not everybody thinks the way I think; however, I don't think my thoughts and my abilities are far from the mainstream.

Q. We're talking –

A. I know what you're asking. I just – having never done it, having never tested my abilities, I can't say -- I would hope I have the ability to focus on the case as it is tried in this courtroom rather than from what I've read.

Q. What we're really talking about -- and, of course, you've been through a lot of education, a lot of experience as a teacher and so forth. We're really talking about self-discipline –

A. Yes, sir.

Q. -- in this category.

A. And I'm pretty good with that.

Q. And we all -- many people in this community, in this county, have had exposure to this case from one source or another. Just because somebody has read about something or heard about something does not necessarily disqualify them from being a juror in this case.

It may if, in fact, they cannot give me an assurance that they feel they can completely set that aside and concentrate exclusively on the evidence that's presented here in the courtroom. That's the bottom line.

Do you feel you're comfortable with that responsibility?

A. Yes, sir, I will give it my best.

Q. Okay.

(57 RT 12220-12203.) The prosecution (57 RT 12209) and defense (57 RT 12210-12211) passed her for cause.

Juror 200267192 #12 indicated in her questionnaire that she had never heard of appellant. (80 CT 24112.) She had moved to Kern County from Illinois approximately five months earlier. (80 CT 24106; 61 RT 13107.) She wrote that the only thing she heard about this case was in the hallway outside the courtroom when "someone said I hope it is not [the]

case about the man killing his 2 children." (80 CT 24114.) She had never heard of the case from the media – no newspaper articles or television. (61 RT 13114.) In her questionnaire, she wrote that someone mentioned, "that's the retrial" and she knew it was a retrial based on juror misconduct. (61 RT 13115.) That person told her that he or she had read about it in the paper, nothing else. (61 RT 13115.) Defense counsel asked if she could be analytical, setting emotions aside in this case, as it involves the deaths of children and she has a young child. (61 RT 13117.) She responded, "I think if the facts are well displayed and everything, I think I would be able to judge if it was right or wrong, if that was - - if that person is guilty or not guilty. I hope to anyway." (61 RT 13117.) She further explained, "I really don't know the situation in how it happened or if it did happen. So I guess I don't know how intense this case is going to be." (61 RT 13117.) She said, "Hopefully I'm a very - - I consider myself an honest person. So I'd want to do what's right." (61 RT 13117.) The prosecution (61 RT 13122) and defense (61 RT 13119) passed her for cause.

Alternate Juror 200304374 indicated in her questionnaire that she had heard of appellant from the newspaper. (79 CT 23896.) She read a newspaper article concerning jury selection for this trial on the first day she was called for jury duty on February 29, 2000. (79 CT 23898; 65 RT 14037.) She wrote that this information did not make her favor the prosecution or defense because she did "not know that much about [the] case." (79 CT 23898.) She does not regularly follow criminal cases or crime stories in the news. (79 CT 23899.) She also heard of the case on the television news. (65 RT 14037.) When the judge asked her if her exposure to the media coverage would influence her decision-making process as a juror, she said it would not because she did not know all of the

facts. (65 RT 10437-10438.) She stated she could be fair to both the prosecution and the defense. (65 RT 14038.) She stated that if she served on the jury she could be a fair juror and give it 100% of her attention. (65 RT 14042.) She said that she thought it was important for her to be a fair and impartial juror. (65 RT 14051.) Defense counsel asked her if she were in appellant's place whether she would get a fair trial from 12 jurors just like her and she responded, "Yes." (65 RT 14051-14052.) The prosecution (65 RT 14047) and defense (65 RT 14051) passed her for cause.

Alternate Juror 200375713 indicated on his questionnaire that he had never heard of appellant (79 CT 24040) and had heard nothing about this case, "except what the judge today told [them]" in the courtroom (79 CT 24042). When asked if this knowledge made him favor the prosecution or defense he replied, "Neither, [I] haven't heard the case." (79 CT 24042.) He did not regularly follow criminal cases or crime stories in the news. (79 CT 24043.) When asked in voir dire if he had heard of this case before, he replied, "No." (66 RT 14301.) He stated that he could be a fair juror in this case. (66 RT 14305-14306.) The defense asked him if he were appellant in this case and 12 jurors just like him were seated in the juror box, would he feel confident that he would get a fair trial. (66 RT 14306.) He replied, "Yes." (66 RT 14306.) The prosecution (66 RT 14308) and defense (66 RT 14306) passed him for cause.

B. Law And Analysis

A change of venue must be granted when the defendant demonstrates a reasonable likelihood that a fair trial cannot be held in the county. (§ 1033, subd. (a); *People v. Vieira* (2005) 35 Cal.4th 264, 278-279.) In ruling on the motion, the trial court considers: (1) the nature and gravity of

the offense; (2) the nature and extent of the news coverage; (3) the size of the community; (4) the status of the defendant in the community; and (5) the popularity and prominence of the victim. (*Id.* at p. 279.) On appeal, it is the defendant's burden to show: (1) that denial of the venue motion was error (i.e., a reasonable likelihood that a fair trial could not be had at the time the motion was made); and (2) that the error was prejudicial (i.e., a reasonable likelihood that a fair trial was not in fact had). (*People v. Prince* (2007) 40 Cal.4th 1179, 1213.) A reasonable likelihood means something less than "more probable than not" and something more than merely "possible." (*People v. Dennis* (1998) 17 Cal.4th 468, 523.) The reviewing court sustains any factual determinations supported by substantial evidence, and independently reviews the trial court's determination as to the reasonable likelihood of a fair trial. (*People v. Hart* (1999) 20 Cal.4th 546, 598.)

1. Forfeiture

As a threshold issue, appellant forfeited this claim when he failed to renew his change of venue motion after voir dire. (*People v. Hart, supra,* 20 Cal.4th at p. 598; see also *People v. Bolin* (1998) 18 Cal.4th 297, 312-313; *People v. Williams* (1997) 16 Cal.4th 635, 654-655.) Here, appellant did not renew the motion after voir dire. (69 RT 14982-14983, 14984-14985 70 RT 15090.) Thus, the claim is forfeited.

2. Appellant's Failure to Exhaust Peremptory Challenges

As appellant recognizes (AOB 251-254), his claims are undermined by his failure to exhaust his peremptory challenges (69 RT 14974-14984) and failure to challenge any of the jurors for cause. (57 RT 12210-12211, 12239; 58 RT 12435; 61 RT 13119, 13143; 62 RT 13404; 65 RT 14032,

14051; 66 RT 14264, 14306; 67 RT 14581, 14462; 68 RT 14708; 69 RT 14690; *People v. Farely* (2009) 46 Cal.4th 1053, 1085, citing *Beck v. Washington* (1962) 369 U.S. 541, 557-558 [the circumstance that the defendant did not challenge for cause any of the jurors selected "is strong evidence that he was convinced the jurors were not biased"]). Here, appellant failed to exercise all of his available peremptory challenges by using only 16[7] peremptories out of 20 (69 RT 14974-14984), while the prosecution used 13 (69 RT 14974-14976, 14979, 14981-14984). As this Court has repeatedly affirmed, "The failure to exhaust peremptories is a strong indication that the jurors were fair, and that the defense itself so concluded." (*People v. Dennis*, *supra*, 17 Cal.4th at p. 524, citing *People v. Price* (1991) 1 Cal.4th 324, 393, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1162, [internal quotation marks omitted].) This last point has proved decisive in affirming the denial of a motion to change venue. (See *People v. Dennis*, *supra*, 17 Cal.4th at p. 524; *People v. Sanders* (1995) 11 Cal.4th 475, 507; *People v. Daniels* (1991) 52 Cal.3d 815, 853-854; *People v. Davis* (2009) 46 Cal.4th 539, 581.)

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[7] Appellant used peremptory challenges on the following: Juror 200139832 (69 RT 14974), Juror 200313554 (69 RT 14975), Juror 200016068 (69 RT 14976), Juror 200044426 (69 RT 14976), Juror 200083817 (69 RT 14976-14977), Juror 200320607 (69 RT 14977), Juror 200031341 (69 RT 14977), Juror 200061416 (69 RT 14978), Juror 200077231 (69 RT 14978), Juror 200287618 (69 RT 14979), Juror 200340413 (69 RT 14979), Juror 200044597 (69 RT 14980), Juror 200329630 (69 RT 14980), Juror 200097478 (69 RT 14981), Juror 200153647 (69 RT 14981); also, appellant challenged Juror 200127437 (69 RT 14983) as an alternate.

Here, defense counsel's neither to exhausted his peremptory challenges nor objected to the jury that was selected. Rather, defense counsel expressly *stated* he and appellant thought the jury could be fair and impartial. When discussing the dismissal of a juror during the selection process because the juror felt uncomfortable with appellant "giving him a stare-down routine" (69 RT 14994), defense counsel stated, "[Appellant] agreed with counsel that the entire 12 people plus the alternates were appropriate jurors." (69 RT 15004.) Appellant expressed satisfaction with not only the final composition of 12 jurors and 2 alternates but also the original 12 jurors and 4 alternates.[8] Even appellant recognized that his jury was not predisposed.

Appellant's failure to exhaust his perempotry challenges, and his express recognition that the sworn jury was "appropriate" as being fair and impartial, is decisive in determining that the jury actually selected was fair. (See *People v. Dennis*, *supra*, 17 Cal.4th at p. 524; *People v. Sanders*, *supra*, 11 Cal.4th at p. 507; *People v. Daniels*, *supra*, 52 Cal.3d at pp. 853-854.) To hold otherwise would negate this Court's prior authority on this point. This fact, along with all other factors, establishes that his claim must fail.

3. Change Of Venue Factors

a. Nature And Gravity Of The Offense

Appellant contends the offense was "unusually distressing, involving the death of two helpless children in two separate incidents," weighing in favor of a change of venue. (AOB 241.) The brutal beatings, torture, and

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[8] This comment was made before Juror 200173447 and Juror 200043863 were excused the same day they were sworn. (69 RT 15036-15039.) Both counsel stipulated to the dismissals. (69 RT 15032.)

consequent murders of Tyler and Dylan were appalling acts. Even so, in capital cases with crimes of significantly greater viciousness than was displayed in this case, this Court has ruled that the nature of the crime is not decisive.

In *People v. Williams, supra,* 16 Cal.4th at page 655, the court noted that a capital murder involving the murder of four people, including two children, was not dispositive in favor of a change of venue. Similarly, in *People v. Price*, *supra*, 1 Cal.4th at pages 390-391, in which the murder victim was a mother beaten viciously in her home while her two children slept nearby, the nature of the crime was not decisive for venue purposes.

"Prospective jurors would sympathize with the girls' fate" no matter where the trial was held, and this sympathy stems from the nature of the crime, "not the locale of trial." (*People v. Edwards* (1991) 54 Cal.3d 787, 808.) Regardless of where appellant's trial had occurred, the nature of the crime would have been the same. The inquiry remains whether the local jury pool was affected by the nature of the crime in a manner that makes it reasonably likely a defendant cannot have a fair trial unless the matter is transferred to a more distant venue. (See *Id.*) The murders of two children, while disturbing, are not determinative and do not compel a change of venue absent other indicia that a fair trial could not be had in Kern County.

Appellant further argues this case inspired a countywide interest in the general societal problem of child abuse. (AOB 241, 243.) However, during the first change of venue argument, the prosecutor explained that Dylan's death was one of the last of a string of nine abusive homicides involving child victims within a year and a half. (6 RT 739.) This publicity focused not on appellant or the other child homicides, but on the effectiveness of public agencies in intervening before a homicide could

occur. (6 RT 742, 738.) Contrary to appellant's claim, the focus on the subject was already there, "in the community's mind even before this case happened, and the larger part of the publicity that we've seen is devoted to that general subject." (6 RT 739.)

b. Nature And Extent Of The News Coverage

Appellant claims the news coverage over time was "sensational," describing appellant as a convicted child killer and the Antichrist, and had political overtones regarding child abuse, favoring a change of venue. (AOB 242-245.)

The trial court found there was "substantial" media coverage in this "high profile" case. (55 RT 11741.) However, even where the media coverage has been characterized as "sensational," this Court has found no error in the denial of a motion for a change of venue where "almost all of the media reports were more than three years old when the case came to trial." (*People v. Dennis*, *supra*, 17 Cal.4th at p. 523; see also *People v. Hernandez* (1988) 47 Cal.3d 315, 334-335 [venue change not mandated where the bulk of the media's coverage of gruesome facts was two years old].) The passage of time weighs heavily against a change of venue as "[t]ime dims all memory and its passage serves to attenuate the likelihood that early extensive publicity will have any significant impact at the time of trial." (*Odle v. Superior Court* (1982) 32 Cal.3d 932, 943.) Even the passage of several months can dispel the prejudicial effect of pretrial publicity. (*People v. Proctor* (1992) 4 Cal.4th 499, 525 [three months]; *People v. Jennings* (1991) 53 Cal.3d 334, 361 [eleven months].)

Any impact of the publicity in this case was mitigated due to the passage of time. Juror # 8 commented during voir dire that it had been "so long" since he heard any publicity about this case that he could not even

recall the exact passage of time. (67 RT 14454.) A large majority of the pretrial publicity occurred in 1996 and 1997, when the charges against appellant were filed (55 RT 11737), three to four years before appellant's trial in April of 2000 (80 CT 24181). Some of the pretrial publicity dated back to Tyler's murder in 1994, six years before appellant's trial. (55 RT 11737.) Nineteen months with very little publicity passed between the first trial and the second trial. (55 RT 11738.) Appellant admitted 30 newspaper articles related to this case and 135 articles related to other cases involving the deaths of young children due to abuse. (6 RT 598, 725-726, 605.) Of those 30 articles, all but one had been published by November of 1996, within a month of Dylan's murder. (6 RT 740.) Any potential prejudice arising from pretrial publicity was attenuated by the passage of time. (*People v. Welch* (1999) 20 Cal.4th 701, 744.)

Appellant relies on *Martinez v. Superior Court* (1981) 29 Cal.3d 574, 581 (*Martinez*) and *Williams v. Superior Court* (1983) 34 Cal.3d 584, 573-574 (*Williams*) for support. (AOB 244-245.) Both are easily distinguishable. *Martinez* and *Williams* both involved pre-trial writ proceedings in murder cases in Placer County, which was before jury voir dire was capable of showing whether a fair and impartial jury was selected. (*Martinez v. Superior Court*, *supra*, 29 Cal.3d at pp. 577-578; *Williams v. Superior Court*, *supra*, 34 Cal.3d at p. 587.) In both cases, there had been pre-trial publicity in which both Martinez's and Williams's co-defendants had implicated them accomplice in the crime. (*Martinez v. Superior Court, supra,* 29 Cal.3d at p. 582; *Williams v. Superior Court*, *supra*, 34 Cal.3d at pp. 589-593.)

In contrast, Kern County was much larger at the time of appellant's trial than Placer County at the time of either the Martinez or Williams writs. (43 CT 12984, 12986.) Only two seated jurors were vaguely aware of the

first trial assured the court that they could put that limited knowledge aside and sit as impartial jurors in this case. (67 RT 14575; 57 RT 12220-12203; *Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 582; *Williams v. Superior Court*, *supra*, 34 Cal.3d at pp. 592-593.) None of the seated jurors in appellant's case reported any knowledge that appellant was found guilty in the first trial, and knew only that there had been a mistrial for jury misconduct. (Juror #1 79 CT 24090; Juror #11 79 CT 23922; 57 RT 12199.) Appellant acknowledged that he had a fair and impartial jury. (69 RT 15004.)

Appellant argues that it was inevitable jurors professing no recollection of this case, or believing they could disregard it, would remember more as they heard the evidence, which would cause them to bend to initial impressions from pretrial publicity. (AOB 228.) Appellant presumes juror bias based on mere exposure to pretrial publicity and his belief that voir dire cannot adequately expose those biases, and further speculates regarding jurors' states of mind and recollection. Appellant's argument does not challenge any specific responses of the seated jurors as indicating they could not be fair and unbiased. This argument is without merit.

The trial court found there was no indication that the pretrial publicity would affect appellant's right to a fair trial in Kern County. (55 RT 11743.) The record supports the trial court's conclusion. While appellant claims that voir dire is not an effective indicator of prejudice and the assurances regarding the ability to be impartial cannot be trusted, this Court has determined otherwise, observing,

> [a]lthough "such assurances are not conclusive" [citation], neither do we presume that exposure to publicity, by itself, causes jurors to prejudge a defendant's guilt or otherwise become biased.

(*People v. Prince*, *supra*, 40 Cal.4th at p. 1215; see *People v. Lewis* (2008) 43 Cal.4th 415, 450.)

c. Size Of The Community

In 1999 Kern County had a population of over 600,000 people. (43 CT 12984, 12986.) Kern is one of the largest counties in California, ranking third in physical area and fourteenth in population. (43 CT 12984.) Bakersfield is the largest city in Kern County, and before appellant's trial, had a population of over 225,000 people in the incorporated area and approximately 350,000 in the greater metropolitan area. (43 CT 12984.) The news media is represented by 28 newspapers, more than 20 radio stations, 3 local television stations and cable access in much of the County to the Los Angeles and national markets. (43 CT 12984.)

Writing about Kern County, this Court has noted, "Cases in which venue changes were granted or ordered on review usually involved counties with much smaller populations." (*People v. Balderas* (1985) 41 Cal.3d 144, 178-179, citing *Williams v. Superior Court, supra,* 34 Cal.3d at p. 592 [Placer County, 117,000 population]; *Martinez v. Superior Court, supra,* 29 Cal.3d at p. 582 [same, 106,500 population]; *Frazier v. Superior Court* (1971) 5 Cal.3d 287, 293, fn. 5 [Santa Cruz County, 123,800 population]; *People v. Tidwell* (1970) 3 Cal.3d 62, 64 [Lassen County, 17,500 population]; *Fain v. Superior Court* (1970) 2 Cal.3d 46, 52, fn. 1 [Stanislaus County, 184,600 population]; *Maine v. Superior Court* (1968) 68 Cal.2d 375, 385, fn. 10 [Mendocino County, 51,200 population].) In

fact, denials of requests for venue changes have been upheld in cases involving counties with significantly smaller populations than that of Kern County at the time of appellant's trial. (See *People v. Vieira, supra,* 35 Cal.4th at pp. 280-283 [Stanislaus County, population 370,000]; *People v. Hayes* (1999) 21 Cal.4th 1211, 1251 [Santa Cruz County, under 200,000 population] *People v. Coleman* (1989) 48 Cal.3d 112, 134 [Sonoma County, 299,681 population].) Thus, Kern County's size does not weigh in favor of a change of venue.

d. Status Of The Defendant In The Community And Popularity And Prominence Of The Victim

Appellant complains that the potential for prejudice caused by the murder of two young, helpless children by a man described as "the Antichrist" on a radio talk show (AOB 249) weighed in his favor of a change of venue. (AOB 249-251.)

As for the status of appellant and the prominence and popularity of the victims, neither appellant nor the victims were prominent or notorious apart from their connection with the current case. Appellant was not prominent nor was he a transient or stranger to the community. (43 CT 12988.) Appellant had been in the community for many years and the young victims had been in the community only a short time, with Tyler only five months old and Dylan only four years old at the time of their deaths.

Appellant claims the victims' notoriety after death, as opposed to prominence achieved during life, makes no difference in the significance of this factor. (AOB 250.) This Court, however, has found,

> [a]ny uniquely heightened features of the case that gave the victims and defendant any prominence in the wake of the crimes, which a change of venue normally attempts to alleviate, would inevitably have become apparent no matter where defendant was tried.

(*People v. Prince*, *supra*, 40 Cal.4th at p. 1214, quoting *People v. Dennis*, *supra*, 17 Cal.4th at p. 523.) Thus, it is their status prior to the crime that is relevant to this particular issue. (See *People v. Prince*, *supra*, 40 Cal.4th at p. 1214; *People v. Ramirez* (2006) 39 Cal.4th 398, 434.)

Appellant further claims the victims' status as young children invoked a special place in the hearts of the community, supporting a change of venue. (AOB 250-251.) "This status, however, will not change with a change of venue." (*People v. Edwards, supra,* 54 Cal.3d at p. 808 [defendant stressed victims' prominence as children supported change of venue].) In *Edwards*, this Court rejected such a claim finding that prospective jurors would sympathize with the victims' fate wherever the trial was held and stated, "[t]he horrendous crime, not the local of the trial, evokes the sympathy." (*People v. Edwards, supra*, 54 Cal.3d at p. 808.) Thus, this factor did not support a change of venue.

4. Lack Of Prejudice

Assuming, arguendo, the trial court erred in refusing to change venue, the decision had no demonstrable effect on the fairness of the trial itself. In determining whether a reasonable probability exists that appellant did not receive a fair trial, this Court considers the voir dire "to determine whether the jurors may have been prejudiced by the pretrial publicity surrounding the case." (*People v. Proctor*, *supra*, 4 Cal.4th at pp. 526-527.) Exposure to publicity does not automatically translate into prejudice. (*Ibid*; see *People v. Panah* (2005) 35 Cal.4th 395, 448.) There is no prejudice if the

jurors can lay aside their impressions or opinions and render a verdict based on the evidence presented in court. (*People v. Daniels*, *supra*, 52 Cal.3d at p. 853.)

