IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **RICHARD TULLY,** Defendant and Appellant.	**CAPITAL CASE** S030402

Alameda County Superior Court No. H9798
The Honorable William R. McGuiness, Judge

RESPONDENT'S BRIEF

BILL LOCKYER
Attorney General of the State of California

MARY JO GRAVES
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

RONALD S. MATTHIAS
Supervising Deputy Attorney General

MARGO J. YU
Deputy Attorney General
State Bar No. 105085

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5872
Fax: (415) 703-1234
Email: margo.yu@doj.ca.gov

Attorneys for Respondent

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

Page

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **RICHARD TULLY,** Defendant and Appellant.	**CAPITAL CASE** S030402

STATEMENT OF THE CASE

By information filed December 1, 1987, in the Alameda County Superior Court, the district attorney charged appellant Richard Christopher Tully in count 1 with murder (Pen. Code, § 187).[1/] Attendant to count 1 the information alleged the following special circumstance: that appellant committed the murder while engaged in the commission of burglary, or the attempted commission and flight thereafter of burglary (§ 190.2, subd. (a)(17)). (6 CT 1539.) Also attendant to count 1 the information alleged that during the commission of the murder appellant personally used a knife (§ 12022, subd. (b)) and inflicted great bodily injury on his victim (§ 1203.075). (6 CT 1539-1540.) The information charged appellant in count 2 with burglary (§ 459), and in count 3 with assault with intent to commit rape (§ 220). Attendant to both counts 2 and 3 the information alleged that appellant inflicted great bodily injury on his victim (§§ 1203.075, 12022.7), and count 3 added a knife-use enhancement (§ 12022, subd. (b)). (6 CT 1540-1541.)

At arraignment on February 29, 1988, appellant pleaded not guilty and

---

1. Hereinafter, unless otherwise stated, all statutory references are to the Penal Code.

denied both the special circumstance and enhancement allegations. (6 CT 1542, 1548.)

On June 10, 1989, the trial court granted the prosecution's motion to amend the information by striking the count 1 great-bodily-injury allegation, the count 2 burglary charge (and accompanying GBI allegation), and redesignating the count 3 charge of assault with intent to commit rape as count 2. (6 CT 1542; 7 CT 1826.)

Jury voir dire began on June 22, 1992. (7 CT 1877; 2 RT 341.) The presentation of evidence in the guilt phase commenced on July 28, 1992 (8 CT 1932; 10 RT 2007), and ended on August 14, 1992 (8 CT 1974; 14 RT 2982-2983; 15 RT 3016). Additionally on August 14, 1992, the trial court granted the prosecution's motion to dismiss the GBI allegation attendant to count 2. (8 CT 1974; 15 RT 3017.)

The jury returned its guilt phase verdict on August 18, 1992, finding appellant guilty of first degree murder on count 1 (§ 187, subd. (a)), and also finding true the attendant burglary-murder special circumstance (§ 190.2, subd. (a)(17)), and the use-of-a-weapon enhancement allegation (§ 12022, subd. (b)). The jury additionally found appellant guilty on the count 2 charge of assault with intent to commit rape (§ 220), and found the knife-use enhancement allegation true (§ 12022, subd. (b)). (8 CT 1979-1983; 16 RT 3263-3266.)

The presentation of evidence in the penalty phase began on September 3, 1992 (8 CT 2005; 16 RT 3412), and ended on September 11, 1992 (8 CT 2019; 17 RT 3620). The jury returned its verdict on September 21, 1992, fixing appellant's punishment at death. (9 CT 2130; 18 RT 3900-3903.)

On December 4, 1992, the trial court denied appellant's motion to modify the judgment (§ 190.4). The court thereafter imposed the death judgment on the count 1 murder conviction (§ 187), and sentenced appellant to a determinate four-year prison term on the count 2 conviction of assault with intent to commit

rape (Pen. Code, § 220), plus a consecutive term of two years on the finding that during the assault appellant personally used a deadly and dangerous weapon (§ 12022, subd. (b)). The court then stayed that six-year term, as well as the one-year term it had imposed on the jury's finding that during the commission of the murder appellant personally used a deadly and dangerous weapon (§ 12022, subd. (b)). (9 CT 2146-2154; 18 RT 3906-3919.)

STATEMENT OF FACTS

The facts are presented as this court must view them—in the light most favorable to the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 575-579.) Hence, all inferences and intendments are drawn in the prosecution's favor, and all conflicts and ambiguities in the evidence are presumed resolved in the prosecution's favor as well. (*Ibid.*)

Appellant, Sandy Olsson, And Hollyhock Street In Livermore

In the winter of 1985, the then 26-year-old appellant moved in with John Chandler at 1572 Hollyhock Street in Livermore, two doors down from where Sandy Olsson lived. (13 RT 2503-2504.) Appellant had been recently discharged from the Marine Corps. (13 RT 2532.) He subsequently lived with Chandler "off and on." (13 RT 2503-2504, 2534.) Appellant was five feet six inches tall, and weighed 160 pounds. (Exh. 9C at p. 15.) Because Chandler had been seriously dating appellant's mother for many years, he and appellant were "almost like father and son." (13 RT 2501-2503.) Chandler told authorities that sometime around September 1985 he was with appellant when appellant picked up a hunting license and purchased a Buck 110 knife. (14 RT

2854-2855.)[2/] The hunting license was dated August 19, 1985. (14 RT 2528.)

As for Chandler and Olsson, in the time they were neighbors they spoke to each other only once, for about 10 minutes. Chandler accidentally broke one of Olsson's house windows with a golf ball and he went to her home to explain what had happened. (13 RT 2504-2505.) Chandler never told appellant about this incident. (13 RT 2506.)

In early 1986 Sandy Olsson was 59 years old. (14 RT 2780-2781.) She lived alone for most of the year and worked as a registered nurse at the Veteran's Administration Medical Center in Livermore, where she had numerous responsibilities. (10 RT 2007-2012, 2019, 2022; 14 RT 2780-2782, 2792-2793, 2825.) The backyard of Olsson's home at 1556 Hollyhock opened on to Springtown Golf Course. (10 RT 2031; 11 RT 2094, 2103-2104, 2126, 2209; 12 RT 2296; 13 RT 2642.) Typically Olsson worked Monday through Friday from either 7:00 or 7:30 a.m. to 4:00 p.m., and sometimes on weekends. (10 RT 2013-2014; 14 RT 2782, 2807.) On the days that her shift ended at 4:00 p.m. Olsson would arrive home at about 4:30 p.m. She would enter through the front door, and then shut, lock, and chain the door behind her. (14 RT 2783, 2788, 2823.) She would typically walk directly to her bedroom, put her purse on the dresser, and change some of her clothes. (14 RT 2783-2784, 2808-2809.) She next typically walked into the kitchen and poured herself a Coke with a small amount of bourbon mixed in. (14 RT 2784-2785, 2808, 2817.) Olsson bought large quantities of both Coca-Cola and bourbon when she found it on sale. (14 RT 2809, 2821.)

---

2. At trial Chandler denied this. (13 RT 2526-2528.) He testified as follows: "I said we went, we bought a hunting license, and we stopped at Don's Surplus, and we went over to K-Mart and looked for some binoculars. I could not pinpoint which place he bought a knife, if he bought one. I could not remember him buying one. That's why I couldn't pinpoint when he bought it, if he did, if he bought it." (13 RT 2527.)

Olsson's father, Clifford Sandberg, who was widowed in 1982, regularly arrived from his home in Topeka to stay with Olsson from the end of October to the beginning of March. (14 RT 2780-2782, 2792-2793.) When he stayed with her, he cooked, cleaned, washed and folded clothes, and did odd jobs around the house. (14 RT 2786-2787, 2792.) When he did the wash, he usually washed two pairs of men's flannel pajamas, both his and his daughter's. (14 RT 2787.) According to Sandberg, he and Olsson would eat dinner together and afterwards watch television together. (14 RT 2785.) When Sandberg sometimes asked Olsson in the evening if she wanted to go out for a walk or do something else, she typically declined, citing fatigue from work. (14 RT 2787-2788.) Instead Olsson would retire to her bedroom with a bourbon-and-coke drink and read her mail, magazines, and the newspaper. Sandberg would go to his room and read. (14 RT 2785-2786, 2816.) On Sundays, father and daughter went to church together. (14 RT 2797.)

Olsson's daughter, Sandra Walters, talked to her mother on the phone once a week, and spent the weekend with her once a month. (14 RT 2807, 2820-2821, 2829, 2831.) If Olsson was working, after work they would sit and talk, take Walters's dog for a walk, make dinner, or go out to dinner and shop. (14 RT 2810.) If they went out, they would be home before 8:00 p.m., and then sit and talk or watch TV. (RT 2810.) At the end of each night Olsson walked through her house and made sure that all the windows and doors were locked. (14 RT 2823-2824.) Olsson routinely went to bed anywhere from between 9:00 p.m. to 10:00 p.m. (14 RT 2810, 2814.)

Olsson was a very modest woman who wore flannel pajamas to bed because she always felt cold. She also wore either a very tattered brown or blue terry cloth men's robe. (14 RT 2797-2798; 2814-2817.) Olsson often fell asleep while reading. When Walters stayed over, she would turn off her mother's bedroom light after Olsson fell asleep. (14 RT 2815.) Sandberg recalled

similar events. When he would stay with his daughter he sometimes saw her bedroom light on when he would awake in the very early morning. He would knock, open the door, and find Olsson in her flannel pajamas and bathrobe sitting up asleep with a book still open. Sandberg would put away the book, pull the blankets over her and say, "Honey, scoot down and I'll turn out the light." (14 RT 2786-2787, 2795.) The next morning, after Olsson went to work, Sandberg would go into her room, pick up the drinking glass and take out old newspapers. Olsson kept her bedroom very neat. Her bed was always made and her clothes hung or put way. She never left her bathrobe lying on the floor next to her bed. (14 RT 2786-2788, 2815.)

According to Sandberg, when he stayed with his daughter she never had male visitors, but approximately once a month would go out to dinner with some nurse friends. (14 RT 2787, 2793-2794, 2800, 2804.) Walters had met only one of those friends, Barbara Green. (10 RT 2017; 14 RT 2812.) Elden Freeman, who, along with his wife, had lived directly across the street from Olsson for 21 years, could not recall Olsson having any visitors in July 1986 except for her daughter. (13 RT 2642-2643, 2645; 14 RT 2831-2832.) Freeman was retired and home most of the time. (13 RT 2643.)