Of the 14 people who comprised the jury – 12 jurors and 2 alternates – 8 knew nothing about appellant or his crimes and had not been exposed to *any* pretrial publicity. (Juror #2: 79 CT 23944, 23946; 68 RT 14682-14683; Juror #3: 79 CT 23992, 23994; 57 RT 12233; Juror #5: 80 CT 24137, 24139; Juror #6: 79 CT 23968; 68 RT 14703, 14708; Juror #9: 80 CT 23872, 23874; 58 RT 12427; Juror #10: 80 CT 24161; 66 RT 14261; Juror #12: 80 CT 24112, 24114; 61 RT 13114-13115; and Alternate Juror 200375713: 79 CT 24040, 24024; 66 RT 14301.) Two seated jurors and one alternate juror had very limited knowledge of the case, and no information regarding the facts or circumstances of the crimes. (Juror #4: 65 RT 14030, 14022; Juror #7: 62 RT 13401; 79 CT 24018; Alternate Juror 200304374: 65 RT 14037; 79 CT 23850.) Only three seated jurors were exposed to some pretrial publicity involving the facts or circumstances of the crimes. (Juror #1: 79 CT 24090; 67 RT 14574; Juror #8: 79 CT 24066; 67 RT 14454; and Juror #11: 79 CT 23922; 57 RT 12199.) The five seated jurors and the one alternate juror who had any degree of prior knowledge of the case all assured the court that they were capable of setting aside that knowledge and deciding the case based on the law and the evidence presented at trial. (Juror #1: 67 RT 14575; Juror #4: 65 RT 14023-14025; Juror #7: 62 RT 13401; Juror #8: 67 RT 14454-14455; Juror #11: 57 RT 12220-12203; and Alternate Juror 200304374: 65 RT 10437-14038.)

Based on the jurors' limited exposure to, and memory of, the pretrial publicity, assurances made by the jurors to decide the case based only on the evidence presented at trial, and the nature and timing of the publicity,

there was no prejudice from any pretrial publicity warranting a change in venue. The trial court properly found that appellant could have a fair trial. (55 RT 11742-11743.) Appellant has not established a reasonable likelihood that he did not receive a fair trial in Kern County. (*People v. Jenkins* (2000) 22 Cal.4th 900, 943; *People v. Lewis, supra,* 43 Cal.4th at p. 450.)

5. Additional Arguments

Appellant makes several other contentions related to the change of venue motion. First, he claims this case is more egregious than *People v. Vieira,* because he contends, the voir dire failed to adequately investigate the jurors' knowledge of the case and the pretrial publicity was pervasive, not sporadic. (AOB 226-227; *People v. Viera, supra,* 35 Cal.4th at p. 283, fn. 5.) However, appellant failed to raise any objection below to the adequacy of the voir dire process, and actively participated in voir dire. At various times, during appellant's voir dire, defense counsel or the trial judge informed prospective jurors who were not familiar with the case that it involved the death of two young children and inquired whether that would affect their ability to be a fair and impartial juror. (Juror #1: 67 RT 14579-14581; Juror #2: 69 RT 14689; Juror #4: 65 RT 14029; Juror #5: 61 RT 13137, 13141-13142; Juror #6: 14707-14708; Juror #12: 61 RT 13117.) In addition, appellant did not object to the statement of the case read to the jury panel, and stated it was satisfactory. (56 RT 11836.)

Appellant claims Kern County has a large proportion of death penalty supporters which makes it more likely for the prosecution to stack the jury. (AOB 254.) Appellant cites few facts and no legal authority to support this claim. (See Cal. Rules of Court, rule 8.204(a)(1)(B).)

Appellant provides numerous statistics regarding voir dire and prospective jurors' answers. (AOB 185, 228-231.) However, appellant fails to cite to the record or explain the numerical process used to produce those statistics, making it impossible to respond. (See Cal. Rules of Court, rule 8.204(a)(1)(B).) These contentions should be rejected for lack of factual and legal support.

Assuming that the claim has been preserved for appeal, the trial court properly denied appellant's motion for change of venue because examination of the relevant factors did not show a reasonable likelihood that a fair trial could not be had in Kern County. Appellant also failed to show a reasonable likelihood that he in fact did not receive a fair trial. As such, his claim must be rejected.

II. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SEVER

Appellant claims the trial court prejudicially erred in denying his pretrial motion to sever the two murder charges, thereby rendering his trial fundamentally unfair, in violation of his rights to due process and a fair trial under both the state and federal Constitutions. (AOB 259-312) Respondent disagrees.

A. Record

In the first trial on June 30, 1997, appellant filed a motion to sever the murder counts and also to sever the failure to register count. (2 CT 653-676, 678-695 [People's Opposition], 704-712 [appellant's supplemental argument].) The prosecution conceded severance of the failure to register count (3 RT 385), and severance was granted (3 RT 388). The trial court denied appellant's severance motion of the murders:

> As to Counts 1, 2, and 3, the Court's going to make a finding that it is not appropriate to sever these counts one from another.
>
> It appears to the Court that the statutory requirements for joinder are met. Counts 1 and 2 are of the same class of crime or offense as one another and the provisions of Penal Code Section 954 provide the basis for the Court's ruling in that regard.
>
> In addition, Counts 2 and 3 are connected together in their commission and, therefore, it's appropriate to deny the separation of that – those two counts.
>
> The Court would make a finding that the defendant has failed to establish that there would be an abuse of discretion if the Court did not sever.
>
> Further, the defendant failed to make a clear showing that prejudice would occur if the charges were tried together.
>
> In light of those comments, it would appear clear to the Court that the severance of Counts 1 and 2 and 3 of that request is denied. They will be tried together.

(3 RT 389-390.)

In the second trial on February 1, 1999, appellant filed a motion to sever the two murder counts. (42 CT 12455-12464; 43 CT 12999-13016 [People's Opposition].) On February 24, 1994, during his severance argument, defense counsel requested that the trial court take judicial notice of the first trial; the trial court agreed. (56 RT 11758.) Relying on *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, the defense argued severance was warranted and the evidence was not cross-admissible. (56 RT 11756, 11761-11773.) On February 25, 2000, the trial court delayed ruling on the severance motion stating, "I think the motion to sever is extremely important in this case, and I want to be very careful to look at that new case

that you have brought to the attention of the Court." (56 RT 11868.) On February 28, 2000, the trial court denied the motion to sever, stating:

> The Court has carefully reviewed the arguments of counsel, plus the motions that have been submitted. And it appears to the Court that it is appropriate to deny the motion to sever. The consolidation of these is in order, and the Court is -- with what the previous law is that relates to matters of this nature, and the Court's going to deny the motion to sever.

(56 RT 11870.)

B. Law

Consolidation or joinder of charged offenses has long been preferred under the law because it promotes efficiency and judicial economy. (*People v. Soper* (2009) 45 Cal.4th 759, 771-772 (*Soper*); *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220 (*Alcala*).) The statutory criteria for joinder are satisfied if the charged offenses are "connected together in their commission, or . . . [are] of the same class of crimes or offenses." (§ 954.) However, the trial court, "in its discretion," may order them tried separately "in the interests of justice and for good cause shown." (§ 954.) "The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*People v. Soper*, *supra*, 45 Cal.4th at p. 774.)

Where the statutory requirements for joinder are met, the defendant """must make a *clear showing of prejudice* to establish that the trial court *abused its discretion*""" in denying the defendant's motion to sever. (*People v. Soper*, *supra*, 45 Cal.4th at p. 774, quoting *Alcala v. Superior Court, supra,* 43 Cal.4th at p. 1220, emphasis in original.) A trial court's ruling on a motion to sever is reviewed for abuse of discretion. (*People v. Soper*, *supra*, 45 Cal.4th at p. 774; *Alcala v. Superior Court, supra*, 43 Cal.4th at p. 1220.) A reviewing court considers the record before the trial

court when it denied severance in order to determine whether the ruling falls outside the bounds of reason. (*People v. Soper, supra*, 45 Cal.4th at p. 774.)

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

(*People v. Sandoval* (1992) 4 Cal.4th 155, 172-173 (*Sandoval*).)

On a motion for severance, the defendant bears the burden of showing that the evidence would not have been cross-admissible in a separate trial. (*People v. Hartsch* (2010) 49 Cal.4th 472, 494.) If the evidence underlying the charges is cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and justifies a trial court's refusal to sever properly joined charges. (§ 954.1; see also *People v. Soper*, *supra*, 45 Cal.4th at pp. 774-775.) There exists a hierarchy with respect to the degree of similarity that is needed for cross-admissibility. (*Alcala v. Superior Court*, *supra*, 43 Cal.4th at p. 1222.) To be relevant on the issue of identity, the uncharged crimes must be highly similar to the charged offenses sharing sufficiently distinctive common features amounting to a signature. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) In order to be relevant as a common design or plan,

> evidence of uncharged misconduct must demonstrate "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations."

(*Id.* at p. 402.) The least degree of similarity is required to prove intent, requiring only that the uncharged misconduct be sufficiently similar to support the inference that the defendant probably harbored the same intent in each occurrence. (*Alcala v. Superior Court*, *supra*, 43 Cal.4th at pp. 1222-1223.)

If the reviewing court determines the evidence underlying properly joined charges was not cross-admissible, it proceeds to consider "'whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the "other-crimes" evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses.'" (*People v. Soper*, *supra*, 45 Cal.4th at p. 775.) In order to make such an assessment, the reviewing court considers three additional factors,

> any of which—combined with our earlier determination of absence of cross-admissibility—might establish an abuse of the trial court's discretion: (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case.

(*Ibid.*) These factors are then balanced with the potential for prejudice to the defendant from a joint trial and the countervailing benefits to the state. (*Ibid.*)

> "[T]he trial court's discretion under section 954 to deny severance is broader than its discretion to admit evidence of uncharged crimes under Evidence Code section 1101" because, in large part, a joint trial "ordinarily avoids the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials."

(*People v. McKinnon* (2011) 52 Cal.4th 610, 630; citing, *People v. Bean* (1988) 46 Cal.3d 919, 935-936.)

C. Analysis

Counts 1 and 2 were murder charges. Joinder was permissible as both counts were of the same class of crime within the meaning of section 954. (See, e.g., *People v. Thomas* (2011) 52 Cal.4th 336, 350; *People v. Cook* (2006) 39 Cal.4th 566, 581; *People v. Manriquez* (2005) 37 Cal.4th 547, 574.) "Because the statutory requirements for joinder were met, appellant can establish error only on a clear showing of prejudice." (*People v. Maury* (2003) 30 Cal.4th 342, 395.) Appellant fails to do so.

Appellant argues that the murders of Tyler and Dylan were not cross-admissible and had few meaningful similarities. (AOB 287-297.) While the trial court did not state on the record whether it found the evidence to be cross-admissible, both parties argued and briefed that issue. (56 RT 11760-11770 [defense], 11775-11783 [prosecution].)

The evidence was cross-admissible to show intent, identity, motive, common design or plan, and absence of accident based on 12 distinctive similarities: 1) both victims were the children of appellant's live-in-girlfriend at the time each was killed; 2) appellant resided with each victim for a brief period of time immediately before the victims were killed; 3) immediately after appellant began residing in each home, both victims

began to show signs that they were being physically abused by appellant; 4) before appellant moved in, both children were healthy, that is, they had no abnormal physical injuries prior to appellant's arrival; 5) both children were "found" lifeless by appellant; 6) appellant was the last person with both children before they became lifeless due to fatal injuries sustained immediately or within a short period of time before death; 7) appellant was unemotional after both deaths; 8) appellant had an argument with both victim's mothers immediately before the children were murdered; 9) appellant was jealous of both children and the time they required from their mothers; 10) appellant had previously been alone in the children's bedrooms during the night; 11) both children died from assaultive, forceful, blunt-force trauma which correlated to the most common type of child-abuse deaths for their age range; and 12) both children sustained signature injuries of bruising and injury to the ears. (56 RT 11774-11780; 43 CT 13007-13009; see *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 402-403.)

Even defense counsel acknowledged the similarities in both murders in the "assaultive-type behavior," the similarities of appellant's romantic relationship with the mothers of the victims, and the similarity that appellant knew the victims. (56 RT 11767.) Appellant preyed on mothers with young children. Michelle Edwards and Melinda Andrews also met this criterion. (86 RT 18416; 85 RT 18587.) Further, appellant's signature injury to his victim's ear also occurred with Edwards' young son when appellant became frustrated with his crying and twisted the lower left lobe. (86 RT 18441-18442.) Based on the overwhelming concurrence of common features, the murders were cross-admissible and joinder was proper. (*People v. Soper*, *supra*, 45 Cal.4th at pp. 774-775.)

Appellant contends the remaining three *Sandoval* factors weigh in support of his argument that the trial court abused its discretion. (AOB 297-306; *People v. Sandoval*, *supra*, 4 Cal.4th at pp. 172-173.) He argues the combination of the murders was far more inflammatory than each murder standing alone, the evidence of Tyler's murder was weaker than the evidence in Dylan's murder, joinder converted the matter into a capital case, and any additional expense in severance would have been nominal. (AOB 297-310.)

Appellant is correct that the present matter is "one in which the joinder itself gave rise to the special circumstance allegation (multiple murder, § 190.2, subd. (a)(3)), . . . [thus,] a higher degree of scrutiny [must] be given the issue of joinder." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1318.) However, this factor alone does not support appellant's claim. The trial court heard extensive arguments and carefully scrutinized the evidence presented in the first trial before denying appellant's motion to sever. (See *Alcala v. Superior Court*, *supra*, 43 Cal.4th at p. 1220.) Neither murder was especially likely, or more likely than the other, to inflame the jury's passions. Each murder was similar in nature and equally appalling. The prosecutor's evidence was nearly equal in strength as to both murders. Appellant speculates the evidence of Tyler's murder was weaker because the charges were dismissed in 1995. (AOB 302; 2 CT 589-590.) This is explained in the testimony of Dr. Dollinger who performed Tyler's autopsy and clarified that at the time of Tyler's death in 1994, he, along with several other pathologists, were unaware of the term "diffuse axonal injury" in describing Shaking Baby Syndrome. (79 RT 16806, 16811.) The evidence was not weaker in Tyler's case; rather, the doctors were simply unfamiliar with recent medical literature and forensic evidence that was later discovered based on those medical advances. (43 CT 13014.) There was no abuse of discretion.

Appellant relies on a case from the Court of Appeal, *People v. Grant* (2003) 113 Cal.App.4th 579 (*Grant*). (AOB 279-282.) In that case, the appellate court gave four reasons for finding that joinder had resulted in gross unfairness: (1) the evidence was not cross-admissible; (2) the prosecutor urged the jury to infer that because the defendant possessed stolen property, he must have committed the burglary as well; (3) the trial court refused to give an instruction on the non-cross-admissibility of the evidence; and (4) the evidence on the two counts was similar, but the evidence on the burglary charge was weaker. (*People v. Grant, supra*, 113 Cal.App.4th at pp. 590-592.) Appellant argues that here, as in *Grant*, the prosecutor argued the two murders were similar and cites portion of one sentence in the closing argument in support of this inference. (AOB 281.) However, in this case, the prosecutor never urged the jury to infer that because appellant killed one victim, he must have killed the other. Rather, the prosecutor immediately prior to the argument cited by appellant compartmentalized each murder, stating:

> If you threw Tyler Ransom completely out and just looked at the evidence on Dylan Vincent, without considering what happened to Tyler two years before, the evidence overwhelmingly demonstrates he's told you a total fabrication about the events of that day and that he's clearly guilty of murdering Dylan.
>
> If you took Dylan Vincent's murder and threw the evidence on that out and just considered the evidence on Tyler Ransom, the evidence still shows you that Tyler Ransom was killed by Frank Alvarez, too, because he's lying to you about it here in court.

(88 RT 18862.)

Appellant maintains that here, as in *Grant*, the crimes were committed three years apart, and any common marks were not sufficient to support a

strong inference the same person committed both crimes. (AOB 280.) Appellant acknowledges he was the last person alone with each victim before they died. (85 RT 18228.) As detailed above, there were significant similarities between the murders, the type of victims-extremely young little boys, appellant's romantic relationship with the mothers, appellant moving into the household shortly before killing the victims, appellant physically abusing the boys over a period of time, both children were killed from the most common type of abusive injuries for their age range, and appellant's signature injury inflicted in their ears. Because *Grant* involved a case where there was no cross-admissibility of evidence, *Grant* does not support appellant's claim.

Appellant claims that nothing in the trial court's instruction precluded the jurors from making improper cross-admissibility conclusions. (AOB 281.) The contention lacks merit. The jury received proper instruction with CALJIC No. 17.02, which provided in pertinent part: "Each count charges a distinct crime. You must decide each count separately." (88 RT 18987; 81 CT 24483; see *People v. Geier* (2007) 41 Cal.4th 555, 578-579, overruled on another ground in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 as indicated in *People v. Houston* (2012) 54 Cal.4th 1186, 1220; *People v. Catlin* (2001) 26 Cal.4th 81, 153.)

Appellant argues that the jurors rendered a verdict based on emotion and not logic, causing prejudice and an inflammatory impact. (AOB 294-301.) This contention is without merit. The trial court instructed the jury not to be "influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." (88 RT 18957; 81 CT 24403 [CALJIC No. 1.00].) Jurors are presumed to follow their instructions, and this instruction dispels appellant's argument. (See *People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

Lastly, appellant cannot and has not shown prejudice amounting to a denial of fundamental fairness. "'A pretrial ruling that was correct when made can be reversed on appeal only if joinder was so grossly unfair as to deny due process.'" (*People v. Hartsch*, *supra*, 49 Cal.4th at p. 494, quoting *People v. Stitely* (2005) 35 Cal.4th 514, 531.) The overwhelming evidence detailed above, combined with the forensic and circumstantial evidence, along with appellant's own incriminating statements that he was the last person alone with both victims when they sustained their fatal injuries and died, closely linked the crimes together. Appellant has failed to show that denial of severance deprived him of a fair trial.

III. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS JUROR 9 FOR ALLEGED MISCONDUCT

Appellant contends that his conviction should be reversed because the trial court abused its discretion by refusing to discharge Juror 9 (190049175) after he told an acquaintance at a bar that he was Juror 9 in the "crazy or stupid" Alvarez case. (AOB 314-325.) Respondent disagrees.

A. Record

On April 24, 2000, after an eleven-day recess over the Easter Holiday, the prosecutor brought to the court's attention that her babysitter, Michele Brown, had a conversation with Juror 9 (190049175) at a bar one week eariler in which Juror told her he was a juror on the "crazy" or "stupid" Frank Alvarez case. (76 RT 16010, 16015.) Brown told Juror 9 she was good friends with the prosecutor, told him not to say anything more, and walked away. (76 RT 16016.) The trial court questioned Juror 9.

> THE COURT: It's been brought to the Court's attention this morning that apparently you had some contact with a young lady who apparently acts as a baby-sitter for Ms. Purcell from time to time and that you met her, had contact with her. Social contact, I gather. Just a brief visitation with her at the Jelly's bar, I believe it was called.

Do you recall that situation? Do you remember having had a conversation with somebody who had indicated -- anyway, the question I guess has arisen regarding some contact you apparently had with this particular party. I don't even know her by name. But do you know who that lady would be?

THE JUROR: Not specifically. I don't -- no, not exactly.

THE COURT: Do you know where Jelly's bar is?

THE JUROR: Yeah.

THE COURT: Have you been there in the last 11 days, shall we say?

THE JUROR: Yeah.

THE COURT: And at that time did you have conversation with someone regarding this case?

THE JUROR: I don't recall specifically discussing it with someone.

THE COURT: Okay.

THE JUROR: I may have. Not -- well, I don't recall any specifics. I had a few cocktails that evening, but I don't remember discussing the case with anyone. Maybe the fact that I was on the jury.

THE COURT: That apparently was the report, was that you had advised this young lady, who ever she may be, that you were on this case as a juror.

THE JUROR: Okay.

THE COURT: That's the extent of the understanding that I have regarding the matter. And I guess I need to find out from you if you, number one, recall having had that contact. I think you just referenced the fact that maybe you may have said something about being on the jury in the Alvarez case.

Do you recall that, sir?

THE JUROR: I don't specifically recall saying that. Like I said, I had a couple cocktails that evening, and I probably forgot that I even talked to her. Typically, I don't -- if it ever comes up in any conversation, it's just that I'm on the jury.

THE COURT: Do you know the woman or young lady that we are referring to here, some friend of yours?

THE JUROR: I vaguely recall hearing her say something like that, that she was a baby-sitter, but that's about it.

(76 RT 16016-16018.) Defense counsel then questioned Juror 9.

[MR. BUTKIEWICZ:] Mr. [190049175], in reference to this recollection that you may have regarding your contact or any comments that you made regarding being a juror in this case, did you express any opinion to that woman that you had contact with at Jelly's regarding the characterization of this case?