As for appellant, Chandler first testified that appellant was still living with him in early July 1986, but later testified that appellant moved out around that time or perhaps a few days earlier. (13 RT 2503, 2507-2508.) Appellant kept a key to the house, however, left some of his clothes there, and continued to receive mail and phone calls there. (13 RT 2508-2510.) Appellant would come over "seldom," said Chandler, after he (appellant) moved out, but there were times when Chandler found appellant sleeping in the house when Chandler got up to go to work. (13 RT 2511, 2521, 2523.) And Chandler left notes for appellant in the house after appellant moved out because appellant had left no forwarding address or new phone number. For example, Chandler received a

letter addressed to appellant that was postmarked July 18, 1986, and on that letter Chandler left a note for appellant to return a call to the union hall concerning a job. (13 RT 2510-2513, 2516.)[3/] Appellant was having difficulty keeping a job. (13 RT 2522.)

In any event, it had been on July 17, 1986, that Sandberg spoke to his daughter—for what turned out the be the last time—when he called her to wish her a Happy 60th Birthday. (14 RT 2780-2781, 2791.) Walters saw her mom—for what also turned out to be the last time—during the weekend of July 19 to 21, 1986, when they got together to celebrate Olsson's birthday. (14 RT 2806, 2820.) Olsson and her sister had "big plans" to visit their father in Topeka on Saturday July 26, to help him celebrate his 85th birthday. (10 RT 2025; 14 RT 2791-2792, 2822.)

July 24 And 25, 1986: The Crime

On Thursday, July 24, 1986, Olsson arrived for work at the VA Medical Center at 7:00 a.m. So did a fellow registered nurse, Maxine Gatten. (10 RT 2012, 2027, 11 RT 2090.) Gatten did not see any injuries or bruises on Olsson. (10 RT 2012.)

That day nurse Deborah Gifford and Olsson worked on the same floor. Gifford also saw no bruise on Olsson's forehead. (11 RT 2089, 2092.) At about 4:00 p.m. the two nurses left work together and walked from the hospital to their cars. Olsson was in a good mood given her impending trip to Topeka. (11 RT 2089-2090, 2092.) From work Olsson proceeded to a nearby

---

3. In statements he eventually gave to the authorities appellant stated that while he had moved out of Chandler's home in November 1985, in July 1986 he "still had belongings there" and "came and checked the mail." (People's Exh. 9C at p. 39.) Appellant "used to go there weekly to check on mail" because from November 1985 onward he used Chandler's house as his permanent address. (*Ibid.*)

Albertson's supermarket. (11 RT 2090-2093.)

At about 4:15 to 4:45 p.m., neighbor Freeman saw Olsson return home from work, park in her driveway, get out of her car with her purse slung over her shoulder, and walk into her house. (13 RT 2644-2648.) At about 8:00 p.m., from his front window, Freeman saw Olsson exit her lighted den. (13 RT 2645-2646, 2649.) At about 10:00 p.m., Olsson turned off the light. (13 RT 2650.) No other lights were on in her house. (13 RT 2651.)

Also at around 10:00 p.m., Linda Rocke, who lived with her family at 1427 Aster Lane in Livermore, went into their backyard, which opened up on to Springtown Golf Course. (11 RT 2094-2095.) Rocke subsequently went to sleep in her bedroom, the closest room to the golf course. At 4:00 a.m. Rocke was awakened by a noise. She went to the family room to quiet the family dog, who was barking wildly at the sliding glass door leading to the backyard. (11 RT 2096-2097, 2101, 2109.) Because the dog would not calm down Rocke forced it outside so it would not wake the rest of the family up. (11 RT 2097-2098.) Once outside the dog ran towards the backyard gate that separated part of the yard from the golf course. (11 RT 2098.) Two to three feet from the gate Rocke found what looked like a small bathroom screen on the deck. (11 RT 2095, 2099, 2104-2105, 2113-2115.) Rocke, struggling to get her dog back inside, did not give much thought to the screen and eventually went back to sleep. (11 RT 2099-2101.) When Rocke awoke at 6:00 a.m. and went into her backyard she again saw the bathroom screen. (11 RT 2101-2103.)

At around 7:30 a.m., as Elden Freeman returned from his morning walk, he noticed that Olsson's car was still in her driveway. He thought that perhaps she was sleeping in; he knew she was going on vacation soon and he was expecting her to bring over her house key so he could take care of the house while she vacationed, as he usually did. (13 RT 2644, 2651-2652; 14 RT 2832.)

Meanwhile, at the VA Medical Center, Olsson had not shown up for work.

Fellow nurse Gatten called Olsson's home but nobody answered. (10 RT 2015, 2081.) Gatten then called the night supervisor and asked if Olsson had called in sick. She had not. (10 RT 2015.) Gatten next took over Olsson's duties as the charge nurse and made the necessary staff assignments. (10 RT 2015-2016.) At about 8:00 a.m. Gatten placed a third call to Olsson, but there was still no answer. (10 RT 2015-2016.)