Did you make any derogatory comments about the validity/nonvalidity? I don't want to get too specific, but do you recall making any comments, one way or the other, about what you thought about this case, what you thought about being a juror on this case?

THE JUROR: No.

MR. BUTKIEWICZ: Other than just I'm a juror on this case?

THE JUROR: No.

MR. BUTKIEWICZ: Is it that you don't recall or that you did not make any such statement?

THE JUROR: I didn't. I just -- just that I'm on this particular case as a juror.

MR. BUTKIEWICZ: Okay. That's your recollection of –

THE JUROR: Yeah.

MR. BUTKIEWICZ: -- what you said, if anything?

THE JUROR: Uh-huh.

(76 RT 16018-16019.)

Defense counsel requested that Juror 9 be discharged because he had expressed an opinion about this case being "stupid" or "crazy." (76 RT 16020.) Defense counsel argued that Juror 9 was obviously intoxicated while at the bar, and was not being honest with the court. (76 RT 16020.) The prosecution argued that the words "crazy" or "stupid" are very innocuous statements, and that Juror 9 did not indicate that he had formed an opinion regarding appellant, the defense, or the prosecution. (76 RT 16021.) The prosecution noted Juror 9 might have been generally referring to the fact that he would rather be somewhere else. (76 RT 16021.) The prosecution thought that Juror 9's comments were not inflammatory, and that he could continue to be a fair and impartial juror. (76 RT 16021.) The trial court stated, "I disagree with defense counsel's jumping [in]to the fray here and making some comment that the juror is lying about what he had to say on the stand. I think he was very forthright in his comments." (76 RT 16023-16024.) The trial court indicated based on the explanations given, it found ". . . nothing that would interfere with [his] ability to be fair and impartial." (76 RT 16024.) However, the trial court declined to rule on Juror 9's possible dismissal until after questioning Michele Brown, the babysitter. (76 RT 16024.)

Brown testified that at approximately 11 p.m. on Saturday, she was at a bar in Bakersfield and saw Juror 9. (76 RT 16222.) She personally knows Juror 9 through mutual friends. (76 RT 16224.) She had one margarita at dinner before arriving at the bar and was relatively sober. (76 RT 16222.) When asked to describe Juror 9's level of intoxication, she

replied that she thought, "he'd had a few drinks" and that he appeared to be somewhat intoxicated. (76 RT 16222-16223.) She agreed with defense counsel's statement that she would not have wanted him to drive home that night. (76 RT 16223.)

Brown recounted that she and Juror 9 were in engaged in small talk when Garrett Hamilton, a Kern County Deputy District Attorney, came up in conversation. (76 RT 16223.) Juror 9 stated that he was on a jury and during voir dire, he had mentioned to the court that he knew Hamilton because his wife had previously dated Hamilton before they married. (76 RT 16223-16224.) During questioning from the court, Brown explained that she is currently dating Hamilton and has been for the past year-and-a-half. (76 RT 16224.) Brown explained that Juror 9,

> proceeded to tell me that he was on the Alvarez case, and he said the - - I don't recall if he said the crazy Alvarez case or the stupid Alvarez case, and they were out there playing a lot of loud music and I said excuse me, and then he repeated again I'm on this crazy or stupid Alvarez case, and I said is that the case that Cathy Purcell is doing, and he said yes, because I was not sure if that's what he said, so I made him repeat it more than once, and I said you know what, I'm a very good friend of Cathy Purcell, I do not think you should tell me anything else about this, I don't want to talk to you about this, and then he proceeded to kind of go on and say yeah, I'm juror number nine. He said that several times. And that was about the end of the conversation.

(76 RT 16224-16225.) Brown walked away from Juror 9 and did not speak to him again out of fear that he might say something about this case. (76 RT 16225.) Her conversation with Juror 9 lasted approximately three to five minutes. (76 RT 16225.) Brown disagreed with defense counsel's categorization that Juror 9 called the Alvarez case stupid or crazy in a derogatory fashion. (76 RT 16226.) She clarified, "No, he just kind of

matter-of-factly said I'm doing the stupid, crazy, Alvarez case." (76 RT 16226.) Brown then notified the prosecutor, Ms. Purcell. (76 RT 16226.)

The court denied defense counsel's request to dismiss Juror 9 for expressing an opinion regarding this case, stating,

> THE COURT: And the Court's going to deny the request. I don't think there's anything about this conversation that the juror had with this young lady that would indicate that -- well, obviously she didn't suggest to him any thoughts as to how he should act as a juror in this case or what the facts are according to her or anything of that nature. In fact, she acted very responsibly in moving away from the situation.
>
> It didn't appear from what she indicated was the conversation that there's anything about referring to this as a stupid or the crazy Alvarez case. It's just merely a matter of speaking that relates to the case itself, in general, but nothing obviously having to do with any interpretation of what the evidence is. So the motion's denied in that regard.

(76 RT 16228.) Defense counsel did not seek a new trial based on Juror 9's alleged misconduct. The trial court immediately admonished the jury stating,

> And the one thing that I would like to admonish you about, as jurors in this case, is that probably the best thing is not to discuss the fact that you are on this case as a juror to anyone.
>
> Advising someone that you are a juror in a particular case, especially one that has had somewhat of a high profile in the media in the past, would tend towards conversation, questions, et cetera, regarding that experience with others. So rather than take the chance that you might get into some requests or inquiries or conversations with other people, I would ask you to please not discuss even the fact that you are on this jury with anyone.

> Now, that doesn't include someone who is involved with you in your professional or occupational activities. To the extent that you need to tell them that you are on a jury, that's fine, and how long it's going to be and what that reference is. But you shouldn't get into any detailed conversation with those people as well regarding any of the testimony that's been presented or you anticipate may be presented or arguments that may have been presented by the attorneys one way or the other in the opening comments.
>
> The main thing that we want to be sure to do is to avoid any influences on your thought processes from any outside sources so that we can be assured fully that only the information that's presented here in the courtroom, testimony of witnesses here, exclusively here, be utilized for purposes of making any determination as to your responsibilities as jurors in this case.
>
> So please minimize that. Keep it to zero, if you can, so that we don't have any such problems that you might be exposed to by people wanting to find out from you. And it's only natural. Human nature dictates that, somewhat. So please don't discuss even the fact that you are acting as a juror in this case, and that hopefully will avoid anything of that nature.

(76 RT 16029-16032.)

B. Law

Section 1089[9] specifies that a juror may be discharged upon good cause shown to the court that the juror is unable to perform his duty. (*People v. Daniels, supra,* 52 Cal.3d at p. 864.) Serious and willful

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[9] Section 1089 provides, in relevant part,

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefore, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box . . ..

misconduct by a juror constitutes "good cause" to dismiss that juror. (*Ibid.*) A juror's inability to perform his or her duties under section 1089 must appear in the record as a "demonstrable reality" and will not be presumed. (*People v. Marshall* (1996) 13 Cal.4th 799, 843.)

"'It is misconduct for a juror during the course of trial to discuss the case with a nonjuror.'" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1309 (*Lewis*), citing *People v. Danks* (2004) 32 Cal.4th 269, 304 (*Danks*).) Any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is presumptively prejudicial. (*People v. Lewis*, *supra*, 46 Cal.4th at p. 1309.)

> [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.]

(*People v. Stewart* (2004) 33 Cal.4th 425, 510-511, citing *In re Hamilton* (1999) 20 Cal.4th 273, 296.) Where a juror's conversations with a non-juror are on non-substantive or trivial matters, the presumption of prejudice may be rebutted. (*People v. Lewis*, *supra*, 46 Cal.4th at p. 1309 [misconduct harmless where juror told her husband only how jury chose a foreman and other nonsubstantive matters]; *People v. Stewart, supra,* 33 Cal.4th at pp. 509-510 [misconduct harmless where juror complimented the appearance of defendant's former girlfriend, a trial witness].)

The issue of whether prejudice resulted from jury misconduct is a mixed question of law and fact subject to an appellate court's independent determination. (*People v. Danks*, *supra*, 32 Cal.4th at p. 303.) The reviewing court accepts the trial court's credibility determinations and

findings on questions of historical fact if supported by substantial evidence. (*Id.* at p. 304; see *People v. Harris* (2008) 43 Cal.4th 1269, 1305.)

"'[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors.'" (*People v. Danks*, *supra*, 32 Cal.4th at p. 302, quoting *Rideau v. Louisiana* (1963) 373 U.S. 723, 733.) "The jury system is an institution that is legally fundamental but also fundamentally human." (*People v. Danks*, *supra*, 32 Cal.4th at p. 304.) "Jurors are not automatons. They 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. To demand theoretical perfection from every juror during the course of a trial is unrealistic." (*Ibid.*, quoting *In re Carpenter* (1995) 9 Cal.4th 634, 654-655.)

C. Analysis

Appellant claims the trial court erroneously refused to dismiss Juror 9 for juror misconduct midtrial after the juror blatantly disregarded the court's admonitions not to discuss the case, and the trial court failed to consider the juror's attempts to discuss the case as serious misconduct in violation of his rights to a fair trial. (AOB 314-325.)

In *People v. Danks*, *supra*, 32 Cal.4th at pages 300-304, a juror discussed with her husband the stress she was feeling in making her decision regarding the death penalty while completing her household duties every evening after a full day in court. This Court found such communication was not misconduct because the juror discussed only the stress she was feeling and did not discuss the case, evidence, or deliberations with her husband. (*Id.* at p. 304.) The discussion here is

similar to the discussion in *Danks* between the juror and her husband because they did not involve any exchange of information pertinent to the trial. Juror 9's comment was harmless, not derogatory, and indicated his desire to be somewhere else rather than in the courtroom serving as a juror in a long, complicated death penalty trial. (76 RT 16226, 16228, 16021.) Similarly, in *People v. Kaurish* (1990) 52 Cal.3d 648, 694, a juror's derogatory comment "'Oh, you son-of-a-'" directed at defense counsel when the defense rested was not an "'improper or external inference'" but an expression of "momentary exasperation with the proceedings."

Appellant relies on *People v. Cissna* (2010) 182 Cal.App.4th 1105 (*Cissna*), (AOB 319-322), which involved a juror's conversations with a nonjuror friend outside the courtroom. (*People v. Cissna*, *supra*, 182 Cal.App.4th at p. 1114.) The *Cissna* court found the presumption of prejudice unrebutted because the juror's conversations occurred every day and covered not only the merits of the case but also the defendant's failure to testify. (*Id.* at pp. 1118, 1120, 1121-1122.) The *Cissna* court determined these discussions were akin to deliberations reserved for the jury room as they included the victim's motive to falsely accuse the defendant and which party should prevail. (*Id.* at pp. 1119-1120.) The nonjuror essentially became the "thirteenth juror who had not undergone the voir dire process to uncover bias." (*Id* at p. 1120.) Because it involved repeated discussion about the defendant's failure to testify and daily discussion regarding the evidence presented, *Cissna* concerned a fundamentally different type of misconduct than what is alleged here.

Here, the juror never discussed any facts of the case, the evidence, nor did the juror express any opinions of the evidence. Brown, the babysitter, made no attempt to influence the juror with outside information. Juror 9

merely made a one to two word comment, i.e., "stupid" or "crazy," at a bar when he identified his jury service to a mutual acquaintance over drinks. (76 RT 16222-16225.) *Cissna* distinguishes itself from the present facts: "This is not a case where a juror inadvertently or briefly mentioned something about the case to an outsider." (*People v. Cissna, supra*, 182 Cal.App.4th at p. 1119.) Juror 9's behavior was even less offensive than an inadvertent or brief comment about the case because he did not mention the evidence or anything regarding the case. *Cissna* is further distinguishable because, unlike that case, Juror 9 was made aware of his alleged misconduct midtrial, which lead to its cessation and an admonition to the jury, all of which suggests a mitigation of any initial prejudice. (76 RT 16029-16032.)

Appellant speculates that Juror 9 committed serious misconduct because he was "fully ready to discuss the case, if only he could find someone to listen to him," he accuses Juror 9 of lying under oath, and claims Juror 9 likely violated other court orders of which they were unaware. (AOB 318, 321, 325.) Such suspicions and accusations are unsupported in the record. The trial court explicitly found Juror 9's responses to be honest, candid, and "very forthright." (76 RT 16024.) This court defers to the trial court's credibility determinations when supported by substantial evidence. (*People v. Danks*, *supra*, 32 Cal.4th at p. 304; see also *People v. Harris*, *supra*, 43 Cal.4th at p. 1305.) Brown and Juror 9's testimony showed no prejudicial misconduct and the trial court's creditability determination was supported by substantial evidence.

There was no juror misconduct in this case. (*People v. Danks*, *supra*, 32 Cal.4th at pp. 300-304.) However, if deemed to be misconduct, the record rebutted any presumption of prejudice. (See *Id.*; *People v. Lewis, supra,* 46 Cal.4th at p. 1309.) As described above, the trial court

determined Juror 9's "crazy" or "stupid" comment was of a trifling nature, explaining it was "merely a manner of speaking" and had nothing to do with any interpretation of the evidence. (76 RT 16288.) Both Juror 9 and Brown testified that there was no discussion of the facts of the case, nor any expression of opinions about the case. (AOB 319; 76 RT 16016-16019, 16223-16226, 16021.) Rather, it was a comment on the lengthy, complex trial considering jury voir dire began on February 28, 2000, and the penalty phase verdict was delivered on June 1, 2000. (76 RT 16021.) Juror 9's comment did not evidence his lack of impartiality or unwillingness to follow the law pertaining to the evaluation of facts and resolving those facts according to applicable law, and it did not indicate any bias or prejudice. (76 RT 16024, 16228.) There appears no demonstrable reality that Juror 9 was unable to properly perform his function. (See *People v. Lewis*, *supra*, 46 Cal.4th at p. 1309.)

As there was no prejudicial misconduct, appellant's state and federal constitutional rights to due process, an impartial jury, a fair trial, and reliable verdicts were not violated. (See *People v. Danks*, *supra*, 32 Cal.4th at p. 310.) For all these reasons, appellant's claim must be rejected.

IV. PSYCHOLOGIST DR. DEAN HADDOCK'S REBUTTAL EXPERT TESTIMONY WAS RELEVANT AND DID NOT VIOLATE *KELLY/FRYE*[10]

Appellant claims the trial court erred by allowing a psychologist to testify in rebuttal about Shari's Child Abuse Potential Inventory (CAPI-6)

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[10] The *Kelly/Frye* rule alternatively is called the *Kelly* rule. (*People v. Kelly* (1976) 17 Cal.3d 24, 30; *Frye v. U.S.* (D.C.Cir.1923) 293 F. 1013; see e.g., *People v. McDonald* (1984) 37 Cal.3d 351, 372 (*McDonald*), overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896.) Respondent refers to it as *Kelly* in accord with this Court's comment in *People v. Cowan* (2010) 50 Cal.4th 401, 469, fn. 22.

test result, because that evidence did not meet the scientific requirement for admissibility under *Kelly*. (AOB 326-348.) Appellant further argues the testimony was not relevant and prejudicially violated his state and federal constitutional rights to a fair trial. (AOB 326-348.) Respondent disagrees.

A. Record

At trial, appellant sought to admit third-party culpability evidence at an Evidence Code section 402 hearing to support his defense that Shari physically abused and murdered Tyler, and to impeach Shari's credibility. (80 CT 24344; 77 RT 16476.) The defense sought to admit evidence from a CPS investigation that occurred in April of 2000 claiming to show that Shari abused her daughter Taylor, abused her unborn child by using controlled substances, and was currently contesting a dependency hearing. (77 RT 16476-16481; 80 CT 24345-24349.) The prosecution filed a response to defendant's motion arguing that if the disputed evidence was admitted,

> the People intend[ed] to offer rebuttal testimony in the form of testimony from expert mental health professional[], . . . Dr. Dean Haddock, that after testing and examination Shari [wa]s not at risk for physically abusing her child; opinions reached during the course of her dependency hearing.

(80 RT 24348; 77 RT 16498.) Appellant did not object to the offer of Dr. Haddock's testimony or request an Evidence Code section 402 hearing on the prosecution's proposed rebuttal testimony.

Beginning on April 27, 2000, the trial court conducted a two-day Evidence Code section 402 hearing on the defense's CPS third-party culpability evidence. (77 RT 16475-78 RT 16684.) On May 2, 2000, after taking the matter under submission, the trial court granted the defense's motion to admit the evidence. (80 RT 16907-16913.) The trial court also ruled that any CPS documents, files, or records themselves were inadmissible. (80 RT 16908.)

On May 15, 2000, Dr. Haddock testified in rebuttal that he was a licensed clinical psychologist and had been and the director of Community Counseling & Psychological Services since 1982. (86 RT 18356-18357.) Dr. Haddock described his qualifications, which included a Master's Degree and doctorate in clinical psychology, a doctorate in philosophy, and several certifications from peers acknowledging his accomplishments in the top one percent of his field. (86 RT 18536-18358.) He testified that he completes competency referrals for numerous counties, works as a consultant to develop the mental health system at Corcoran Prison, and supervises and trains many psychologists, counselors, and social workers. (86 RT 18358.) Dr. Haddock further testified as follows:

> Q. Do you have a special expertise with something known as the Child Abuse Potential Inventory, or CAPI?
>
> A. Yes, I do.
>
> Q. Tell us about that.
>
> A. My dissertation research was helping to establish the validity and the reliability of the Child Abuse Potential Inventory, which was originally developed by a Dr. Joel Milner, who was at the University of North Carolina and is now at the University of Colorado.
>
> My dissertation study was to identify persons who are at risk to abuse children in out-of-home care. My research was my dissertation research. It was published in the Journal of Clinical Psychology in 1983 and my research has been used to further develop the Child Abuse Potential Inventory with research since that time. It's listed in the reference of the manual of the Child Abuse Potential Inventory. It's now at its sixth stage.
>
> Q. And it's called the CAPI-6 for shorthand?
>
> A. Yes.

Q. What is the CAPI-6 used for, just generally?

A. The Child Abuse Potential Inventory is used primarily worldwide by Children's Protective Services to identify persons who are at risk to physically abuse children in their care.

Most of the Human Services, at least across the United States and Canada, are either aware or use it regularly to screen persons who are involved in foster care or in reunification plans, when children are being returned to their parents' care.

Q. And did you have an opportunity -- well, strike that.

How does it work? Can you tell us how do you do the test within the index?

A. The test is -- I always forget how many.

It's 160 questions and the person answers the questionnaire with either agree or disagree, describing themselves, and then it is scored.

There is a validity scale, which attempts to identify persons who are trying to make themselves look too good or too bad on the test, which would invalidate the test.

And then there is a physical abuse scale, which makes a prediction as to whether a person would be at risk to abuse children in their care.

Q. Okay. So there seems to be, I guess what I'll call in layman's languages, a safeguard for fakers, that type of thing?

A. Yes.

Q. Now, because it is a test that you're filling – they're writing agree or disagree, the individual that you're analyzing, themselves, correct?

A. Yes.

Q. Did you have the opportunity to do this test on a person by the name of Shari Ransom in October of 1998?

A. Yes, I did.

Q. And was that in regard to dealings with CPS and reunification?

A. Yes. The – I'm sorry.

Q. Now, when you do this test, generally with CPS-type things, is it a general test that you do in pretty much all the cases of reunification regardless of the reason for any family maintenance or --

A. Well, for the most part, when I receive a referral from the juvenile court, there is a battery of tests that I give to the person that's been referred so that I can provide the most information that I can to the court for their decision making.

Q. Is this one of the general tests in your battery of tests that you give?

A. Yes.

Q. Did you perform this test on Shari Ransom in October of 1998?

A. Yes.

Q. And can you tell us what was the result of that test?

[DEFENSE]: Objection; Kelly-Frye.

THE COURT: Overruled.

A. The results of that test were that I found Mrs. Ransom -- Ms. Ransom's scores that she was not at risk to physically abuse children in her care.

(86 RT 18359-18362.) During cross-examination, Dr. Haddock was asked if his predictions under CAPI-6 had ever been wrong and he responded, "Not that I'm aware of." (86 RT 18369-18370.)

B. Law

Under the *Kelly* rule, the proponent of evidence based on the application of a "new scientific technique" must first establish its reliability. (*People v. Kelly*, *supra*, 17 Cal.3d at p. 30.) The principal application of the *Kelly* rule was identified as applicable

> only . . . to that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is new to science, and even more so, the law. The courts are willing to forgo admission of such techniques completely until reasonably certain that the pertinent scientific community no longer views them as experimental or of dubious validity.

(*People v. Stoll* (1989) 49 Cal.3d 1136, 1156 (*Stoll*).) Reliability requires a showing that: (1) the technique has gained general acceptance in the particular field to which it belongs; (2) any witness testifying on general acceptance is properly qualified as an expert on the subject; and (3) correct scientific procedures were used in the particular case. (*Ibid.*) *Kelly* was designed to insulate the jury from expert testimony premised on methods that carry a misleading aura of scientific infallibility. (*People v. Eubanks* (2011) 53 Cal.4th 110, 141.)