Olsson's colleagues were concerned that Olsson was sick because she had been complaining of chest pains and because she was very reliable and rarely called in sick. (10 RT 2017-2018, 2027.) At 8:45 a.m., nurse Gatten saw Olsson's close friend and office mate Barbara Green. They commented to each other that there had to be a problem because Olsson would never fail to show up for work without phoning in. (10 RT 2017, 2021-2023, 2026-2027, 2068.)

Thereafter Green immediately called Olsson's home. Green thought that perhaps Olsson's car had broken down on the road and she needed help. (10 RT 2028.) Green let the phone ring 20 times but no one answered. Green told the chief nurse that she was worried and going over to Olsson's house. (10 RT 2029; 14 RT 2767-2769.) Green and Olsson had made a pact with each other that if need be they "would hold each other until death." (10 RT 2031.) Green had a feeling that Olsson might need her. (10 RT 2031.)[4/]

Green drove to Olsson's house and saw her car parked in the driveway and a newspaper in front. (10 RT 2029.) Green rang the doorbell, knocked on the door and yelled her friend's name. There was no response. (10 RT 2030.) Green unsuccessfully tried to open the front door and peeked through the slightly-opened curtain of the living room window but did not see any movement inside. (10 RT 2030, 2036, 2061, 2078.) She also looked through

---

4. Nurse Green had been at work for a few hours already because she had not been able to sleep the night before and didn't want to stay home and disturb her family. (10 RT 2025-2026.) When Green saw Olsson the day before she didn't observe any bruises on Olsson's forehead. (10 RT 2025.)

a wrought-iron protected window with a partially-opened curtain. Green still did not see Olsson. (10 RT 2031, 2036-2037, 2062.) Green next walked to the back of Olsson's house where she saw two bedroom windows covered with screens. Green tried to open the back sliding glass doors, but they were locked. (10 RT 2031-2032, 2061, 2064.) Green could not walk any farther around the house because chicken wire blocked the path to the garage. (10 RT 2032, 2061.) Green saw a high bathroom window that was open and had no screen. She moved a tall planter stand under the window and stood on it, but her fingertips barely reached the windowsill. (10 RT 2032-2034, 2037-2039, 2064, 2074-2076; 14 RT 2833.) Green continued to yell out "Sandy" to let her friend know she was there to help. (10 RT 2040.) Green went to each of the next-door neighbors to try to get help but neither was home. (RT 2032, 2034-2035, 2040.) Green then went to Freeman's house where she explained to him that Olsson had not arrived for work and was not answering her phone and that she (Green) could not get into Olsson's house to see if she was all right. Green used the Freeman phone and called 911. (10 RT 2040-2043; 13 RT 2642, 14 RT 2832-2833.)

While waiting for police to arrive Green returned to Olsson's house with Freeman. (10 RT 2043-2044, 14 RT 2832.) She moved a taller plant stand under the open bathroom window and as Freeman steadied it she climbed up and was able to reach through the window and push open the bathroom door. In the reflection of the full-length mirror on the bathroom door Green saw Olsson laying on her stomach across a bed, naked. A puddle of blood was on the floor. (10 RT 2044-2046.) Green wanted to get inside immediately to try and stop the bleeding on Olsson's head, but Green could not climb through the window. (10 RT 2045-2046.) Freeman ran back to his house to get a ladder. (10 RT 2046; 14 RT 2834.) Green stayed and repeatedly yelled assurances to Olsson that she would tend to her as soon as possible. (10 RT 2046; 14 RT

2834.) With Freeman's help Green used the ladder to climb in the house through the bathroom window. (10 RT 2047-2048, 2072-2074; 14 RT 2834-2835, 2840.)

Green rushed to her friend. (10 RT 2048.) Olsson was laying face down across the bed with her head turned to the left and her foot extended over the side of the bed. Her right leg was pulled up into an awkward position. (10 RT 2048-2049.) Her arms were underneath her and blood was dripping down her face. (10 RT 2048.) There were multiple slits on her shoulders and back showing fatty tissue. Her left eye was bulging out of her head. (10 RT 2048.) Blood was still dripping onto the floor. Green touched and stroked Olsson under her right shoulder blade, the only area of her body that had no wounds. (10 RT 2048-2049.) With her touch Green felt "death. There's nothing as cold as death." (10 RT 2048-2049, 2070.) Olsson's bed clothes, blankets and sheets were crumpled underneath her. (10 RT 2048-2049, 2076.)

Green noticed that the bedroom closet door was slightly open and she became afraid that somebody was still inside the house. (10 RT 2049.) As she walked out of the bedroom to locate a phone to call 911 again, she saw a family picture that had fallen from the wall to the hallway floor and another picture on the wall that was tilted and broken. (10 RT 2049-2051; 14 RT 2843.) As she walked through the kitchen and living room Green found neither a phone nor an intruder. She did not turn on any lights. (10 RT 2050-2051.)