When an expert testifies, the "issues of test reliability and validity" can be addressed on cross-examination or by calling expert witnesses to testify in rebuttal. (*People v. Stoll*, *supra*, 49 Cal.3d at p. 1159.) In *Stoll*, this Court ruled that "absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly*[]." (*Id.* at p. 1157.) Expert opinion testimony includes a psychologist's interview and professional interpretation of standardized personality tests. (*Id.* at p. 1140.)

> "'We have never applied the *Kelly*[] rule to expert medical testimony, even when the witness is a psychiatrist and the subject matter is as esoteric as the reconstitution of a past state of mind or the prediction of future dangerousness, or even the diagnosis of an unusual form of mental illness.'"

(*Id.* at p. 1157.) "No precise legal rules dictate the proper basis for an expert's journey into a patient's mind to make judgments about his behavior." (*Id.* at p. 1154.) A psychological evaluation is "a learned professional art, rather than the purported exact 'science' with which *Kelly*[] is concerned." (*Id.* at p. 1159.) "[A]bsent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly*[]." (*People v. Eubanks*, *supra*, 53 Cal.4th at p. 140, citing *People v. Stoll*, *supra*, 49 Cal.3d at p. 1157.)

The conclusion as to whether the *Kelly* rule was applicable is examined independently. (*People v. Rowland* (1992) 4 Cal.4th 238, 266.)

C. Analysis

Appellant claims that Dr. Haddock's testimony regarding Shari's CAPI-6 test results were not relevant and should not have been permitted without first determining whether the test met the *Kelly* standards for new scientific evidence. (AOB 326-348.) Appellant forfeited his relevance claim because he failed to make a timely objection on that basis. (*People v. Nelson* (2011) 51 Cal.4th 198, 223 [failure to make a timely and specific objection on the ground asserted on appeal makes that ground not cognizable]; see *People v. Waidla* (2000) 22 Cal.4th 690, 717 [questions relating to admissibility of evidence will not be reviewed on appeal absent objection in trial court].) Here, defense counsel failed to object in a timely manner on relevance grounds and merely stated to the trial court during a sidebar on cross-examination after Dr. Haddock's opinion had been given, ". . . I don't personally see what the relevance is and [what] his opinion as

to whether he thought Shari Ransom was potentially abusive . . .." (86 RT 18376.) This personal opinion was not a timely objection. Thus, appellant relevance objection was forfeited.

Even if appellant's relevance claim was not forfeited, it fails on the merits. Part of appellant's defense regarding Tyler's death was that Shari was the perpetrator. To support that claim, appellant brought in evidence from a pending CPS investigation that Shari abused her second child, Taylor, as well as the unborn child she was carrying at the time of trial. Part of the prosecution's rebuttal included opinion evidence from Dr. Haddock. (77 RT 16479-16497.) "Rebuttal evidence is relevant and admissible if it tends to disprove a fact of consequence on which the defendant has introduced evidence." (*People v. Valdez* (2012) 55 Cal.4th 82, 169.) Once appellant introduced evidence tending to show that Shari abused or neglected her children, Dr. Haddock's opinion testimony was relevant rebuttal evidence on that issue, and the trial court properly admitted it. (See *People v. Gurule* (2002) 28 Cal.4th 557, 656 [admission of rebuttal evidence within sound discretion of trial court and not disturbed on appeal unless "palpable abuse"].)

Appellant argues the trial court prejudicially erred in allowing the testimony of Dr. Haddock while refusing the defense's alleged request for a hearing to determine whether the doctor's reliance on the CAPI-6 exam satisfied the *Kelly* standard for the admissibility of scientific evidence. (AOB 332-348.) Relying on *People v. John W.* (1986) 185 Cal.App.3d 801, 803-809 [penile plethysmorgraph test not generally accepted as reliable in scientific community] and *In re Amber B.* (1987) 191 Cal.App.3d 682, 691 [child psychologist formed opinion of sexual abuse from child's play with anatomically correct dolls was new scientific

process], appellant attempts to distinguish his case from *People v. Stoll, supra*, 49 Cal.3d at page 1155. (AOB 333-345.) His argument is without merit; *Kelly* does not apply in this case.

In *People v. Stoll, supra*, 49 Cal.3d at page 1136, a defendant charged with sexually molesting children sought to introduce expert testimony from a psychologist who would have opined that the defendant did not possess any "pathology" in the nature of "sexual deviation," had not previously engaged in "sexual deviancy of any kind," and that it was "unlikely . . . she would be involved in the events she's been charged with." (*Id.* at pp. 1146, 1149, italics omitted.) The expert's opinion was based on interviews and professional interpretation of standardized personality tests conducted on the defendant, including the Minnesota Multiphasic Personality Inventory (MMPI) and the Millon Clinical Multiaxial Inventory (MCMI). (*Id.* at pp. 1147-1149.) Citing *People v. Jones* (1954) 42 Cal.2d 219, 222, this Court found the proffered testimony was relevant character evidence that should not have been excluded by the trial court on the basis of *Kelly*. (*People v. Stoll, supra*, 49 Cal.3d at p. 1152.) This Court observed that the expert opinion was admissible because it had been formed based on the psychologist's individual interpretation of the interviews and test results, and because the tests at issue were long accepted within the field and thus were not a new scientific technique. (*Id.* at pp. 1154-1155.)

Dr. Haddock's testimony regarding the CAPI-6 test was properly admitted as relevant expert opinion testimony on rebuttal, not subject to *Kelly*. (*People v. Stoll, supra*, 49 Cal.3d at p. 1157.) The CAPI-6 was not a "new scientific technique." (*People v. Kelly, supra*, 17 Cal.3d at p. 30.) It had been long accepted by psychologists, and was in its sixth edition. (86 RT 18360.) Dr. Haddock explained that during his dissertation

research, between 1979 when he received his Master's degree or 1982 when he received his doctorate, he helped establish the validity and reliability of the CAPI-6. (86 RT 18356, 18359.)

Dr. Haddock noted that the CAPI-6 was not only generally accepted, but accepted "worldwide" by CPS organizations as a tool to determine the likelihood of individuals to physically abuse children in his or her care. (86 RT 18360.) Dr. Haddock performed this test in every referral he received from the dependency court for reunification purposes. (86 RT 18361-18362.) He explained that the CAPI-6 test is an empirical test similar to the MCMI. (86 RT 18368.) The CAPI-6 test is merely a statistical prediction for a potential for abuse and not a definitive opinion as to whether abuse would or would not occur. (86 RT 18369.)

It cannot be argued that CAPI-6 was a new scientific technique, which carried a misleading aura of scientific infallibility effectively blindsiding the jury. (*People v. Stoll*, *supra*, 49 Cal.3d at p. 1157.) Dr. Haddock, even though he qualified as an expert, gave his opinion on the stand, and the jurors were able to temper their acceptance of his testimony "with a healthy skepticism born of their knowledge that all human beings are fallible." (*Ibid.*) The trial court did not abuse its discretion by allowing Dr. Haddock to provide the jury with his expert opinion testimony in rebuttal.

Even assuming the trial court erred when it failed to exclude the testimony regarding the CAPI-6 test following appellant's *Kelly* objection, it was harmless. Assuming that the trial court should have sustained appellant's Kelly objection, any error did not result in a miscarriage of justice. (Evid. Code, § 353; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Dr. Haddock did not base his opinion solely on Shari's CAPI-6 test results; he also based his opinion on a clinical interview and a battery of

psychological tests combined with her history. (86 RT 18365, 18367-18369.) Even if the trial court had excluded Shari's CAPI-6 test results predicting the unlikelihood she would abuse children four years after appellant murdered her son, there is no reasonable probability that appellant would have obtained a more favorable result. In addition, as discussed in Argument II, the evidence against appellant was overwhelming. Error, if any, was harmless under state or federal standards for assessing the effects of error. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

Lastly, appellant claims the trial court's alleged error violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 348.) Appellant failed to make any objection below based on these federal constitutional provisions. Thus, he may not raise such an argument here. (*People v. Rowland, supra,* 4 Cal.4th at p. 267, fn. 5.)

V. APPELLANT WAS NOT SANCTIONED FOR VIOLATING THE COURT'S *IN LIMINE* RULING EXCLUDING EVIDENCE OF BRIAN RANSOM'S PRIOR CONVICTIONS; APPELLANT WAS NOT DENIED HIS RIGHTS TO COUNSEL OR TO BE PRESENT

Appellant contends the trial court improperly sanctioned him and denied him meaningful access to counsel or any opportunity to be heard after he testified about inadmissible evidence of Brian Ransom's child molestation convictions. (AOB 349-405.) Respondent disagrees.

A. Record

On August 6, 1999, the prosecution filed a motion in limine to exclude evidence of Brian Ransom's two convictions for child

molestation.[11] (42 CT 12621-12623.) On August 17, 1999, appellant filed an opposition. (43 CT 12792-12826.) On September 8, 1999, with appellant present, the trial court heard argument on the motion. (54 RT 11249-11289.) The trial court then granted the prosecution's motion to exclude the evidence under Evidence Code section 352, finding it more prejudicial than probative stating,

> My conclusion is that getting involved in this area of attempting to somehow or other attack the moral turpitude of Shari Ransom through this process as suggested by the defense I feel is beyond the limit, it's overreaching, and it is more prejudicial, would be more prejudicial than probative, as it relates to allowing it to be in.
>
> So the Court's going to deny your request as it relates to this attempt at attacking the credibility of Shari Ransom.

(86 RT 11290.)

During appellant's defense case, on May 10, 2000, appellant was testifying about Brian Ransom threatening him after Tyler's death. (84 RT 17996-17998.) The following colloquy occurred between appellant and his trial counsel:

> Q. When you moved over to Ashe Road, did you ever see Brian Ransom over near your house on Ashe Road?
>
> A. Yes.
>
> Q. Had you ever given him that address?

---

[11] The prosecution's motion states that Brian's prior convictions were for violations of section 288, but fails to identify the subdivision and only identifies the offenses as "molestations." However, the police report of the incident attached to appellant's motion identifies the crimes as lewd and lascivious acts with a child under the age of 14 (§ 288, subd. (a)). (43 CT 12801, 12806.)

A. No.

Q. Had you ever given Brian Ransom your phone number?

A. No.

Q. Had you basically stopped seeing Brian Ransom?

A. After I found out he had been convicted of child molestation, yes, I did.

Q. When you –

MR. SOMERS: Objection, your Honor. May we have a sidebar?

THE COURT: Sure.

(84 RT 17998.)

During the in chambers conference the prosecution objected to appellant "bomb[ing] in" Brian's child molestation conviction without provocation by defense counsel, in violation of the trial court's order, in order to try to "smear" Brian because it was helpful to appellant's defense. (84 RT 17999-18001.) The prosecution sought to cross-examine appellant about deliberately violating the trial court's order and offered immunity from any prosecution for contempt. (84 RT 18000, 18002-18005.) The prosecution argued it was relevant to appellant's credibility, "that he will basically stop at nothing, including violating a court order, to do whatever he had to do to get himself off from this charge." (84 RT 18005.) The defense expressed concern regarding any possible infringement of attorney-client privilege matters and acknowledged appellant was present when the trial court ruled the evidence inadmissible. (84 RT 18004.) The

prosecution responded that it had no objection to appellant being permitted adequate time before the cross-examination so that defense counsel could advise him regarding his rights and any issue of privilege. (84 RT 18008-18009.)

The trial court observed that it was late, and they would deal with the cross-examination issue regarding violating the court's order the following morning, "giv[ing] everyone a chance to think it over." (84 RT 18009.) The prosecution requested the trial court to admonish the jury, and the following exchange occurred:

> THE COURT: I don't have any problem with asking the jurors to step outside the courtroom at this point and providing some kind of an admonition to him to cease and desist as it relates to references of this nature that in any way relate to the previous orders of this Court, and without -- I don't intend to have him make any statements one way or the other about this.
>
> MR. SOMERS: I don't think that's necessary, and probably inappropriate, till he's had a chance to talk with counsel.
>
> THE COURT: So I guess what I -- in order to avoid any further reaction by him of this nature, the suggestion I think is well taken, to ask the jurors to step outside a few minutes and go ahead and get to that with the defendant/witness, and then when we finish with that, knowing that we will revisit this matter in the morning at 8:30 –
>
> MS. WALTERS: All right.

(84 RT 18010-18011.) The defense did not object to any admonition. Outside the presence of the jury, the trial court admonished appellant at follows:

THE COURT: . . . [¶] Mr. Alvarez is on the stand as a witness, and the result of his comments shortly before the sidebar conference, which was the last 10 or 15 minutes in chambers with all attorneys present, we've been discussing what has been alleged to have been a violation of the Court's order as it related to an in limine motion that was made some time ago and was in the pretrial proceedings in this case.

This Court made an order which has been violated by the witness in his comments regarding Brian Ransom's history or record.

And Mr. Alvarez, you were present -- and I don't want any comments from you in this regard.

You were present during the pretrial proceedings at all times. You were certainly present when motions were discussed and when this Court made rulings on motions, and by making a reference to the child molest charges against Brian Ransom, you have violated the Court's order, and all I can do today is to admonish you as it relates to advising you not to make any further reference whatsoever to that subject, or any of the other subjects that were contained in our pretrial motions, in which this Court, when you were present, and you were made aware of by being present during those proceedings of this Court's orders as it related to those motions, and there's not to be any further comments in violation of any of those pretrial orders that this Court made during that in limine motion.

The People have comment?

MR. SOMERS: Sounds pretty clear to me, your Honor.

THE COURT: How about the defense, comments?

MS. WALTERS: No, your Honor.

(84 RT 18013-18014.)

Appellant was present the following morning on May 11, 2000, when the trial court heard argument from both parties. (85 RT 18063-18078.) The prosecution asked to cross-examine appellant on his violation of the

court order, contending it was relevant to his character for truth and honesty under Evidence Code section 780, and also to his credibility and character. (85 RT 18064-18069.) The prosecutor thought it was appropriate to ask for the sidebar yesterday, rather than plunging into such a sensitive matter in front of the jury. (85 RT 18071.)

The trial court discussed the possibility of removing appellant from the courtroom, stating appellant had "knowingly violated a court order, as far as I'm concerned. And I don't want this matter to become an absolute sideshow." (85 RT 18072.) However, the trial court declared that it was not prepared to remove appellant from the courtroom at that point, but would consider doing so if there was any further conduct of that nature. (85 RT 18075-18076.)

Defense counsel argued that appellant's the violation of the court order was unintentional. (85 RT 18076.) Defense counsel objected to the prosecutor cross-examining appellant based on concerns the prosecution might ask about privileged attorney-client matters. (85 RT 18076-18077.) The trial court noted the prosecutor had agreed to waive any charges related to the contempt of court for the conduct, and the court was inclined to accept that proposal. (85 RT 18077.) Defense counsel then submitted on the issue. (85 RT 18077-18078.) The trial court granted the prosecution's request to cross-examine appellant. (85 RT 18078-18080.)

The prosecutor cross-examined appellant as follows:

> Q. You couldn't, and then you felt it important to tell us about the fact that Mr. Ransom has a child molestation conviction, didn't you?
>
> A. That was one of her questions. I gave an answer. I misunderstood the question.

Q. You misunderstood her question to call for information about a child molest conviction that Brian Ransom had, right?

A. I thought she was referring and asking me a question why I had separated from Brian Ransom, in other words, stopped seeing him, stopped working out with him, stopped associating with him, and that was after he wrote to me and said what you just -- I'm not allowed to say that anymore. I don't know –

Q. Well, let's go over that.

You're not allowed -- you were not allowed to mention his child molestation conviction ever in this trial, were you?

A. It slipped. It was an accident.

Q. You slipped.

Because there was a specific order of the Court, made at a pretrial motion in this case, that that was ruled by the Court basically not to be admissible as evidence in this trial. Isn't that correct?

A. That is correct.

Q. And you were there when that ruling was made, right?

A. Yes, I was.

Q. And you knew that the judge had ruled that it couldn't come in, right?

A. Correct.

Q. But you like to blame Brian Ransom for Tyler Ransom's death, don't you?

A. Blame him for his death?

Q. For Tyler Ransom's death.

A. I think he had a lot to do with it.

Not Tyler Ransom's death, but -- okay, go ahead and ask the question.

Q. With Tyler Ransom's death.

A. Yes.

Q. You blame him for Tyler Ransom's death, right?

A. I'm not blaming anybody right now. I'm just saying it was only Shari and me there. I don't know if Brian did it or not. I'm not blaming nobody.

Q. Now, you were there at the court hearing where the judge ruled that there was to be no mention of that conviction in this trial, right?

A. Yes, I just said yes.

Q. And I take it you weren't asleep during that hearing, were you?

A. No, I was not.

Q. You knew what the Court ruled, right?

A. Yes, I did.

Q. And you deliberately violated that court ruling, didn't you?

A. Not deliberately. It was an accident.

Q. It was an accident.

A. Yes, it was.

Q. You were asked a question about when you were separated, and it was an accident that you mentioned something you'd been told you couldn't bring up?

A. I had misunderstood the question and I thought the question was being asked of me why I left Brian and terminated the relationship between me and him, and that was -- that was why. It was the truth. I even said it in my statements.

[¶] . . . [¶]

Q. . . . In this trial, even though you were told you couldn't, you deliberately violated a court order to bring in his child molestation conviction because you wanted to dirty him up in front of this jury. Isn't that right, sir?

A. That was an accident.

Q. You'll stop at nothing to get yourself off from these charges, will you?

A. No, sir. I –

MS. WALTERS: Objection; argumentative.

THE COURT: Overruled.

BY MR. SOMERS:

Q. In fact, wouldn't you like to –

MR. BUTKIEWICZ: I would object. If he's going to ask the question, at least allow the defendant to answer.

THE COURT: If that's an objection –

BY MR. SOMERS:

Q. Why did you tell us about that, sir?

Answer.

A. It was an accident. I misunderstood, Mr. Somers. I misunderstood the question and I thought the question was stating why, in fact, did I leave and terminate my relationship with Brian Ransom, and I said because of what you just said. I can't say it anymore.

Q. Okay, let's go over the questioning.

[¶] . . . [¶]

Q. Next question: Had you basically stopped seeing Brian Ransom?

That calls for a yes or no answer, doesn't it?

A. Yes, it does.

Q. And your answer was after I found out he had been convicted of child molestation, yes, I did, right?

A. Yes, that's what I said.

Q. Let me show it to you.

A. I believe you.

Q. What about that question don't you understand -- or didn't you understand yesterday when you felt it necessary to tell us about that?

A. I misunderstood the question and on accident I gave that answer and I'm sorry.

Q. Tell me what you misunderstood about the question that you thought called for his child molestation conviction.

A. I just misunderstood the question.

Q. Tell me what you misunderstood about the question that called for it. You didn't answer me, sir.

A. Well –

Q. Tell me what you misunderstood in that question.

MS. WALTERS: Your Honor, I'm going to object.

Argumentative and asked and answered.

THE COURT: Overruled.

MR. SOMERS: It's been asked, not answered.

I'll withdraw it.

THE COURT: I overruled the objection.

MR. SOMERS: I didn't mean to withdraw the question, your Honor, just the comment. It was inappropriate and I apologize.

A. I misunderstood. The question, I thought, was why did you basically stop seeing Brian Ransom. I misunderstood the question.

[] MR. SOMERS:

Q. What word did you hear, when Ms. Walters was standing right there, that sounded like why do you?

A. It just sounded. I'm sorry. Sorry.

(85 RT 18210-18218.)

B. Law

Well-established principles apply to a defendant's right to be physically present during proceedings in a criminal case.

> [A] defendant has a federal constitutional right, emanating from the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment, to be present at any stage of the criminal proceedings "that is critical to its outcome if his presence would contribute to the fairness of the procedure." [Citations.] In addition, a defendant has the right to be personally present at critical proceedings, pursuant to the state Constitution [citations], as well as pursuant to statute (§§ 977, 1043).

(*People v. Bradford, supra,* 15 Cal.4th at pp. 1356-1357.) A defendant's presence is required if it "'"bears a reasonable and substantial relation to

his full opportunity to defend against the charges."'" (*People v. Virgil* (2011) 51 Cal.4th 1210, 1234 (*Virgil*).) "The defendant must show that any violation of this right resulted in prejudice or violated the defendant's right to a fair and impartial trial. [Citation.]" (*Ibid.*)

The same analysis applies under article I, section 15 of the California Constitution and sections 977 and 1043. (*People v. Virgil, supra*, 51 Cal.4th at p. 1234.) "'"[T]he accused is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his opportunity to defend the charges against him.... [Citation.]" [Citation.]' [Citations.]" (*People v. Virgil, supra*, 51 Cal.4th at p. 1235, citing *People v. Rogers* (2006) 39 Cal.4th 826, 855.) "A defendant is not entitled to be personally present either in chambers or at bench discussions that occur outside of the jury's presence on questions of law or other matters." (*People v. Bradford, supra*, 15 Cal.4th at p. 1357.)

A defendant carries the burden to establish that his absence prejudiced his case or denied him a fair trial. (*People v. Virgil, supra*, 51 Cal.4th at p. 1234.) It is not enough for the defendant to offer speculation that his presence would have contributed to his defense. (*People v. Waidla, supra,* 22 Cal.4th at p. 742 [speculation insufficient].) "Erroneous exclusion of the defendant is not structural error that is reversible per se, but trial error that is reversible only if the defendant proves prejudice." (*People v. Perry* (2006) 38 Cal.4th 302, 312, citing *Rushen v. Spain* (1983) 464 U.S. 114, 118-119.)

C. Analysis

Appellant claims the chambers discussion immediately following his testimony that violated the trial court's order deprived him of his state and federal statutory and constitutional rights to be present at all trial

proceedings. (AOB 375-385.) These rights are not implicated, however, because the chambers discussion did not bear a "reasonable and substantial relation to [appellant's] full opportunity to defend against the charges." (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1234.) The chambers discussion was a direct result of appellant's willful violation of the trial court's in limine order. The trial court made no decision during that conference that had any potential to affect the trial's outcome. (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1357.) The trial court's decision to permit the prosecutor to cross-examine appellant regarding his violation of the court's order did not occur until the following day, in appellant's presence, after appellant was able to confer with his counsel, and after both counsel had made their arguments to the trial court. (85 RT 18063-18080.) Appellant fails to show that his absence from the chambers discussion prejudiced his case or denied him a fair and impartial trial. (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1234.)

Appellant also argues that he was deprived of even minimal elements of state constitutional due process of law when the trial court reached the conclusion that he had intentionally violated a court order, before he had been advised of the allegations against him, before he had been given any opportunity to discuss the matter with counsel, and before he had been given any opportunity to respond. (AOB 386-394.) Appellant failed to object to the trial court's admonition that his testimony remain within the bounds of trial court's evidentiary ruling, and he may not do so for the first

time on appeal. (See § 1044[12]; *People v. Tafoya* (2007) 42 Cal.4th 147, 175-176 [trial court's control over order of examination]; *People v. Morrison* (2004) 34 Cal.4th 698, 710 [voicing an objection or disagreement critical for adequate review].)

Appellant was not charged with contempt of court nor was he or his attorney sanctioned in any way in the jury's presence. The trial court had the authority and obligation to control the admission of evidence and its admonition, outside of the jury's presence, was a proper exercise of discretion. (§ 1044; see Evid. Code, §§ 353, 354.) Appellant has provided no authority suggesting his due process rights were violated when the trial court admonished him about his violation of the trial court in limine ruling when appellant was not charged with that crime.

Appellant next claims the appropriate remedy was to strike his testimony that violated the trial court's ruling, and to admonish the jury to disregard it; and there was no showing that such a remedy was inadequate. (AOB 394-398.) Appellant did not request this remedy in the trial court, nor did he object to the prosecution's request for cross-examination on any ground other than that it may touch upon privileged attorney-client communications. (85 RT 18076-18077.) Thus, his claim is forfeited on appeal as he has failed to preserve it. (See *People v. Marks* (2003) 31 Cal.4th 197, 228 ["[a] general objection to the admission or exclusion of evidence, or one based on a different ground from that advanced at trial,

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[12] Section 1044 states: "It shall be the duty of the judge to control all proceedings during the 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."

does not preserve the claim for appeal."].) In any event, as noted above, the trial court has broad power to control its courtroom and this Court defers to the trial court in determining when a defendant has been disruptive or when further disruption may be reasonably anticipated." (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1237; *People v. Jackson* (1996) 13 Cal.4th 1164, 1211.)

Appellant contends the sanction actually imposed was improper and unprecedented because it allowed the prosecutor to badger and belittle appellant regarding a collateral matter, negating the value of his state and federal constitutional rights to testify in his own behalf. (AOB 398-401.) Appellant misapprehends what occurred below.

The prosecutor's cross-examination was not a sanction imposed by the trial court, but a permissible inquiry into appellant's testimony. If anything could be characterized as a sanction, it was the court's admonition to appellant, outside the presence of the jury, ". . . all I can do today is admonish you . . . not to make any further reference whatsoever to that subject." (84 RT 18013.) This was not an improper sanction. (See *People v. Jackson*, *supra*, 13 Cal.4th at p. 1211.) The cross-examination was a remedy, not a sanction, for appellant's violation of the trial court's ruling excluding evidence of Brian's sexual molestation convictions.

Error, if any, was harmless. It is not "'reasonably probable'" that a result more favorable to [appellant] would have been reached had he been present" for the chambers conference. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1357 [no right to be present for chambers conferences]; *People v. Jackson*, *supra*, 13 Cal.4th at pp. 1210-1211 [absence during one day of trial].) Appellant's claim fails.

VI. THE TRIAL COURT PROPERLY ADMITTED REBUTTAL EVIDENCE OF APPELLANT'S SEXUAL ASSAULTS OF MICHELLE EDWARDS AND MELINDA ANDREWS; THE TRIAL COURT WAS NOT REQUIRED TO FORCE THE PROSECUTION TO ACCEPT APPELLANT'S STIPULATION TO HIS MISDEMEANOR CONVICTION

Appellant argues the trial court abused its Evidence Code section 352[13] discretion in ruling that the prosecution could present impeachment evidence by means of acts of moral turpitude with testimony of his misdemeanor sexual assault conviction of Andrews and uncharged rape and false imprisonment of Edwards. (AOB 410-422.) Appellant also contends the trial court prejudicially erred in failing to accept appellant's offer to stipulate that he had previously been convicted of a misdemeanor involving moral turpitude and by allowing the prosecutor to present extensive evidence that was highly prejudicial and marginally relevant. (AOB 406-427.) Appellant's claim is without merit.

A. Record

On August 9, 1999, appellant filed a motion to exclude evidence of his prior acts involving criminal violations or moral turpitude. (42 CT 12692A-12692h.) On August 12, 1999, the prosecution filed a response stating that should appellant choose to testify, the prosecution would seek

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[13] Under Evidence Code section 352,

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

"leave of court before attempting to impeach [his] credibility with any of his prior conduct." (43 CT 12773-12774.)

When it appeared that appellant was going to testify, on May 10, 2000, the prosecutor sought to introduce evidence of appellant's sexual assaults of Michelle Edwards and Melinda Andrews to impeach him. (84 RT 17882-17883, 17892.) Appellant had pleaded guilty to misdemeanor sexual assault of Melinda Andrews (§ 243.4, subd. (e)(1)). (84 RT 17884.) The prosecutor did not seek to admit evidence of the plea or conviction, recognizing that unless appellant denied the conviction, it was inadmissible hearsay. (*People v. Wheeler* (1992) 4 Cal.4th 284, 290-295 (*Wheeler*); 84 RT 17884.) The prosecutor argued, however, the incidents were probative regarding appellant's credibility. Impeaching appellant with the conduct showing moral turpitude would aid the jury in evaluating his credibility. (84 RT 17884-17885.) The prosecutor asserted that the evidence was relevant and its introduction would not result in an undue consumption of time, because appellant's credibility versus that of Shari Ransom was a central issue in Tyler's death. (84 RT 17885.)

Defense counsel admitted that the sexual assaults of Andrews and Edwards were moral turpitude offenses. (84 RT 17893.) Defense counsel then offered to stipulate to the admission of the misdemeanor conviction if the trial court found it admissible, stating "I would offer - - while I know it's not valid under *Wheeler*, I would in fact, offer a stipulation that Mr. Alvarez could be impeached by the fact that he has a conviction for a misdemeanor involving moral turpitude." (84 RT 17895-17896.) Defense counsel articulated the stipulation would involve treating the misdemeanor like a felony to avoid discussing the facts in front of the jury. (84 RT 17897.)

In response to appellant's stipulation the prosecutor stated,

> Now, as far as counsel's offer of a stipulation, the People would not accept that offer and are not permitted -- are not and cannot be required to accept that stipulation.
>
> The People are not prepared to enter into a stipulation by which solely the fact of the misdemeanor conviction, the Melinda Andrews case, would come in but none of the underlying facts.
>
> First of all, that flies in the face of the significance of the conduct as defined by *People vs. Wheeler*. To say simply a misdemeanor conviction involving moral turpitude gives the jury no idea of what that conduct is in order to evaluate its relevance to his credibility.
>
> Again, with that being defined by the defense as their respective credibility being a central issue in the trial, as a matter again of simple fairness, the evidence itself should be admitted.
>
> And, therefore, the People are not prepared to stipulate when the sole reason of the defense, of course, suggesting a stipulation, understandably, is to try to rob that evidence of all its probative value and keep the jury's attention focused solely on Shari Ransom without permitting it also to be fairly and appropriately focused on the credibility of [appellant].

(84 RT 17902-17903, italics added.)

The trial court admitted the impeachment evidence and accepted the prosecution's refusal to stipulate:

> After listening to well presented argument from both sides in this regard, the Court clearly understands this matter as it relates to credibility in this case. It's been made an issue by the defense in the manner in which they have submitted their defense, in part, at least, in this regard. I don't know that that automatically, then, would cause this Court to say, well, what's good for the goose is good for the gander type of approach.

But in light of what the law is and what the stated positions of the parties are, number one, as it relates to the stipulation, I think the People certainly have an option that they may exercise and they have exercised; and that is, in this instance, to reject any proposed stipulation along the lines as proposed by the defense on this issue.

I think that, according to the case law and arguments of the defense, when we heard arguments previously as it related to some of the activities and testimony presented in behalf of the defense regarding the issue of the childcare issue, if that's what we can call it, this has brought to the Court's attention by that argument that this kind of information is and I ruled so as it related to that issue or those issues and allowed that information, that late-found, if that's what it was, late-found information regarding the report of the investigator of the District Attorney's Office and the Child Protective Services personnel.

It appears to the Court that subject to the District Attorney -- on a 352 analysis of the prejudicial versus probative weighing, that the People are entitled to present the evidence that they have proposed in these categories that you have proposed.

So I'm going to make the advance ruling as it relates to these proceedings this morning that I will, if it gets to the point of the defendant choosing to testify in this matter, that the People may utilize the Edwards, Andrews, Borgsdorf incidents to be presented on the issue of credibility and, further, the information regarding the misdemeanor.

(84 RT 17905-17906.)

Prior to questioning appellant regarding Andrews and Edwards, the trial court informed the jury that the testimony was being introduced for a limited purpose:

[PROSECUTION]: Your Honor, the next matter or subject area I'm going into in cross-examination relates to certain -- I guess allegations would be the best word, of sexual assault that had been made against Mr. Alvarez on previous occasions.

We are offering these for the limited purpose at this point in time of being considered by the jury as relevant to the issue of credibility. And I would request that the jury be admonished that matters I cover in cross-examination on this subject area are only relevant to the issue of Mr. Alvarez's credibility, because I believe that is the law.

THE COURT: You will receive from me a jury instruction that will address this issue as well. But in order that you clearly understand, this line of questioning is being presented and proposed by the district attorney for the limited purpose of and only this limited purpose, and that is the credibility issue. So please keep that in mind and carefully analyze the jury instruction when I read it to you.

And as I will tell you at the time when I do read you jury instructions in this case, you have a right to ask that those jury instructions be delivered back to you in the jury room for your review.

And this is a critical element here. It's a limited purpose for which this information is being presented.

You may proceed.

(85 RT 18122-18123.) The trial court later instructed the jury pursuant to CALJIC No. 2.09:

Certain evidence was admitted for a limited purpose. At the time this evidence was admitted, you were instructed that it would 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.

(81 CT 24417; 88 RT 18964.) The trial court also instructed the jury with CALJIC No. 2.23.1 as follows:

Evidence has been introduced through the testimony of Michelle Edwards, Melinda Andrews, and Donna Hogan for the purpose of showing that a witness, [appellant], engaged in past criminal conduct. This evidence may be considered by you only for the purpose of determining the believability of that witness.

> The fact that a witness engaged in past criminal conduct, if it is established, does not necessarily destroy or impair a witness' believability. It is one of the circumstances that you may take into consideration in weighing the testimony of that witness.

(81 CT 24427; 88 RT 18967.)

B. Law

"No witness including a defendant who elects to testify in his own behalf is entitled to a false aura of veracity." (*People v. Beagle* (1972) 6 Cal.3d 441, 453, disapproved on other grounds in *People v. Castro* (1985) 38 Cal.3d 301, 307.) Under Evidence Code section 788, a witness can be impeached with evidence "that he has been convicted of a felony." Since the enactment of Proposition 8 in 1982, a witness in a criminal trial can also be impeached with evidence of prior misdemeanor misconduct. (*People v. Wheeler*, *supra*, 4 Cal.4th at pp. 290-295.) However, the admissibility of any past misconduct is limited to matters involving moral turpitude or dishonesty. (*People v. Wheeler*, *supra*, 4 Cal.4th at pp. 295-296.) "'Moral turpitude'" has been generally defined as "'a readiness to do evil.'" (*Id.* at p. 289.) "Misconduct involving moral turpitude may suggest a willingness to lie." (*Id.* at p. 295.)

Past criminal conduct amounting to a misdemeanor of moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach, subject to the court's discretion under Evidence Code section 352. (*People v. Wheeler*, *supra*, 4 Cal.4th at pp. 295-296.) When a misdemeanor is offered for impeachment purposes, a trial court exercising discretion under Evidence Code section 352 should consider "those factors traditionally deemed pertinent in this area." (*Id.* at p. 296.) These include whether the misdemeanor is remote in time or whether it involves dishonesty. (*Id.* at p. 297.) Another important

consideration is that a misdemeanor "is a less forceful indicator of immoral character or dishonesty than is a felony." (*Id.* at p. 296.) "Moreover, impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present." (*Ibid.*) As a result, trial courts "should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*Id.* at pp. 296-297.) This Court applies the "deferential abuse of discretion standard when reviewing a trial court's ruling under Evidence Code section 352." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

"The general rule is that the prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness. [Citations.]" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1007.) The United States Supreme Court also recognizes the "familiar, standard rule . . . that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." (*Old Chief v. United States* (1997) 519 U.S. 172, 186-187.)

C. Analysis

Appellant claims the testimony of Andrews and Edwards caused an undue consumption of time, undue prejudice, confused the issues, and mislead the jury. (AOB 414-422.) Edwards began testifying as the last witness in the afternoon of May 15, 2000 (86 RT 18415), and ended the morning of May 16, 2000 (86 RT 18503). Andrews' testimony was much briefer; her testimony on the morning of May 10, 2000, only consisted of

37 pages. (85 RT 18586-18623.) In contrast, over one full day of trial was "devoted to impeaching Shari [] with evidence of misconduct" relevant to her credibility. (84 RT 17900.) There was no undue consumption of time.[14]

Appellant further claims undue prejudice because the Andrews and Edwards incidents bore similarities to the present allegations, which offered the jurors an irresistibly tempting opportunity to misuse the evidence, and that such a danger was increased by the trial court's admonitions. (AOB 415-421.) The trial court instructed the jury immediately before evidence came in and again prior to deliberations, that the evidence could be considered only for the limited purpose of assessing appellant's credibility and believability. (85 RT 18122-18123; 88 RT 18964, 18967.) In the absence of any indication to the contrary, it is presumed that jurors follow the instructions they are given. (*People v. Holt* (1997) 15 Cal.4th 619, 662; *People v. Boyde* (1988) 46 Cal.3d 212, 255.) Appellant fails to identify any affirmative indication in the record to support his claim that the jury did not follow these limiting instructions.

Appellant contends the danger of confusing the issues and misleading the jury outweighed any probative value of the prior conduct, and the

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[14] Appellant complains that 272 pages of Reporter's Transcript devoted to Andrews' and Edwards' testimony was an undue consumption of time. (AOB 414.) Appellant's guilt phase trial consisting of evidence entailed approximately 3,526 pages. (71 RT 15151; 87 RT 18677.) Respondent calculated this number from deducting 15,151 from 18,677, arriving at 3,526. The first witness in the guilt phase began testifying on page 15151. (71 RT 17171.) And, the trial court noted the evidence portion of the guilt phase trial was completed on page 18677. (87 RT 18677.) 272 pages out of over three thousand pages is minimal.

admission of the Andrews and Edwards evidence created a mini-trial. (AOB 421-422.) Appellant argues that the contradicting evidence and lies in Andrews' testimony confused and misled the jury. (AOB 421.)

To the extent that there were contradictions or lies in the testimony offered by Andrews, such evidence would have been to appellant's favor in discrediting Andrews and further decreasing any possibility of prejudice. Since the testimony was offered for the limited purpose of evaluating appellant's credibility, it follows that if the jury disbelieved Andrews, it would not draw a negative inference against appellant from her testimony. Appellant's testimony was not "entitled to a false aura of veracity." (*People v. Beagle*, *supra*, 6 Cal.3d at p. 453.) In addition, the incidents were recent. Appellant had been in custody since October 25, 1996 (1 CT 103-110); the Andrews sexual assault occurred on January 23, 1996 (85 RT 18587), and the Edwards rape and false imprisonment occurred just over a week later on February 2, 1996 (86 RT 18430). The court clearly understood its discretion under Evidence Code section 352 and properly exercised it to admit the testimony of Andrews and Edwards. (84 RT 17905-17906; *People v. Wheeler*, *supra*, 4 Cal.4th at pp. 295-296.)

Appellant contends the trial court had the power to require the prosecutor to accept his stipulation regarding Andrews' misdemeanor offense, and that the court abused its discretion by refusing to do so. (AOB 423-424.) However, appellant provides no authority to support his proposition. Appellant offered to stipulate that the Andrews' misdemeanor conviction for sexual battery involved moral turpitude, but not to the relevant conduct. (84 RT 17893.) The prosecutor argued that the probative value and persuasive effect of Andrews' testimony exceeded the stipulation proposed by appellant. (84 RT 17902-17903.) The prosecution was not

obligated to present its case in the sanitized fashion suggested by the defense. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1169-1170.) The trial court did not abuse its discretion by refusing to require the prosecution to accept appellant's proposed stipulation.

Error, if any, in admitting this evidence was harmless. Tyler's and Dylan's fatal injuries were sustained during the time appellant was alone with them. Appellant admitted he was alone with them and the last one to see either of them alive. Additionally, the medical and family testimony of strongly supported the conclusion that appellant physically abused and killed both young boys. It light of the strong evidence against appellant, it is not reasonably probably the jury would have reached a more favorable result regarding appellant's guilt had the court excluded the evidence of Andrews and Edwards. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

For the first time on appeal, appellant argues the trial court's admission of the testimony by Andrews and Edwards was an error that prejudicially denied him of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair jury trial in accordance with due process of law and to reliable fact-finding. (AOB 424-427.) Appellant failed to make any argument or objection below based on federal constitutional provisions. Thus, he may not raise that argument here. (*People v. Rowland, supra,* 4 Cal.4th at p. 267, fn. 5.) Appellant contends that these due process rights were violated and the error here must be evaluated under the federal constitutional standard of *Chapman v. California, supra,* 386 U.S. at page 18. (AOB 425-426.) Respondent disagrees, as "generally, violations of state evidentiary rules do not rise to the level of federal constitutional error." (*People v. Benavides* (2005) 35 Cal.4th 69, 91.) Appellant's claim must be rejected.

VII. ADMITTED STATEMENTS MADE BY DYLAN DID NOT VIOLATE *CRAWFORD V. WASHINGTON* (2004) 541 U.S. 36; THE TRIAL COURT PROPERLY ADMITTED THE STATEMENTS UNDER EVIDENCE CODE SECTIONS 1360 AND 352

Appellant claims the trial court prejudicially erred in admitting hearsay statements Dylan made to Ben and Monica Alvarez, asserting their admission violating *Crawford v. Washington* (2004) 541 U.S. 36. He argues the statements were erroneously admitted under Evidence Code sections 1360 and 352. (AOB 428-436) Respondent disagrees.

A. Record

In the first trial on May 1, 1998, the prosecution filed a motion to admit statements made by Dylan pursuant to Evidence Code section 1360.[15]

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[15] Evidence Code section 1360 states in pertinent part:

> (a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply: [¶] (1) The statement is not otherwise admissible by statute or court rule. [¶] (2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability. [¶] (3) The child either: [¶] (A) Testifies at the proceedings. [¶] (B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child. [¶] (b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement. [¶] (c) For purposes of this section, "child abuse" means an act proscribed

(continued...)

(5 CT 1715-1715.) On April 30, 1998, appellant filed an opposition to the motion. (5 CT 1686-1694.) On May 1, 1998, after conducting an Evidence Code section 402 hearing, the trial court found the statements to be reliable and granted the prosecution's motion to admit them. (29 RT 5548-5631.) In admitting the statements, the trial court determined:

> The statements are reliable according to this evidence we've had here. Certainly there was -- there's no question that Dylan had some sort of speech problem notwithstanding both witnesses indicated an ability to understand what he was saying even though having to interpret somewhat themselves through the process.
>
> And, therefore, the court's going to make the finding that these statements are, in fact, reliable and will grant the motion.

(29 RT 5631.)