Green reached the front door and grabbed the knob. She saw that the chain mount, along with the screws and a piece of wood, had been torn out of the door molding. (10 RT 2051-2052.) The chain mount and screws were hanging from the chain, which was still fastened to the lock plate attached to the door. (10 RT 2052.) Green turned the door knob, but the door was locked. Frightened, she tried again, determined to force her way out if necessary. This time the door unlocked and Green opened the door. (10 RT 2052, 2077-2078;

14 RT 2843, 2846.)

Freeman, who was out front, walked inside. (14 RT 2836.) He glanced inside the bedroom and saw Olsson lying on her stomach on the bed. He asked Green if Olsson was all right. Green, crying, shook her head no. Green said she could not find the phone. Freeman showed her to the breakfast dining area and to a telephone. (10 RT 2053; 14 RT 2836.) Barbara Green, distraught and crying over her friend, again called 911. She reported that Sandy Olsson had been murdered—"stabbed to death." (10 RT 2053-2054; 14 RT 2836.)

A police officer soon arrived and Green told him about Olsson. (10 RT 2054, 2065.) Freeman left and Green sat in the kitchen and cried. (10 RT 2054.) There was no blood in that area of the house. (10 RT 2054.) The officer asked Green if Olsson was really dead. Green replied, "I know she is, but I'll check." (10 RT 2055.) Green walked to Olsson and tried to feel a pulse on her neck, but could not. Green told the police officer, "Yes, she is dead. There is no pulse." (10 RT 2055-2056.) The officer asked a second time, "Are you sure she's dead?" (10 RT 2056.) Green touched Olsson's neck again and confirmed the absence of a pulse. (10 RT 2055-2056.)

When Livermore Police Sergeant Scott Robertson, assigned to investigate the crime, arrived at 1556 Hollyhock at 9:45 a.m., he met up with three other officers, Community Service Aid Sao Mangrai, as well as Green and Freeman. (11 RT 2117-2118, 2166-2168; 12 RT 2318-2319 .)[5] Robertson noted that there were no lights on the golf course behind Olsson's house to illuminate her back yard. (14 RT 2859.) Nor were there any street lights near the front of the house. (14 RT 2860.) Inside the home the officer found the point of forced

---

5. Green stayed in the house until a police officer said she could leave. (10 RT 2059.) Green then returned to the Freeman house where she called work and told them about Olsson. (10 RT 2059.) At some point Green went home and lay on her couch where she felt her heart racing so fast she thought it would burst. (10 RT 2059.)

entry: the front door, as shown by the fresh damage to the chain lock. Robertson noted, as did Green, that the chain mount, screws, and wood that had been attached to the door molding was pulled out of it, and was hanging from the chain still fastened to the lock plate attached to the back of the door. (11 RT 2122, 2128, 2151, 2169, 2174; 14 RT 2843, 2862.) Robertson noted that the two-inch brass screws that had once held the chain mount to the door molding had been set into a void instead of a stud. (14 RT 2862-2864.)

As Robertson walked through the house he observed that it was well kept, and that there was no clutter anywhere except in the kitchen. (11 RT 2120, 2130.) A receipt from Albertson's was on the kitchen counter. (11 RT 2132; 12 RT 2257-2558; 14 RT 2909.) It showed that Olsson had received $3.95 in change. (14 RT 2918.) There were no lights or appliances on inside the house. (11 RT 2123.) In the main hallway Robertson saw that two pictures on the wall were tilted, and that pictures were on the floor in the entryway and master bedroom. Apart from the injuries to the victim, those were the only signs of a struggle. (11 RT 2121-2122, 2124, 2128, 2133-2134, 2141-2142, 2154; 12 RT 2233; 14 RT 2843.) Robertson saw no blood anywhere in the house except in the master bedroom. (11 RT 2120.)

In the master bedroom police saw Olsson's naked body laying on her bed. (11 RT 2135-2136, 2138, 2143, 2145-2146, 2168-2169, 2190-2191; 12 RT 2232-2233.) Underneath her body were a pair of flannel pajamas and blankets. (11 RT 2148-2149, 2190-2191; 12 RT 2237-2238.) Robertson saw "bruised" and "marked" lines on Olsson's forehead, lips, and outside her left ankle, which Robertson believed consistent with being hit with the edge of a forced-open door. (11 RT 2175-2176.)[6] Officers observed a small pool of blood on the

---

6. On an earlier occasion, Olsson's father recalled, a neighbor came by during evening hours seeking medical attention for his wife. Olsson responded to the neighbor's loud and rapid pounding at the front door by opening the door and peeking out, while keeping the chain secure. (14 RT 2788-2789.)

carpet floor next to the west edge of the bed. Robertson also saw blood splatters on the closet doors and a blood smear on the light switch. (11 RT 2123-2124, 2135, 2141-2142, 2144, 2172-2174, 2192; 12 RT 2232-2233.) There was a glass of Coca-Cola and a glass of bourbon on the night stand next to the bed. (11 RT 2134, 2138, 2185.) A bathrobe and a pair of slippers were on the floor next to the east side of the bed. (11 RT 2134, 2138, 2145; 12 RT 2233.) On the desk in the bedroom were some folded clothes, put there by Olsson in preparation for her planned trip to visit her father. (11 RT 2135, 2138, 2146; 14 RT 2822.) Robertson found no money in the house. (11 RT 2156-2157.)

Outside the house Robertson checked the windows and saw that while both the master bedroom and kitchen windows were open a few inches, each still had its screen attached. Similarly, the windows to the den that overlooked the driveway were fully open but secured by iron grates and undisturbed screens. (11 RT 2127, 2157-2159.) The curtains covering Olsson's window were slightly opened and the drapes for the sliding glass door were drawn shut. (14 RT 2861.) The master bathroom window was fully opened and had no screen. (11 RT 2127.)