In the second trial on August 6, 1999, the prosecution again filed a motion to admit statements made by Dylan pursuant to Evidence Code section 1360. (42 CT 12639.) On August 13, 1999, appellant filed a response objecting to their admission. (43 CT 12777-12780.) On August 31, 1999, the trial court heard argument from both counsel and took the matter under submission. (53 RT 11038-11051.) On February 25, 2000, after a second brief argument by both counsel (56 RT 11861-11864), the trial court granted the prosecution's motion stating:

(...continued)

> by Section 273a, 273d, or 288.5 of the Penal Code, or any of the acts described in Section 11165.1 of the Penal Code, and "child neglect" means any of the acts described in Section 11165.2 of the Penal Code."

THE COURT: All right. As I indicated, we have been through this previously. And I was anxious this morning to spend a few minutes just discussing it and having counsel be given kind of a bird's eye presentation, which, of course, is possibly similar to previous arguments made as well in this regard.

And I have reviewed the documents that have been presented, I've reviewed the points and authorities that have been submitted by the People and in the opposition by the defense as it's been submitted in Ms. Walters' presentation.

And the Court is going to grant the motion to the People to allow the information be provided to the Court as it relates to that statement pursuant to provisions of Section 1360 of the Evidence Code.

I looked at that carefully, as well. And it appears that subject to further evidence being brought by the defense, to the extent they wish to, this matter will be acceptable and will be allowed to be presented, to be evidence to the jury by the People, subject to that obvious observation that the defense will be able to cross-examine and present whatever evidence in opposition that they wish to in this regard.

So the motion as related to No. 35, the motion of the District Attorney, is granted.

(56 RT 11864-11865.)

B. Evidence Code Section 402 Testimony

1. Monica Alvarez's Pre-Trial Testimony

Appellant's sister, Monica, testified that during the three-week period that she became acquainted with Dylan before his death, she observed bruises and injuries on Dylan several times. (29 RT 5576-5577.) Monica questioned Dylan about his injuries. (29 RT 5588-5592, 5595-5597, 5598.) Dylan typically stated he "fell" or avoided answering her questions. (29 RT 5592, 5596-5597, 5598-5599.) In questioning Dylan, Monica was mindful to avoid "coerc[ing] any response or answers." (29 RT 5597.)

The last time Monica spoke to Dylan, appellant was present and Monica saw a new, dark bruise on Dylan's check; she looked at appellant and in a "sarcastic tone" asked appellant where Dylan had sustained the new bruise. (29 RT 5600-5602, 5580.) After Monica and appellant had a "confrontation -- discussion," Monica asked Dylan how many times appellant hit him. (29 RT 5602.) Dylan replied, "four times." (29 RT 5581, 5603.) Monica understood Dylan even with his speech impediment. (29 RT 5603, 5583-5587.) Monica immediately recorded the incident in her diary. (29 RT 5605.)

2. Ben Alvarez's Pre-Trial Testimony

Approximately two and a half to three weeks before Dylan's death, Ben noticed Dylan had a bruised lip with a sore. (29 RT 5612.) Ben asked Dylan who had given him the fat lip and Dylan responded that appellant had and that appellant was mean to him. (29 RT 5612-5613.) Ben claimed that Dylan never blamed appellant for his bruises, but when Ben questioned him about his swollen lip, Dylan hesitantly said, "Daddy." (29 RT 5617.) Dylan called appellant "Daddy" and Ben "Grandpa." (29 RT 5618.) Ben noted that with Dylan's speech impediment, it was difficult to understand him, but Ben asked several times, had Dylan repeat himself, and then Ben was able to understand. (29 RT 5612, 5614.)

C. Trial testimony

1. Monica Alvarez's Trial Testimony

Monica asked Dylan how he acquired his numerous bruises and injuries, and Dylan generally would repeat whatever she asked him or say that he fell. (76 RT 16059-16060.) Monica asked Dylan how many times appellant had hit him and Dylan responded "four times." (76 RT 16060.) Dylan's speech was slow for a four-year-old, but Monica was able to understand him. (76 RT 16057.)

2. Ben Alvarez's Trial Testimony

Ben testified he noticed bruises on Dylan's lip and the side of his mouth. (75 RT 15978-15979.) Ben asked Dylan what happened to his lip, and Dylan shyly said "Daddy." (75 RT 15980.) Dylan mumbled and was slightly incoherent, and flip-flopped about what happened to him. (75 RT 15980.) Ben clarified Dylan told him that appellant had caused his fat lip. (75 RT 15981.) Ben asked appellant if he caused Dylan's fat lip and appellant said Dylan was clumsy and would lose his balance and bump into things. (75 RT 15981.)

D. Law

The confrontation clause of the Sixth Amendment to the United States Constitution provides that in all criminal prosecutions the accused shall have the right to confront witnesses against him. (*Idaho v. Wright* (1990) 497 U.S. 805, 813.) In *Crawford v. Washington, supra,* 541 U.S. at page 36, the Supreme Court held that out-of-court testimonial statements must be excluded under the confrontation clause of the United States Constitution unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the declarant. (*Id.* at pp. 59, 68.) The confrontation clause has no application to out-of-court nontestimonial statements. (*Whorton v. Bockting* (2007) 549 U.S. 406, 420; *People v. Gutierrez* (2009) 45 Cal.4th 789, 812.)

> [O]nly testimonial statements are excluded by the Confrontation Clause. Statements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules.

(*Giles v. California* (2008) 554 U.S. 353, 376 [no blanket forfeiture rule applies to right of confrontation where defendant's wrongful act makes a witness unavailable to testify at trial].)

Evidence Code section 1360 creates a limited exception to the hearsay rule in criminal prosecutions for a child's statements describing acts of child abuse or neglect. (Evid. Code, § 1360; see *People v. Brodit* (1998) 61 Cal.App.4th 1312, 1327; cf. *In re Cindy L.* (1997) 17 Cal.4th 15, 29 [dependency proceedings].) Evidence Code section 1360 safeguards the reliability of a child's hearsay statements by requiring that: (1) the court find that the time, content, and circumstances surrounding the statement(s) provide sufficient indicia of reliability; (2) the child either testifies at the proceedings, or, if the child is unavailable to testify, other evidence corroborates the out-of-court statements; and (3) the proponent of the statement gives notice to the adverse party sufficiently in advance of the proceeding to provide him or her with a fair opportunity to defend against the statement. (Evid. Code, § 1360; see *People v. Eccleston* (2001) 89 Cal.App.4th 436, 444-445; *People v. Brodit*, *supra*, 61 Cal.App.4th at p. 1329; cf. *In re Cindy L.*, *supra*, 17 Cal.4th at p. 29.) Although generally, determination under Evidence Code section 1360 is reviewed for an abuse of discretion, this Court independently reviews the court's finding of reliability. (See *People v. Eccleston*, *supra*, 89 Cal.App.4th at p. 445; Evid. Code, § 1360, subd. (a)(2).)

Under Evidence Code section 352, the trial court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.) A trial court has broad discretion in determining whether to admit or exclude evidence objected to on the basis of this section. (*People v. Anderson* (2001) 25 Cal.4th 543, 591.) The trial court's discretion will not be disturbed unless it was exercised "'in

an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

E. Analysis

Appellant argues that Dylan's statements constituted inadmissible hearsay in violation of his federal constitutional right of confrontation, relying on *People v. Sisavath* (2004) 118 Cal.App.4th 1396 (*Sisavath*). (AOB 445-456.) In *Sisavath*, the Fifth District Court of Appeal held that a child sexual abuse victim's statement to a police officer "was testimonial under *Crawford*." (*Id.* at p. 1402.) The *Sisavath* court further held that the child's statement to a trained interviewer at a county facility also was testimonial because it was "'"made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."' [Citation.]" (*Ibid.*, fn. omitted.) Underlying this conclusion were the following facts: "[The victim's] interview took place after a prosecution was initiated, was attended by the prosecutor and the prosecutor's investigator, and was conducted by a person trained in forensic interviewing." (*Id.* at p. 1403.)

However, this case is more similar to *People v. Gutierrez, supra,* 45 Cal.4th at page 789, where the defendant was convicted of murdering his ex-girlfriend. (*Id.* at pp. 796-797.) Two months after the murder, the victim's sister told the victim's three-year-old son that they would visit his mother's grave soon. (*Id.* at p. 798.) The boy replied that he would "untie" his mother and explained that the defendant and his "mean friend tie[d] up" his mother and pointed to his neck. (*Ibid.*) The boy said he hit the defendant to get him to stop. (*Ibid.*) As he told this to his aunt, the boy was crying and making an angry face. (*Id.* at p. 808.) Two days later, the

aunt reported the boy's statements to detectives. (*Id.* at p. 808.) This Court found these statements not testimonial under *Crawford* and more like "'a casual remark to an acquaintance.'" (*Id.* at p. 813.)

Dylan's statements were not testimonial under *Crawford.* Dylan's statements to appellant's sister and father that appellant had previously hit Dylan, were more like a casual remark to an acquaintance rather than a statement made by an accuser to government officers. (*People v. Gutierrez*, *supra*, 45 Cal.4th at pp. 812-813.) Monica and Ben were not government agents; they were appellant's family and acquaintances of Dylan, which he called familial names. (See *Crawford v. Washington*, *supra*, 541 U.S. at pp. 51-52 [observing an "accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."].) Dylan's responses were not a formal accusation against appellant nor did appellant's family indicate any attempt to use the information against appellant. In fact, appellant's sister and appellant's father did not report Dylan's statements until after Dylan's death, when specifically questioned by a detective. (75 RT 15995-16000; 29 RT 5622-5624.)

Moreover, the statements were not testimony given at a preliminary hearing, before a grand jury, or at a former trial; or statements made to police during an investigation. (See *Crawford v. Washington*, *supra*, 541 U.S. at pp. 68-69.) Dylan's statements were not made in a professional interview-like environment, were not made in circumstances leading one to believe they would be used later at trial, were not made to a trained interviewer after the commencement of prosecution, and no authorities, police or prosecution, were present when the statements were made. Thus, *Crawford* does not apply and admission of Dylan's nontestimonial statement did not violate appellant's Sixth Amendment right to confront witnesses.

Error, if any, was harmless. Dylan's statements were a small part of the prosecution case. Whether appellant actually caused earlier injuries or bruises to Dylan was not at issue except to the extent that Dylan's statements shows appellant caused physical injuries before, and thus, was likely to have caused the fatal injuries. Admitting the statements that appellant had previously hit Dylan four times and appellant had previously given Dylan a fat lip are not as inflammatory as the charges against appellant or as inflammatory as other evidence, including Borgsdorf catching appellant in Dylan's room with his hands around Dylan's neck. (80 CT 24318.) In addition, appellant stated on the 9-1-1 call that he had been "tending to [Dylan] all day long." (80 CT 24189.) Appellant nervously rambled to the first responders that Dylan bruised easily and when asked what happened, appellant responded that they were playing earlier. (71 RT 15162, 15180.) In addition, Dylan's statements were also admissible for a non-hearsay purpose, to show Dylan's state of mind regarding his fear of appellant. Dylan shyly answered that appellant caused his fat lip and Moody and Hall described how Dylan was fearful of appellant, the statements explain Dylan's fear. In light of the substantial evidence of appellant's guilt, any error in admitting Dylan's statements was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 368 U.S. at p. 24; See *People v. Cage* (2007) 40 Cal.4th 965, 991-992 [applying *Chapman* standard in evaluating the prejudice resulting from erroneous admission of a testimonial out-of-court statement in violation of the confrontation clause].)

Appellant further argues the trial court should have excluded Dylan's statements under Evidence Code section 1360 because the content and circumstances of the statements did not provide sufficient indicia of reliability. (AOB 457-463.) Appellant does not argue the prosecution

failed to meet the second and third requirements for the admissibility of corroboration and notice under Evidence Code section 1360. The record of Dylan's statements to appellant's father and sister regarding the physical abuse were sufficiently reliable to meet the requirements for admissibility under Evidence Code section 1360. Monica asked Dylan how many times appellant had hit him while appellant was in the room. (26 RT 5600-5602, 5580.) Dylan immediately replied, "four times." (26 RT 5603, 5581.) Appellant did not dispute Dylan's statement or attempt to correct it. Monica understood Dylan even with his speech impediment. (26 RT 5603.) Contrary to appellant's argument, Monica immediately recorded the incident in her diary. (AOB 451; 26 RT 5605.) Dylan's statement to Monica was sufficiently reliable.

Dylan's statements to Ben were also reliable. During the pre-trial hearing, Ben testified that when he asked Dylan who had given him the fat lip he was sporting, Dylan responded that appellant had done it and appellant was mean to him. (29 RT 5612-5613, 5617.) Ben further acknowledged that Dylan had hesitantly answered, "Daddy" did it, referring to appellant. (29 RT 5617-5618.) Ben testified he was able to comprehend Dylan. (29 RT 5612, 5614, 5627-5628.)

The time, content, and circumstances of Dylan's statements provide sufficient indicia of reliability, and there was corroboration from other witnesses. (Evid. Code, § 1360, subd. (a)(2); *People v Eccleston*, *supra*, 89 Cal.App.4th at p. 449.) The statements were made close in time to when the injuries or bruises occurred and they were recorded in Monica's diary and relayed to detectives shortly after they occurred. (29 RT 5629.) Monica questioned Dylan with care making sure not to coerce Dylan. (29 RT 5597.) In addition, Dylan was speaking to appellant's family members, who likely would have biased in favor of protecting appellant, as

evidenced by Ben's testimony. (29 RT 5630.) The trial court did not abuse its discretion in admitting Dylan's statements under Evidence Code section 1360. (29 RT 5631.)

Appellant also contends the trial court failed to perform an Evidence Code section 352 analysis in admitting Dylan's statements to Monica and Ben, which he argues were more prejudicial than probative. (AOB 436-445.) While

> the record must "affirmatively show that the trial court weighed prejudice against probative value" [citations], the necessary showing can be inferred from the record despite the absence of an express statement by the trial court.

(*People v. Prince, supra,* 40 Cal.4th at p. 1237.) The trial court expressly stated that it had reviewed appellant's opposition and therefore considered his objection under Evidence Code section 352. (56 RT 11864.) In addition, before ruling, the trial court considered the testimony of three witnesses and the in-court arguments from counsel. The record supports the inference that the trial court conducted analysis under Evidence Code section 352. (29 RT 5548-5631; 53 RT 11038-11051; 56 RT 11861-11865.)

Appellant contends the statements made by Dylan were the only direct evidence that appellant was the person responsible for any injury that Dylan suffered, and all other evidence was highly circumstantial, thus increasing the potential for prejudice. (AOB 438-439.) However, the prosecution noted exactly the opposite, "I don't intend to argue it's direct evidence because it isn't, it is circumstantial." (29 RT 5570.) Additionally, there was direct eyewitness testimony from Borgsdorf who observed appellant "a couple of times" in Dylan's room with his hands around Dylan's neck in the middle of the night telling Dylan to shut up. (80 CT 24318.) Appellant admitted to officers that he sometimes played with

Dylan "too hard" and appellant "didn't mean to bruise [Dylan]." (71 RT 15225-15226.) Jeff Moody and Theresa Hall noticed Dylan was very afraid of appellant and appellant tried to cover up the bruises Dylan showed them. (75 RT 15919, 15920-15922.) Given the corroboration provided by other witnesses, as well as appellant's admission of bruising Dylan, it is clear that the jury did not throw logic aside in reaching its verdicts based on an emotional reaction from hearing Dylan's statements that appellant had hit him. (See *People v. Lenart* (2004) 32 Cal.4th 1107, 1125.) The trial court properly denied appellant's Evidence Code section 352 objection.

Error, if any, under Evidence Code sections1360 and 352 was harmless. Dylan's statements that appellant hit him four times and caused a fat lip were not as potentially prejudicial as were charges against appellant, or the forensic evidence of the brutal beating and attempted suffocation that Dylan endured. There is no reasonable probability that a result more favorable to appellant would have been reached if Dylan's statements had not been admitted. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

VIII. APPELLANT FAILED TO REQUEST A CLARIFYING INSTRUCTION; THE JURY WAS PROPERLY INSTRUCTED PURSUANT TO CALJIC NO. 8.24

Appellant argues the jury instruction regarding the mental state required for first degree torture murder was inadequate because it failed to state that the phrase "sadistic purpose" must be limited to circumstances in which sexual pleasure is derived from the infliction of pain thereby prejudicing him.[16] (AOB 464-481.) Appellant failed to request a clarifying

[16] Appellant argues that the evidence was insufficient to support the theory of murder by torture in Argument IX.

instruction on this point and forfeited this claim; in any event, the contention is without merit.

A. Record

The prosecution argued two theories to support the charges of first degree murder for both Tyler and Dylan: deliberate and premeditated murder and murder by torture. (88 RT 18782-18785.) The prosecution requested that the jury be instructed with CALJIC No. 8.24, defining murder by torture. (87 RT 18706.) The defense proposed a modification to CALJIC No. 8.24, lengthening the explanations or definitions of "willful, deliberate, and premeditated intent." (87 RT 18706-18709.) The trial court denied appellant's proposal (87 RT 18709), and instructed the jury under CALJIC No. 8.24 as follows:

> Murder which is perpetrated by torture is murder of the first degree. The essential element of murder by torture -- the essential elements of murder by torture are as follows: One, one person murdered another person; two, the perpetrator committed the murder with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain upon a living human being for the purpose of revenge, extortion, persuasion, or for any sadistic purpose; and three, the acts or actions taken by the perpetrator to inflict extreme and prolonged pain were the cause of the victim's death.
>
> The crime of murder by torture does not require any proof that the perpetrator intended to kill his victim or any proof that the victim was aware of pain or suffering.
>
> The word willful, as used in this instruction, means intentional.
>
> The word deliberate means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.
>
> The word premeditation means considered beforehand.

(88 RT 18974-18975; 81 CT 24448.)

During closing arguments, the prosecutor maintained that appellant committee murder by torture when he killed Tyler:

> And again, for what reason do you do that, squeeze a child so hard you break their ribs? For what reason do you snap or twist that leg? For what reason do you shake them so hard that it's like they've been hit by a car?
>
> That is torture murder. It was done with the intent to inflict extreme and prolonged pain on that child *for persuasion*[17] *or some sadistic purpose,* or in anger because he was crying, which would be a sadistic purpose.
>
> [¶] . . . [¶]
>
> And it was done with the purpose to inflict extreme and prolonged pain for a sadistic purpose, because the child's crying bothered him.

(88 RT 18817-18818, emphasis added.)

B. Law

When a defendant believes a jury instruction needs amplification or explanation, it is the defendant's burden to make such a request. (See *People v. Hart, supra,* 20 Cal.4th at p. 622.) Absent such a request, the court is under no obligation to amplify or explain the language of an instruction. (*People v. Bonin* (1988) 46 Cal.3d 659, 708, overruled on different grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

"[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) "Instructions should be interpreted, if possible, so as to

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[17] Appellant omitted the word "persuasion" in his argument. (AOB 466.)

support the judgment rather than defeat it if they are reasonably susceptible to such interpretation." (*People v. Laskiesicz* (1986) 176 Cal.App.3d 1254, 1258.)

There is no legal definition of "sadistic purpose" in the murder by torture jury instruction. (*People v. Raley* (1992) 2 Cal.4th 879, 901 (*Raley*).) Rather, "[i]t is a term in common usage, having a relatively precise meaning, that is, the infliction of pain on another person for the purpose of experiencing pleasure." (*Id.* at p. 901.) Consequently, there is no need to instruct the jury on the meaning of this term because the common understanding of the jurors is all that is required. (*Ibid.*)

"'When a word or phrase "'is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request.'" [Citations.]' [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 670, quoting *People v. Estrada* (1995) 11 Cal.4th 568, 574.) When it is argued the instruction is so vague and confusing as to violate fundamental ideas of fairness, a reviewing court inquires "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*People v. Raley*, *supra*, 2 Cal.4th at p. 901, quoting *Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

C. Analysis

Appellant forfeited this claim that CALJIC No. 8.24 failed to define the phrase "sadistic purpose" because he failed to object to it or request a clarifying instruction. (87 RT 18707; See *People v. Valdez* (2004) 32 Cal.4th 73, 113 ["Defendant did not request the clarifying language he now contends was crucial and may not now 'complain on appeal that an

instruction correct in law and responsive to the evidence was too general or incomplete.'"].)

Relying on *People v. Raley*, *supra*, 2 Cal.4th at page 879, appellant claims the lack of a definition of the alleged sexual pleasure element of "sadistic purpose" in CALJIC No. 8.24 violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights thereby prejudicing him. (AOB 467-481.) Appellant failed to object below based on federal constitutional provisions, and he may not raise that argument here. (*People v. Rowland*, *supra*, 4 Cal.4th at p. 267, fn. 5.)

Assuming the claim is not forfeited, the argument is without merit. "[CALJIC No. 8.24], including the phrase 'sadistic purpose,' has been approved as a 'precise and correct statement of the law.'" (*People v. Raley*, *supra*, 2 Cal.4th at p. 900, quoting *People v. Talamantez* (1985) 169 Cal.App.3d 443, 455.) In *Raley*, this Court held there was no need to instruct the jury on the meaning of "sadistic purpose" because the phrase is one "in common usage, having a relatively precise meaning, that is, the infliction of pain on another for the purpose of experiencing pleasure." (*People v. Raley, supra*, 2 Cal.4th at p. 901.) The Court has specifically rejected the argument that the phrase "any sadistic purpose" is vague or requires a legal definition. (*Id.* at p. 899-902; *People v. D'Arcy* (2010) 48 Cal.4th 257, 293.)

Appellant contends the phrase "sadistic purpose: should have been defined because sadism is commonly associated with sexual pleasure. (AOB 467-471.) Although sadism may be associated with sexual pleasure, it does not necessarily have such motivation. (See *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1203 [concluding "common meaning" of "sadistic purpose" is "infliction of pain on another person for the purpose of

experiencing pleasure"].) The phrase "sadistic purpose" is a commonly understood term that involves the infliction of pain for pleasure, regardless of any sexual intent. (*People v. Raley*, *supra*, 2 Cal.4th at p. 901; *People v. Healy* (1993) 14 Cal.App.4th 1137, 1142 ["although sadistic pleasure is commonly sexual, a sexual element is not required"].

Appellant cites portions of the prosecutor's closing argument regarding Tyler's murder, claiming it mislead the jury. (AOB 466, 475.) Appellant contends that the prosecutor's argument that extreme and prolonged pain was inflicted for a sadistic purpose because appellant was angry that Tyler was crying was insufficient to constitute a sadistic purpose. (AOB 466-467.) Appellant's contention is without merit. In *People v. Pensinger* (1991) 52 Cal.3d 1210, 1240, this Court stated, "The jury could infer a sadistic intent to give pain to punish [the five-month-old victim] for crying." (*Ibid.*) Appellant also ignores the fact that the complained instruction and the closing argument also included another intent – the purpose of "persuasion." (88 RT 18818; AOB 466.)

The prosecutor properly and repeatedly argued appellant murdered Tyler by torture when appellant squeezed Tyler's ribs, snapped or twisted Tyler's leg in half, and shook Tyler with force comparable to a car accident. (88 RT 18783-18786, 18787-18788, 18809-18810, 18817-18818.) The prosecutor argued that appellant these torturous acts with the intent to inflict extreme and prolonged pain for the purpose of persuasion of some other sadistic purpose. (88 RT 18817-18818.) A reviewing court must consider the arguments of counsel in assessing the probable impact of an instruction on the jury. (*People v. Garceau* (1993) 6 Cal.4th 140, 189, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) In addition, the prosecutor's closing argument is not evidence and the

jury was so instructed. (CALJIC No. 1.02; 88 RT 18958; 81 CT 24405.) The jury is presumed to have followed this instruction. (*People v. Avila* (2009) 46 Cal.4th 680, 719.) There is no reasonable likelihood that the jury applied CALJIC No. 8.24 in a way that violates the Constitution. (*People v. Raley*, *supra*, 2 Cal.4th at p. 901.)

Assuming that the trial court erred, any error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) "If it can be said beyond a reasonable doubt that the jury must have found the defendant's guilt beyond a reasonable doubt, the error is harmless. If the reviewing court cannot draw this conclusion, reversal is required." (See *People v. Aranda* (2012) 55 Cal.4th 342, 367-368.)

Here, there was evidence of other intents or purposes beyond a "sadistic purpose" that supported the theory of torture murder for both Tyler and Dylan. Appellant and Shari had argued about money and bills hours before appellant murdered Tyler. (80 RT 17008-17010, 16995; 82 RT 17522.) Appellant refused to pay any of the bills, and chastised Shari, telling her that Brian should be paying child support for Tyler. (80 RT 17009.) Appellant told Shari that if Brian refused to pay then she should withhold his right to see Tyler. (80 RT 17009-17010.) The night before appellant murdered Dylan, appellant and Borgsdorf had an argument that escalated to pushing. (72 RT 15451; 80 CT 24250, 24215-24216.) After the fight, appellant admitted he was jealous of the time and attention Shari gave Dylan. (80 CT 24257, 24214.) Appellant also said he was frustrated that Borgsdorf did not trust him with Dylan. (80 CT 24223.) Later that evening, appellant quickly covered up bruises Dylan was displaying to dinner guests and tried to offer the explanation that Dylan was clumsy. (75 RT 15921-15922, 15931-15932.)

Appellant murdered Tyler and Dylan for the purpose of revenge, extortion, persuasion, or some sadistic purpose. Based on the entire charge to the jury and the evidence before it, even if the trial court had been required to define "sadistic purpose," there is no reasonable doubt that the jury would have failed to find appellant guilty.

IX. SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S CONVICTIONS FOR FIRST DEGREE MURDER AS TO DYLAN AND TYLER

Appellant argues the evidence was insufficient to support his convictions for the first degree murders of Tyler and Dylan as deliberate and premeditated, or as murder by torture.[18] (AOB 482-511.) Respondent disagrees.

A. Standard of Review

In determining whether the evidence is sufficient to support a criminal conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 576; *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) The same standard applies if the verdict is supported by circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

"An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise." (*People v. Combs* (2004) 34 Cal.4th 821, 849.) If the evidence

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[18] Section 189 provides in part: ". . . [M]urder which is perpetrated by means of . . . torture, or by any other kind of willful, deliberate, and premeditated killing" is first degree murder.

is susceptible to different factual findings or inferences, "[i]t is the jury, not the appellate court, that must be convinced beyond a reasonable doubt." (*People v. Perez* (1992) 2 Cal.4th 1117, 1126.)

B. Premeditated And Deliberate Murder

1. Law

"An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Jennings, supra,* 50 Cal.4th at p. 645, quoting *People v. Stitely, supra,* 35 Cal.4th at p. 543.) "'[P]remeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.'" (*People v. Jennings*, *supra*, 50 Cal.4th at p. 645.) Premeditation can occur in a brief period of time. (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) "'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . ..'" (*Ibid*, quoting *People v. Thomas* (1945) 25 Cal.2d 880, 900.)

A finding of premeditated, deliberate murder can be sustained by: evidence of planning, of motive, or of an exacting manner of killing. (*People v. Pensinger*, *supra*, 52 Cal.3d at p. 1237; *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) "However, these factors are not exclusive, nor are they invariably determinative." (*People v. Combs*, *supra*, 34 Cal.4th at p. 850.) "'*Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]'" (*People v. Bolin*, *supra*, 18 Cal.4th at pp. 331-332.)

2. Analysis

a. Premeditated And Deliberate Murder Of Tyler

Appellant contends there was insufficient evidence to support the jury's finding that Tyler's murder was premeditated and deliberate. (AOB 483-493.) He claims there was not meaningful evidence of planning or motive, but that the evidence showed the shaking was an unplanned act because no weapon was used. (486-493.)

Here, appellant committed horrific abusive acts when he was alone with Tyler during the two weeks that appellant lived with Shari and Tyler. Shari testified that on November 15th, while she sat at the dinette table speaking to her father on the phone, appellant, on his own, moved Tyler to the bedroom and out of Shari's field of vision. (80 RT 17014, 17016; see *People v. Arcega* (1982) 32 Cal.3d 504, 519 [unusual circumstance that the defendant had his curtains drawn was evidence of planning in order to conceal the crime under the *Anderson* test]; *People v. Pensinger*, *supra*, 52 Cal.3d at p. 1238, fn. 4 [planning does not need to relate only to the act of killing].) When appellant was in the master bedroom for the second or third time, Shari heard Tyler's cries growing louder as if he were in pain. (80 RT 17019-17020.) Tyler suddenly stopped crying, and within seconds, appellant called out to Shari to call 9-1-1. (80 RT 17019-17020.) There was sufficient evidence of planning. Tyler's complete vulnerability, appellant moving him to an isolated room and the evidence of a previously selected spot for the killing suggest planning. (*People v. Pensinger*, *supra*, 52 Cal.3d at p. 1237.)

There was also substantial evidence of motive. Appellant had just argued with Shari about bills and money, and had suggested that Shari use

Tyler as a pawn to obtain money from Brian by withholding custody. (80 RT 17522, 17009-17010.) In addition, the night before he murdered Tyler, appellant told his friend that Tyler cried all the time, which "got to him." (75 RT 15940-15941.) The jury reasonably could have inferred that appellant murdered Tyler because he was irritated with Shari or by Tyler's crying. Appellant argues that no "rational" person would think that shaking a crying child would cause the child to stop crying. (AOB 490.) However, that is exactly what happened. Immediately after appellant fatally shook Tyler, he stopped crying because it tore axons and blood vessels in Tyler's brain causing instantaneous major neurological impairment and unconsciousness, which ultimately led to his death. (74 RT 15743, 15755.) Moreover, the incomprehensibility of the motive does not mean that the jury could not reasonably infer that the defendant entertained and acted on it. (See *People v. Wright* (1985) 39 Cal.3d 576, 593.)

As for the last *Anderson* category, evidence of the manner of the killing, Tyler was five months old, and could not walk or crawl. (*People v. Pensinger*, *supra*, 52 Cal.3d at p. 1238.) Appellant was a grown man who inflicted deliberate cruel physical abuse for approximately two weeks upon a defenseless five-month-old infant who weighed only 15 pounds. Then, in his final act of abuse, appellant again crushed Tyler's ribs, snapped his lower leg in half, and shook him to death. (79 RT 16787.)

There was substantial evidence from which a rational trier of fact could find beyond a reasonable doubt that appellant committed the deliberate and premeditated murder of Tyler.

b. Premeditated And Deliberate Murder Of Dylan

Appellant claims there was no evidence that appellant planned to kill Dylan because there was no information as to what exactly occurred on that

day. Instead, he suggests that if he caused Dylan's death, it was likely the result of an explosion of violence. (AOB 488-489, 492.) Appellant misapprehends the test for sufficiency of evidence, and the record contains substantial evidence of premeditation based on the *Anderson* factors.

There was substantial evidence of planning. Initially, appellant planned to have Dylan stay home from preschool with him while Borgsdorf went to work. However, Borgsdorf changed her mind that morning and decided to take Dylan to preschool. (80 CT 24274.) Appellant stopped her, telling her not to wake up Dylan and that he would take Dylan shopping at the mall. (80 CT 24272.) Appellant was insistent that Borgsdorf not wake Dylan or disturb him. (80 CT 24276.) Appellant had a pattern and a practice of blocking Borgsdorf's access to Dylan. For example, the argument the night before appellant murdered Dylan started when Borgsdorf changed Dylan's clothes, upsetting appellant because appellant wanted to do it. (80 CT 24250.) There simply was no evidence that appellant killed Dylan in an explosion of violence, and there is no evidence appellant was upset that day, considering he woke up in a "lovey" mood. (80 CT 24276.)

The forensic evidence showed that Dylan's injuries and bruises occurred within two to four hours of his death. (71 RT 15355, 15407.) The forensic pathologist testified that Dylan's fatal abdominal injuries could not have occurred more than two hours before the 9-1-1 call. (74 RT 15722-15723.) Appellant admitted he was the last person alone with Dylan before he died (85 RT 18288) and stated he had been playing with Dylan and tending to him all day (85 RT 18288; 80 CT 24186, 24189). It is a reasonable inference that appellant attempted to manufacture an alibi when appellant called his sister and claimed to be waiting at the mall. Appellant

displayed similar behavior after he kidnapped Edwards and forced her to call the Sheriff's Department and ask if she would get in trouble for leaving her husband while taking custody of their son. (86 RT 18485-18486, 18576.) As in the Edwards case, appellant was manufacturing evidence that she voluntarily left her husband, rather than being forced to do so by appellant. (86 RT 18576.)

There was substantial evidence of motive. Appellant had a pivotal argument with Borgsdorf the night before he killed Dylan in which Borgsdorf attempted to kick appellant out of the apartment. (72 RT 15451; 80 CT 24215-24216.) Immediately after the argument, appellant admitted he was jealous of the attention Borgsdorf gave Dylan and he talked to her about her not trusting him with Dylan. (80 CT 24257, 24215, 24223.) That night when Moody and Hall were visiting for dinner, appellant showed his displeasure with Dylan displaying his bruises to Moody and Hall by immediately covering up the marks with his hand and calling Dylan clumsy. (75 RT 15921-15922, 15931-15932.) In addition, appellant's prior conduct with Dylan displayed his motive. Appellant snuck into Dylan's room nightly while Borgsdorf was sleeping; sometimes Dylan's screams would wake her and other times she would wake up to discover new bruises and injuries on Dylan. (80 CT 24313-24314, 24311, 24319, 24290-24291.) Appellant also had a pattern of inflicting serious injuries on Dylan after appellant and Borgsdorf argued. (80 CT 24255-24256.) Borgsdorf thought appellant took out his anger on Dylan. (80 CT 24288, 24256.) From these facts, a rational trier of fact reasonably could infer that appellant had a motive to kill Dylan.

There was substantial evidence of the manner in which appellant brutally killed Dylan. Forensic evidence showed that appellant had repeatedly punched Dylan in the abdomen with considerable force, causing

Dylan's pancreas to split in half and causing numerous hemorrhages to his abdominal cavity. (74 RT 15710-15712.) Ultimately, the blows pinned Dylan's entire abdominal wall back into his spine, crushing his organs. (74 RT 15710-15712.) Appellant likely inflicted these injuries with his fist or foot, the end of a baseball bat, or a broom handle. (71 RT 15366-15367.) The magnitude of the force used to inflict these abdominal injuries is apparent by the fact that such injuries are commonly seen in car accidents caused by the steering column. (71 RT 15367.)

Appellant inflicted the lethal blow to Dylan's abdomen no more than two to three hours before the 9-1-1 call. (74 RT 15823-15824.) However, the first responder testified that Dylan was cold to the touch when he arrived and the paramedic thought Dylan was already dead. (71 RT 15159, 15205.) Dr. Ellis concluded that Dylan could have been "down" for several hours. (71 RT 15341.) From this time frame, a rational trier of fact reasonably could infer that Dylan was fatally assaulted before appellant called Borgsdorf or 9-1-1, and the beating occurred over a long period of time.

Based on the evidence, a rational trier of fact could find beyond a reasonable doubt that appellant committed the deliberate and premeditated murder of Dylan.

C. Torture Murder

Appellant claims there was insufficient evidence to support the jury's finding that he intended to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose in murdering Tyler and Dylan. (AOB 493-509.) Appellant is wrong.

1. Law

The elements of first-degree murder by torture are: (1) the acts causing the death must involve a high degree of probability of death, and (2) the defendant must commit the acts with the intent to torture; the intent to kill is not an element. (*People v. Mincey* (1992) 2 Cal.4th 408, 432; *People v. Davenport* (1985) 41 Cal.3d 247, 267.) The malice required for murder is supplied by, "an intentional act involving a high degree of probability of death which is committed with conscious disregard for human life." (*People v. Davenport, supra,* 41 Cal.3d at p. 267.)

"[T]he intent to inflict torturous pain and suffering on the victim as at the heart of the crime of first degree murder perpetrated by torture." (*People v. Davenport*, *supra*, 41 Cal.3d at p. 268.) Such intent is the calculated intent to cause pain for """"the purpose of revenge, extortion, persuasion or for any other sadistic purpose."""" (*People v. Proctor*, *supra*, 4 Cal.4th at p. 530.) There must be a causal relationship between the acts of torture and death. (*Ibid.*) "The acts of torture may not be segregated into their constituent elements in order to determine whether any single act itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture." (*Id.* at pp. 530-531.)

2. Analysis

In support of his claim that evidence was insufficient to prove that he intended to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose in murdering Tyler and Dylan, appellant likens this case to the murders described in *People v. Steger* (1976) 16 Cal.3d 539, 548-549 (*Steger*) and *People v. Walkey* (1986) 177 Cal.App.3d 268, 276 (*Walkey*). (AOB 497-509.)

In *People v. Steger*, *supra*, 16 Cal.3d at page 539, this Court concluded that the evidence was insufficient to support torture murder where the stepmother beat her stepdaughter repeatedly for one month because the defendant was frustrated by the child's behavior and was attempting to discipline her. (*Id.* at p. 548.) The victim's injuries included a subdural hemorrhage, hemorrhaging liver, adrenal gland, intestines and diaphragm; a lacerated chin, a fractured cheekbone and right forearm, as well as cuts and bruises from head to toe. (*Id.* at p. 543.) The defendant confessed saying that she beat the victim because she was continually frustrated by her inability to control the disobedient child. (*Id.* at p. 543.) Specifically, the Court determined there is "not one shred of evidence" to support a finding that she "severely beat her stepchild" "with cold-blooded intent to inflict extreme and prolonged pain." (*Ibid.*)

> Rather, the evidence . . . paints defendant as a tormented woman, continually frustrated by her inability to control her stepchild's behavior. The beatings were a misguided, irrational and totally unjustifiable attempt at discipline; but they were not in a criminal sense wilful, deliberate, or premeditated. [¶] [S]everal distinct "explosions of violence" took place, as an attempt to discipline a child by corporal punishment generally involves beating her whenever she is deemed to misbehave.

(*Id.* at pp. 548-549, fn. omitted.)

In *People v. Walkey*, *supra*, 177 Cal.App.3d at page 268, the defendant beat his stepson to death while babysitting. (*Id.* at pp. 272-274.) The child had bruises all over his body, fresh bite marks, injuries to his brain from blows to his head, partially healed fractured ribs, a torn liver and a hemorrhaged spleen. (*Id.* at pp. 272-273, 276.) The defendant resented having to take care of the victim, was seen spanking the victim, and had

yelled at the victim when he had a toilet-training accident. (*Id.* at p. 276.) The Fourth District Court of Appeal, quoting the holding in *Steger*, concluded, that the fact that the victim was beaten on numerous occasions showed only

> that several distinct "explosions of violence" took place, as an attempt to discipline a child by corporal punishment . . .. [Citation omitted.] [¶] [T]his evidence merely shows the beatings [the defendant] inflicted on [the victim] were "a misguided, irrational and totally unjustifiable attempt at discipline . . .."

(*Id.* at pp. 275-276.) The appellate court went on to point out expert testimony that had been presented at trial that most instances of child abuse are triggered by something the abuser perceives as a stimulus for the abuse, such as prolonged crying, misbehavior or a toilet-training accident by the victim. (*Id.* at p. 276.) The appellate court added, "Such explosive violence on the part of the abusing adult, without more, does not support a torture murder theory." (*Id.* at p. 276.)

Unlike the defendants is *Steger* and *Walkey*, there was no evidence that appellant murdered Tyler or Dylan during an attempt to impose discipline, or that he inflicted the beatings in explosive fits. "[F]or purposes of proving murder by torture, the intent to inflict extreme pain 'may be inferred from the circumstances of the crime, the nature of the killing, and the condition of the victim's body.'" (*People v. D'Arcy, supra,* 48 Cal.4th at p. 293.) When appellant abused the children, he did so in a secretive, quiet, and calm manner. A rational trier of fact could reasonably infer the intent to cause cruel and prolonged suffering from the evidence showing appellant's premeditated and brutal attacks on a five-month-old infant. (*People v. Pensinger, supra*, 52 Cal.3d at p. 1240.)

a. Murder By Torture Of Tyler

Appellant claims it was apparent that Tyler's injuries resulted from heat of passion and "hot anger," and there was no evidence of torture murder. (AOB 497-498.) Yet, there was no evidence that appellant was angry or acting in the heat of passion at the time he killed Tyler. Appellant did not yell at Tyler and there was no evidence that appellant ever attempted to discipline the five-month-old infant.

There was sufficient evidence that appellant murdered Tyler by means of torture. Appellant began physically abusing Tyler as soon as appellant moved into the home, until his abuse ultimately killed Tyler on November 15th. (80 RT 16975, 16973, 16975.)

Appellant testified that he did not get angry after his conversation with Shari about the overdue bills on November 15th. (84 RT 17963.) Rather, appellant testified he arrived home relaxed after enjoying a message at physical therapy. (84 RT 17956.) Appellant then drank a beer with Cepeda, the neighbor, while discussing appellant's truck. (83 RT 17635.) Cepeda testified appellant acted normally and was not agitated or angry. (83 RT 17642.) While Shari was on the phone with her father, appellant calmly and quietly carried Tyler into the master bedroom room. Appellant then squeezed Tyler's chest causing two new rib fractures (79 RT 16798), twisted or bashed Tyler's lower leg breaking both the tibia and fibula bones in half (76 RT 16200-16203), and appellant lacerated Tyler's liver by causing blunt-force trauma (76 RT 16216-16217). Such injuries required separate blows to the leg, liver, and ribs; each would cause extreme pain. (79 RT 16833-16834.) When appellant shook Tyler, he hit the back of Tyler's head against a hard surface causing a contusion to Tyler's scalp. (79 RT 16851.) The shaking caused hemorrhaging around Tyler's retinas,

and in numerous areas of his brain, tearing axons and causing irreversible neurological damage. (79 RT 74 RT 15743, 15755, 16794-16796.)

Moreover, when speaking to officers about Tyler's injuries, appellant used the word "torture" to describe Tyler's fatal injuries when he said that he would not torture, beat up, and kill a baby because the baby was sick. (85 RT 18207-18208.)