At 10:30 a.m. Lieutenant Don Neher of the Livermore Police Department arrived at 1556 Hollyhock and began coordinating a search of the outside of Olsson's home and the Springtown Golf Course. (12 RT 2288-2290.) Meanwhile, two golfers, Judith Marie Williams and Cathie Garton, found a purse floating in a pond on the ninth hole. (11 RT 2196-2197.) Because Williams thought the purse might be stolen she fished it out of the water with her golf ball retriever and turned it in at the clubhouse. (11 RT 2198.) Inside the purse were, among other items, a checkbook, hospital identifications, and a driver's license, all belonging to Olsson. (11 RT 2199-2201; 12 RT 2291-2293, 2295, 2313, 2331-2340, 2348.) The purse contained no money. (11 RT

2207; 12 RT 2313, 2339-2340.) At around noon Lieutenant Neher picked up the purse at the clubhouse, and placed it in an evidence bag, returned to Olsson's house, and gave it to CSA Mangrai. (11 RT 2201-2202; 12 RT 2291-2295, 2313, 2329-2330.)

Mangrai took numerous photographs of the crime scene, including of Olsson's body. (11 RT 2136, 2168; 12 RT 2230, 2319, 2330.) Other investigators videotaped the crime scene (both inside and outside the home), and took measurements of the home (for diagram purposes). (11 RT 2125-2135; 12 RT 2228-2235.) At another point Olsson's body was removed from the scene and officers and Mangrai began collecting evidence, including the blood. (11 RT 2148-2149; 12 RT 2228-2229, 2235-2260, 2330, 2340.)

At about 2:30 p.m., Renorise Conn, security officer for the Lawrence Livermore Laboratory, along with five co-workers, were directed to 1556 Hollyhock to assist Livermore police in conducting a search of the Springtown Golf Course for a knife. (11 RT 2208-2212; 12 RT 2290.) At around 3:00 p.m., Conn was searching under a large pine tree in knee-high brush, about 29 feet from the backside of a fence along the golf course behind 1313 Aster Lane, which ran parallel along the opposite side of the golf course from Hollyhock. As Conn used her baton to push the brush back and forth, she heard a "clink" sound, opened the brush with her baton, and saw a knife. (11 RT 2212-2214, 2222; 12 RT 2295-2297, 2300.) The knife was very bloody and had what appeared to be tissue on the blade next to the handle. (11 RT 2214, 2216-2220, 2223; 12 RT 2310-2311.) Conn called over others. (11 RT 2215; 12 RT 2297.) Officers bent down and examined the knife. (11 RT 2221; 12 RT 2295-2297, 2310.) At 3:10 p.m., CSA Mangrai arrived, took pictures of the knife, and, using gloves, put it in a paper bag to preserve its evidentiary value. (11 RT 2215-2216, 2221; 12 RT 2298-2299, 2319-2320, 2353-2356.)

At around 4:00 or 5:00 p.m. Linda Rocke returned home and saw police

officers on the golf course. One officer was leading a canine who was smelling the ice plant directly behind the Rockes' backyard fence. (11 RT 2103.) When Rocke asked the officer, "What are you doing?", the officer did not answer. (11 RT 2103-2104.) Rocke saw her husband at home and was surprised because he was supposed to be golfing. He explained that the golf course was closed due to a murder. (11 RT 2105.) Rocke noted for her husband the police presence and the screen in their yard and suggested they contact the police. (11 RT 2106-2107.) She eventually did so. (11 RT 2093-2094, 2107.)

At 5:00 p.m. Lieutenant Neher ceased the search of the golf course, having found nothing in addition to the knife. (12 RT 2299-2300.) At 8:00 p.m. he met up with Mrs. Rocke at her home and she directed him to the window screen in her back yard. She also told him about the commotion her dog had caused that morning. (11 RT 2107; 12 RT 2300-2301.) Mrs. Rocke noticed a couple of tears in the screen and that a bottom corner was bent. (11 RT 2108.) Neher carefully collected the screen to preserve any fingerprints. (11 RT 2107, 2115; 12 RT 2302-2302, 2313.) Neher measured the distance of the most direct route from Olsson's house on Hollyhock to the Rocke's house at 1427 Aster Lane to be 213 yards. (12 RT 2303-2304.) The distance between the Rockes' house to the area of the golf course behind 1313 Aster Lane, where the knife was found, to be 121 yards. (12 RT 2304, 2316.) From where the Buck knife was found to the duck pond in which the purse was found floating was 337 yards. (12 RT 2304.) From Olsson's house to the duck pond was 671 yards. (12 RT 2305.) Olsson's house did not have a fence that prevented direct access to the golf course. (12 RT 2316.)

The paint flecks on the outside screen matched the color of Olsson's house. The scratches on the inner screen corresponded to scratches on the inner frame of Olsson's master bathroom window. Police determined that the screen belonged to Olsson's master bathroom window. (11 RT 2159-2160, 2188.)

Like Mrs. Rocke, police saw that the screen was bent and had holes and cuts in it. (11 RT 2161, 2187-2188.)