A rational trier of fact reasonably could find that appellant murdered Tyler by torture for the purpose of revenge, extortion, persuasion or for any other sadistic purpose for numerous reasons. After appellant moved into the house, Tyler began getting bruises and suffered from numerous broken ribs. (80 RT 16975, 16963-16964.) Appellant would tightly wrap Tyler in a blanket, preventing him from moving. (79 RT 16868-16869; 80 RT 16982-16983.) Appellant consistently wanted Tyler to remain confined in his crib. (80 RT 16984-16985.) Appellant discouraged others from taking Tyler to the doctor and frequently claimed his truck was not working when Tyler had doctor appointments, causing Tyler to miss them. (79 RT 16889-168990, 16873, 16930; 80 RT 16978, 16953.) Appellant claimed to revive Tyler with his "CPR" attempts one week before the murder. (80 RT 16970, 16967.) Appellant and Shari argued about bills right before Tyler was fatally injured. (80 RT 17008, 16995; 82 RT 17522.) Appellant tried to get Shari to use Tyler as a pawn to obtain money from Brian. (80 RT 17009-17010.) This systematic evidence shows appellant inflicted prolonged and cruel suffering upon Tyler. (*People v. Pensinger, supra,* 52 Cal.3d at p. 1240.)

A rational trier of fact reasonably could have determined that appellant beat Tyler numerous times "to give pain to punish h[im] for crying." (*People v. Pensinger, supra*, 52 Cal.3d at p. 1240.) Appellant

admitted to becoming frustrated with Tyler's crying, calling it loud and annoying, and he told his friend that it got to him. (84 RT 17942; 75 RT 15940-15941.)

The jury reasonably could have found that appellant wanted to persuade Tyler to be quiet. The infliction of pain "to control another's behavior" can constitute torture. (*People v. Healy*, *supra*, 14 Cal.App.4th at p. 1141.) Based on all of this evidence, the jury reasonably could have found that appellant murdered Tyler for a sadistic purpose. (*People v. Pensinger, supra,* 52 Cal.3d at p. 1240.)

b. Murder By Torture Of Dylan

In contrast to *Steger* and *Walkey*, there was no evidence that appellant was attempting to discipline Dylan or that he exploded in frustration from Dylan's behavior when appellant inflicted the injuries. There was no expert testimony or any other evidence even suggesting that appellant injured Dylan because he was attempting to discipline him or reacting to something Dylan had done. (*People v. Walkey*, *supra*, 177 Cal.App.3d at p. 276.)

The only evidence that appellant attempted to discipline Dylan was that appellant would place Dylan in the corner by leading him with his hand around the neck, but not strangling him. (80 CT 24213-24214.) Appellant testified that he only left red marks on Dylan's shoulders when he walked him to timeout. (85 RT 18116-18117.) Appellant repeatedly claimed that he had never hit Dylan. (84 RT 18018-18019; 85 RT 18111, 18115-18116.) On the 9-1-1 call appellant told Borgsdorf that he was playing with Dylan when the injuries occurred, not disciplining him, and during his testimony appellant confirmed this statement. (80 CT 24186; 85 RT 18107-18108.) The evidence of abuse shows appellant beat Dylan after he and Borgsdorf would fight, taking out his anger on Dylan. (80 CT 24256, 24288.)

There was sufficient evidence that appellant murdered Dylan by means of torture, that is, Dylan was murdered as a direct result of appellant's infliction of prolonged suffering for revenge, extortion, persuasion, or for any other sadistic purpose.

Appellant and Borgsdorf had an argument the night before when she tried to kick appellant out of the apartment. (72 RT 15451; 80 CT 24215-24216.) Dylan was commonly caught in the middle of the arguments between Borgsdorf and appellant. (80 CT 24288, 24256.) Appellant inflicted the most serious injuries upon Dylan after appellant and Borgsdorf argued. (80 CT 24255-24256.) The night before appellant murdered Dylan, he admitted to Borgsdorf that he was jealous of the attention she gave Dylan and he was upset she did not trust him with Dylan. (80 CT 24257, 24251, 24223.) Borgsdorf often heard appellant sneak into Dylan's room at night and saw Dylan emerge with fresh injuries the following morning. (80 CT 24311, 24315, 24318.) On the day Dylan was fatally beaten, Borgsdorf had not seen Dylan since the night before, when she tucked him in bed. (80 CT 24272.) Appellant stopped her from seeing Dylan that morning. (80 CT 24272.)

Appellant attempted to smother Dylan and succeeded in obstructing Dylan's airway, causing injuries that the forensic pathologists stated he had only seen in other children that were actually smothered to death, but Dylan survived the suffocation. (71 RT 15372-15373; 74 RT 15699.) The smothering was so severe that it caused hemorrhages to Dylan's heart and lungs. (71 RT 15731; 74 RT 15696-15697.) The blood coming from Dylan's penis was likely due to injuries to his kidneys or gastrointestinal tract that was not grossly evident during the autopsy. (71 RT 15385-15386.) Dylan also had appellant's signature bruising inside his right ear canal and on the center of the ear itself. (74 RT 15703-15706.)

There were approximately 70 to 75 bruises on Dylan's face, throat, upper back, lower back, buttocks, and abdomen. (71 RT 15352, 15356, 15360-15361.) There were multiple bruises to Dylan's forehead and back of his head extending down his neck, which were inflicted with such force that it caused Dylan's brain to swell. (71 RT 15356, 15352-15352, 15363; 74 RT 15704-15705) Based on the severity of the injuries to Dylan's head, the forensic pathologist was surprised that he did not detect a skull fracture. (71 RT 15363.) The fatal blunt-force trauma Dylan endured was described as being caused from a fist, foot, end of a baseball bat, or broom handle with extreme force in order to impinge Dylan's organs against his spine. (71 RT 15364.)

Based on the extensive beating inflicted upon Dylan, a rational trier of fact reasonably could have found that appellant murdered Dylan by torture. (See *People v. Pensinger, supra*, 52 Cal.3d at p. 1239 [defendant broke five-month-old victim's ribs, cut her with a knife, slammed her head against a rock, and stepped on her back]; *People v. Mincey, supra,* 2 Cal.4th at p. 428 [five-year-old victim beat over 24 to 48 hour period]; *People v. Proctor*, *supra*, 4 Cal.4th at pp. 531-532 [drag marks made with a knife].)

X. THERE WAS NO CUMULATIVE ERROR AT THE GUILT PHASE THAT WOULD REQUIRE REVERSAL OF THE GUILT JUDGMENT

Appellant contends that even if none of the errors he identified were prejudicial standing alone, the cumulative effect of the errors undermines confidence in the integrity of both phases of trial. (AOB 512-522.) Respondent disagrees. There were no errors to aggregate, and, assuming any error is found, such errors were harmless. Thus, appellant has failed to demonstrate prejudice.

The evidence of appellant's guilt was overwhelming. Both Tyler and Dylan were brutally beaten when they were alone with appellant. The facts and circumstances of each murder supported findings of deliberation and premeditation, as well as torture. Appellant failed to properly preserve his change of venue claim, and even if preserved, failed to show that there was error or that he did not receive a fair trial (see Argument I, above). The crimes were of the same type and were perpetrated in similar fashion, and appellant fails to establish error by their joinder (see Argument II, above). Because there were no errors, there are no errors to aggregate to cumulative error.

Whether considered individually or for their cumulative effect, any alleged errors could not have affected the outcome of the trial. (*People v. Seaton* (2001) 26 Cal.4th 598, 675; *People v. Ochoa* (2001) 26 Cal.4th 398, 447.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Box* (2000) 23 Cal.4th 1153, 1214.) The record shows appellant received a fair trial. His claim of cumulative error should, therefore, be rejected.

XI. ADDITIONAL ERRORS IN CAPITAL SENTENCING

Appellant presents several arguments asserting that California's death penalty statute is unconstitutional. (AOB 523-531.) This Court has rejected these arguments, and appellant has provided no persuasive reason to reconsider these decisions. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1234.)

A. Unanimity Aggravating Circumstances

Appellant contends that the instructions violated the Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution by failing to

require juror unanimity on aggravating factors, or requiring the jury to unanimously find that death was the appropriate punishment beyond a reasonable doubt. (AOB 523-525.)

This Court has held that the failure to require that the jury unanimously find the aggravating circumstances true beyond a reasonable doubt, to require that the jury find unanimously and beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances, or to require a unanimous finding beyond a reasonable doubt that death is the appropriate penalty does not violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. (*People v. Parson* (2008) 44 Cal.4th 332, 370; *People v. Salcido* (2008) 44 Cal.4th 93, 167.) This Court has also expressly found that the United States Supreme Court's decisions interpreting the Sixth Amendment's jury trial guarantee (*Cunningham v. California* (2007) 549 U.S. 270; *Blakely v. Washington* (2004) 542 U.S. 296; *Ring v. Arizona* (2002) 536 U.S. 584; *Apprendi v. New Jersey* (2000) 530 U.S. 466) do not alter this conclusion or affect California's death penalty law. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 228; *People v. Salcido, supra,* 44 Cal.4th at p. 167; *People v. Stevens* (2007) 41 Cal.4th 182, 212.)

Appellant presents no compelling reason to reconsider this Court's prior rulings.

B. Written Finding For Aggravating Factors

Appellant claims that the instructions given in this case failed to require the jury to make written findings about the aggravating factors they found and considered in imposing a death sentence, which was error. (AOB 525.)

California's death penalty statute is not unconstitutional because it does not require the jury to make written findings concerning the aggravating factors it relied upon or in failing to require unanimity as to

aggravating factors, nor does the statute fail to provide a procedure that permits meaningful appellate review. (*People v. Parson, supra*, 44 Cal.4th at p. 370; *People v. Riggs* (2008) 44 Cal.4th 248, 329; *People v. Salcido, supra*, 44 Cal.4th at p. 166; *People v. Watson* (2008) 43 Cal.4th 652, 703.) Also, California's death penalty statute does not violate equal protection by denying capital defendants certain procedural safeguards, such as jury unanimity and written jury findings, while affording such safeguards to noncapital defendants. (*People v. Parson, surpa,* 44 Cal.4th at p. 370; *People v. Harris, supra,* 43 Cal.4th at p. 1323; *People v. Watson, supra,* 43 Cal.4th at pp. 703-704.)

Appellant presents no compelling reason to reconsider those holdings.

C. Death Penalty Statue Not Overbroad

Appellant argues that California's death penalty statute is overbroad and does not perform the constitutionally required narrowing function. (AOB 525.)

This Court has held that California's homicide law and the special circumstances listed in section 190.2 adequately narrow the class of murderers eligible for the death penalty. (*People v. Riggs, supra*, 44 Cal.4th at p. 329; *People v. Salcido, supra*, 44 Cal.4th at p. 166; *People v. Thornton* (2007) 41 Cal.4th 391, 468; *People v. Marks, supra,* 31 Cal.4th at p. 237.) Appellant presents no compelling reason to reconsider those rulings.

D. Intercase And Intracase Proportionality Review

Appellant contends that California's death penalty law is unconstitutional, because it denies him intercase and intracase proportionality review. (AOB 525-526.)

Intercase proportionality review is not constitutionally required. (*Pulley v. Harris* (1984) 465 U.S. 37, 51-54 [104 S.Ct. 871, 79 L.Ed.2d 29]; *People v. Parson, supra*, 44 Cal.4th at pp. 368-369; *People v. Riggs, supra*, 44 Cal.4th at p. 330; *People v. Whisenhunt, supra*, 44 Cal.4th at p. 227.) Appellant presents no compelling reason to reconsider those holdings.

Although appellant mistakenly claims California law does not include intracase proportionality review and he does not specifically request it, he is entitled to intracase proportionality review. (AOB 525-526; *People v. Valencia* (2008) 43 Cal.4th 268, 310-311; *People v. Prince, supra,* 40 Cal.4th at p. 1298.) However, in light of the two horrific murders appellant committed (see Statement of Facts and Argument 9), his sentence is not disproportionate to his personal culpability. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 511.)

E. Mitigation Evidence

Appellant argues that California's death penalty law creates an impermissible barrier to consideration of mitigating evidence by precluding reliance on mental or emotional disturbance, or the dominating influence of another, unless such factors are "extreme" and/or "substantial," in violation of the federal Constitution. (AOB 259.)

This Court has repeatedly rejected the claim that the use of the terms "extreme" or "substantial" in section 190.3 improperly limits the jury's consideration of mitigating evidence in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (*People v. Parson, supra*, 44 Cal.4th at pp. 369-370; *People v. Williams* (2008) 43 Cal.4th 584, 649; *People v. Thornton, supra*, 41 Cal.4th at p. 469.) Appellant presents no compelling reason to reconsider those holdings.

F. Prosecutorial Discretion

Appellant claims California grants unlimited discretion to prosecutors to decide when to seek the death penalty resulting in different standards for each county thereby violating his rights. (AOB 526-527.)

This Court has rejected claims that California's death penalty statute unconstitutionally grants unfettered discretion to prosecutors to decide whether to charge eligible defendants with a capital offense or seek the death penalty, resulting in disparate imposition of the death penalty throughout the state. (*People v. Salcido, supra*, 44 Cal.4th at p. 168; *People v. Prince, supra*, 40 Cal.4th at p. 1298; *People v. Avila* (2006) 38 Cal.4th 491, 615.)

Citing *Bush v. Gore* (2000) 531 U.S. 98, appellant argues that because there are

> equal protection violations where procedures for counting ballots in one county may differ from procedures for counting ballots in another county[,] surely procedures for determining which murder cases merit seeking a death penalty must also be reasonably uniform from one county to another.

(AOB 526-527.) Setting up a uniform standard for the mechanical task of counting ballots is simply not analogous to an evaluation of the unique facts and circumstances of each case and defendant used by prosecutors to determine which murder cases merit seeking the death penalty. In any event, the equal protection issue in *Bush v. Gore* stemmed from the lack of an adequate statewide standard in Florida for determining what constituted a legal vote. (*Id.* at p. 109.) California's statute defining special circumstances to murder provides a uniform statewide standard in California for identifying which murders qualify for the death penalty.

Appellant fails to present a compelling reason for this Court to reconsider its prior decisions.

G. Psychological Effect Of Preexecution Confinement

Appellant claims the delay in carrying out his execution is cruel and unusual punishment. (AOB 527-528.)

This Court has repeatedly rejected the claim that delay in the appointment of counsel on appeal and in processing the appeal, and the probable additional delay in execution, inflicts cruel and unusual punishment within the meaning of the Eighth Amendment to the United States Constitution. (*People v. Prince, supra*, 40 Cal.4th at p. 1298; *People v. Taylor* (2001) 26 Cal.4th 1155, 1176.) Appellant's contention should also be rejected.

H. Section 190.3 Factors In Aggravation Are Overly Broad

Appellant complains the section 190.3 factors in aggravation are overly broad. (AOB 528.) However, this Court has repeatedly held that the statutory sentencing factors are not so arbitrary, broad, or contradictory that they provide inadequate guidance to the jury. (*People v. Harris, supra*, 43 Cal.4th at p. 1322; *People v. Williams, supra*, 43 Cal.4th at p. 648; *People v. Prince, supra*, 40 Cal.4th at p. 1298.) Appellant's argument should also be rejected.

I. Failure To Provide A Presumption In Favor Of Life

Appellant contends the failure to provide a presumption in the favor of life was error. (AOB 528.) This Court has held that there is no constitutional requirement of a presumption in favor of a sentence of life imprisonment without the possibility of parole. (*People v. Parson, supra*, 44 Cal.4th at p. 371; *People v. Whisenhunt, supra*, 44 Cal.4th at p. 228; *People v. Prince, supra*, 40 Cal.4th at p. 1298.) Appellant presents no reason for this Court to reconsider its prior holdings.

J. Political Pressure on the Courts

Appellant claims that this Court has "proven itself unable to review death penalty judgments without being unduly influenced by political pressure. (AOB 528-530.)

This Court has repeatedly rejected the claim that appellate review of death judgments by members of this Court is impermissibly influenced by political considerations in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (*People v. Prince, supra*, 40 Cal.4th at p. 1299; *People v. Avila, supra*, 38 Cal.4th at p. 615; *People v. Kipp, supra,* 26 Cal.4th at pp. 1140-1141.)

Appellant argues that *Kipp*, which addressed and rejected this claim, "misses the point." (AOB 530; *People v. Kipp, supra*, 26 Cal.4th at pp. 1140-1141.) He argues that, "[i]f California's death penalty law is so pervaded by politics that most - or even many - instances of appellate review are affected, meaningful appellate view is impermissibly compromised . . .." (AOB 530.) Contrary to appellant's suggestion, this Court in *Kipp* did not state or suggest that there are, in fact, instances of appellate review being affected by politics. The Court stated that, even assuming for the sake of argument that there was a relationship between political pressures and affirmance of death sentences, there was no showing that a justice of this Court must affirm every death sentence or any particular death sentence. (*People v. Kipp, supra*, 26 Cal.4th at p. 1141.) In fact, this Court has stated in other cases that there is no basis for the claim that appellate review of death judgments by members of this Court is impermissibly influenced by political considerations. (*People v. Samuels* (2005) 36 Cal.4th 96, 138.) Appellant's claim should be rejected.

K. Factors (d), (e), (f), (g), (h), And (j)

Appellant contends each of the factors introduced by the phrase "whether or not" invited the jury to aggravate the sentence upon the basis on nonexistent and irrational aggravating factors. (AOB 530-531.)

The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not unconstitutionally suggest that the absence of such factors amounted to aggravation. (*People v. Parson, supra*, 44 Cal.4th at p. 369; *People v. Whisenhunt, supra*, 44 Cal.4th at p. 228; *People v. Page* (2008) 44 Cal.4th 1, 61.) Appellant's contention should be rejected.

L. International Law Violations

Appellant contends that California's use of the death penalty violates international law, particularly, the International Covenant on Civil and Political Rights and the American Declaration of the Rights and Duties of Man. (AOB 531.) This Court, however, has rejected this contention. (*People v. Parson*, *supra*, 44 Cal.4th at p. 372; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1332; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511.) Appellant provides no reason for this Court to reconsider those decisions.

XII. THERE WERE NO ERRORS AT THE GUILT PHASE REQUIRING REVERSAL OF THE DEATH JUDGMENT

Appellant asserts that various alleged guilt phase errors occurred which, even though harmless at the guilt phase, were prejudicial at the penalty phase. (AOB 532-546.) Respondent disagrees.

As set forth in the arguments relating to the claims of guilt phase error, there was no error. Additionally, appellant's argument rests on a false assumption - that the evidence on the guilt determination was close. As noted in the previous arguments, the evidence was overwhelming in the guilt phase. There was substantial evidence of appellant's state of mind and his intent to cause cruel or extreme pain and suffering to Tyler and Dylan for revenge or a sadistic purpose.

Appellant contends that there was no direct evidence concerning appellant's mental state at the time he killed both victims. (AOB 543-544.) Appellant further claims his neurological problems and the fact that his father physically abused him weighed heavily in mitigation. (AOB 544.) However, this Court does not substitute its reweighing of the aggravating and mitigating factors for that of the trier of fact. (See *People v. Hawthorne* (1992) 4 Cal.4th 43, 80.) Appellant identifies no error.

The penalty phase evidence in aggravation was overwhelming. Appellant brutally beat two young children to death. The jury heard evidence that appellant had sexually assaulted Michelle Edwards and twisted her son's ear in a manner similar to how he had treated Dylan and Tyler. The jury also heard of appellant's assault on Melissa Andrews.

Appellant's mother testified that even though Ben, appellant's father, physically abused all of her sons, none of her other sons ever physically abused children nor were they ever convicted of abusing children. (90 RT 19303.) In addition, the neuropsychologist who evaluated appellant, Dr. Sanderson, testified that appellant's neurological damage did not make him unable to control his behavior; he concluded it was only one factor out of many that would affect appellant's ability to control his behavior. (90 RT 19270-19271, 19278.) The nature of and the circumstances

surrounding, appellant's murders of Tyler and Dylan included powerful evidence compelling a death verdict. Appellant preyed on women with young children. In each case, appellant moved into the household, began physically abusing the children, and ultimately, brutally beat to death each young victim.

As noted above, there were no errors, but assuming error, any error that occurred in the guilt phase was harmless. Appellant fails to establish that any harmless error aggregated with other non-errors or harmless errors to result in prejudice. Appellant's claim is without merit.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of conviction and sentence of death be affirmed.

Dated: July 26, 2013.

Respectfully submitted,

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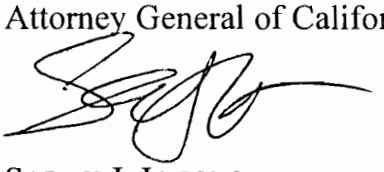
CERTIFICATE OF COMPLIANCE

I certify that the attached **Respondent's Brief** uses a 13 point Times New Roman font and contains 73,330 words.

Dated: July 26, 2013.

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Alvarez***
Case No.: **S089619**

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 July 26, 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 2550 Mariposa Mall, Room 5090, Fresno, California 93721, 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 July 26 2013, at Fresno, California.

Debbie Pereira-Young
Declarant

Debbie Pereira-Young
Signature