The Autopsy

Dr. Sharon Van Meter, an expert pathologist, performed autopsies for the Alameda County Coroner's office. On July 26, 1986, she performed an autopsy on the body of Sandy Olsson. (13 RT 2653-2656.) Olsson was five feet seven inches tall and weighed 155 pounds. (13 RT 2657.) Olsson had multiple wounds to her body, including two stab wounds to the left side of her face, and a stab wound near the eye, which was seven-eights of an inch wide and two inches deep, and had passed through the skin and soft tissue and broke the orbital ridge, the bone under the eyebrow. Infliction of the latter injury required considerable strength. (13 RT 2657-2658, 2661-2664.) The second stab wound to the left side of Olsson's head, which was seven-eighths of an inch wide and two-and-one-half inches deep, had passed into the soft tissue just below her left cheek bone. (13 RT 2663-2664.)

A stab wound to Olsson's neck, three-quarters of an inch wide and one-half to three-quarters inch deep, had passed through the skin and caused some hemorrhaging. A fourth stab wound, very small, was slightly above the third wound and had barely penetrated the skin. (13 RT 2658, 2664-2665.) Olsson also had a stab wound to the lower left chest, one-and-one-quarter inch wide, and three to four inches deep, which had not only passed through the skin and the soft tissue of the chest wall, but through muscle and between two ribs and severed a third rib in two places, entering the sac around Olsson's heart and the fatty tissue on the surface of the heart. Dr. Van Meter opined that considerable force had been required to inflict this wound. (13 RT 2667, 2698.)

Dr. Van Meter found seven stab wounds to the left side of Olsson's neck and upper left shoulder. These wounds were all three-quarters of an inch to one

inch in length and about three to four inches deep. (13 RT 2658-2659, 2669, 2676.) They all had penetrated the skin and soft or fatty tissue and muscles, but did not transect any large vessels or enter any body cavity. (13 RT 2668-2670.) Dr. Van Meter stated that it would have required a moderate amount of force to penetrate these muscles, e.g., the same force it would take to stab through a three- to four-inch raw steak. (13 RT 2670.)

In addition, Dr. Van Meter observed 11 stab wounds to Olsson's left upper back, wounds the doctor numbered 8 through 18. Wound number 8 was three-quarters of an inch wide. (13 RT 2659, 2671.) Wound number 9 was a "complex stab wound" that had been made by overlapping knife cuts, or by movement of the knife or body. (13 RT 2659, 2671.) This wound had penetrated between two ribs. Wound number 10, three to four inches deep, had passed through the soft tissue and between two of Olsson's ribs and into her left lung, leaving one of the ribs fractured. (13 RT 2671.) Stab wound number 11 had entered towards Olsson's side and penetrated the soft tissue outside her chest wall. This wound did not enter the rib cage. Wound numbers 12 through 14, each three to four inches deep, had penetrated Olsson's middle back and passed between two of her ribs, injuring the left lung. Wound number 15 was another complex wound, having penetrated three to four inches between two of Olsson's ribs and injuring a lung. (13 RT 2672.) Wound number 16, two inches deep, had passed into the soft tissue and muscle, but did not enter Olsson's chest cavity. (13 RT 2673.) Wound numbers 17 and 18, three to four inches deep, had passed between two ribs and caused defects in a lung. (13 RT 2673.) These two stab wounds were three-quarters of an inch to one inch in length. (13 RT 2659.)

Olsson's five remaining stab wounds were to her middle back area. (13 RT 2673.) Wound number 19, three inches deep, had passed through the soft tissue between two of her ribs and caused damage to the left lung. (13 RT 2673.)

Wound number 20, two to three inches deep, had entered the right side of the back and passed through the space between two ribs, fracturing one, and continued into the right lung. (13 RT 2673.) Wound number 21, two to three inches deep, had penetrated the soft tissues and fractured a rib. This wound did not pass into the body cavity but ran along the side of the vertebral column. (RT 2673-2674.) Wound numbers 22 and 23 one to one-and-a-half inches deep, had passed into the soft tissue of Olsson's back, but did not penetrate her chest cavity. (13 RT 2674.)

The stab wounds to the eye, left cheek, neck, throat, chest, and the upper left shoulder of Olsson all resulted in hemorrhaging in the underlying soft tissue and muscles. Knife wounds 8 through 18 all resulted in significant hemorrhaging into the lung tissue and chest cavity. Knife wounds 19 to 23 caused bleeding into the lung and right chest. The hemorrhaging indicated that Olsson's heart had been pumping—and that she was still alive—when she was stabbed 28 times. Dr. Van Meter testified that none of these stab wounds would have resulted in instant death for Olsson, and that she could have survived for more than an hour after the wounds were inflicted. (13 RT 2674-2677, 2683.) Dr. Van Meter also testified that Olsson may have remained conscious throughout the knife attack, and would have felt pain each time the knife penetrated her body. Additionally, Olsson would have had difficulty breathing as her lungs and chest filled with blood and air leaked out of her lungs instead of her air passages. (13 RT 2677-2679.) Dr. Van Meter next testified that the stab wounds would have caused considerable bleeding and that Olsson could have lapsed into shock and lost consciousness. (13 RT 2678.) Dr. Van Meter could not determine the order in which the wounds were inflicted on Olsson. (13 RT 2678.) Dr. Van Meter believed that all of the knife wounds inflicted on Olsson were consistent with having been made by the Buck 110 knife the authorities had found at the Springtown Golf Course. (13 RT

2686.)

Dr. Van Meter also found hemorrhaging in Olsson's neck and larynx muscles, and fractures of the superior horns of her thyroid cartilage and of the hyoid bone under the tongue. These injuries were the result of blunt force or compression of the neck, such as by strangulation. Such injuries would have caused Olsson pain and considerable difficulty breathing. The injuries would have resulted in spasm of the airway so that when Olsson breathed, her voice box would have collapsed and her air passage would have become obstructed, causing her to gasp and gurgle. (13 RT 2679-2681.) Dr. Van Meter stated that when all oxygen is blocked, an individual could lose consciousness in a few seconds and ultimately die. If an individual can gasp and take in a bit of air, the person may be able to sustain life for 30 minutes or longer. Again, the considerable hemorrhaging over the fractures indicated that Olsson was alive when the fractures were perpetrated on her. (13 RT 2680-2682.)

Dr. Van Meter also observed multiple blunt injuries, bruises, abrasions, and lacerations on Olsson's body. There was hemorrhaging and bruising around the left eye; on the right forehead there was a contusion an inch-and-a-quarter in diameter with small scrapes and a lot of blood; and there were contusions on the inside of Olsson's upper and lower right lips. (13 RT 2660, 2662, 2665-2666.) Olsson's lip injuries could have been caused by a blow or fall against an object. (13 RT 2666.) Her lip and head injuries were consistent with her head having come into contact with the edge of a door being forced open. (13 RT 2666, 2711.)

Olsson also had a bruise on the back of her right hand, about two inches in diameter, covering the bone area of her third, fourth, and fifth fingers, along with four small abrasions at the base of the hand. On the back of Olsson's right forearm was a purple contusion, and she also had a small faint contusion on the side of her left forearm, just below the elbow. (13 RT 2661, 2683-2684.)

On Olsson's left thigh, just above the knee, was an abrasion a little less than two inches in length. On the back of her left and right thighs were small bruises. (13 RT 2660-2661, 2684.) On the side of Olsson's left ankle were a series of small abrasions forming a line. (13 RT 2661, 2684.) All of these bruises were no more than 24 or 36 hours old, Dr. Van Meter opined. (13 RT 2714.)

Dr. Van Meter examined, but did not find trauma to Olsson's vaginal area. The doctor explained, however, that the absence of visible injury or trauma did not mean that Olsson had not been forced to submit to an act of sexual intercourse before her death. (13 RT 2687-2688.) Dr. Van Meter swabbed Olsson's vaginal, rectal, and oral areas, took pubic and head hair samples, and collected samples of blood and urine (both of which tested negative for drugs). (13 RT 2688, 2689, 2703-2704, 2706-2707.) Dr. Van Meter also found no signs of alcohol abuse by Olsson. (13 RT 2689-2690.)

Dr. Van Meter explained that after Olsson died and her heart stopped pumping, blood from her head continued to drain downward and onto the floor due to gravity. (13 RT 2691.) Dr. Van Meter stated that Olsson died between the time she was last seen, at 10:00 p.m. on Thursday, July 24, and when her body was found at 9:00 a.m. the following morning. (13 RT 2692.) Dr. Van Meter opined that the bruises on Olsson's forearms and right hand could have been defensive wounds from punches, or blunt object injuries caused by being shoved up against a wall, or from a door being forced open on them. Olsson had no defensive cuts or scratch wounds on her forearms or hands from a knife, which suggested she was not attacked with the knife from the front. (13 RT 2694, 2701.) Dr. Van Meter examined Olsson's fingernails for blood or tissue from the assailant, but found none. (13 RT 2694.) Dr. Van Meter pointed out that Olsson suffered the majority of her wounds to her back. (RT 2701.)

Dr. Van Meter determined that the cause of Sandy Olsson's death was

shock and hemorrhaging, as a result of the multiple stab wounds, and associated with asphyxia due to fractures of the larynx. (14 RT 2729-2730.)

July 26, 1986 To March 27, 1987: Further Investigation

On July 26, 1986, Martin Collins, a latent print supervisor for the California Department of Justice and an expert in latent fingerprint development and comparison, examined the Buck 110 knife found at Springtown Golf Course and confirmed the existence of two identifiable prints on the brass end of the knife handle. He photographed the prints, made sure negatives were properly developed, and notified the Livermore Police Department of his findings. (12 RT 2380-2385; 14 RT 2732.) The quality of the prints was excellent and the detail extremely clear. (14 RT 2733.)

On July 29, 1986, Donna Mambretti, another DOJ fingerprint analyst and expert, traveled with fingerprint analyst Angelo Rienti to Olsson's home at 1556 Hollyhock where they, along with members of the Livermore Police Department, reprocessed the home for fingerprints. (11 RT 2189-2190; 12 RT 2280, 2397, 2424-2425, 2458-2461.)[7/] Analysts Mambretti and Rienti recovered numerous useable fingerprints. (12 RT 2426.)

Over the next several months, the Livermore police submitted fingerprints to analyst Mambretti for comparison with latent prints found at the crime scene.

---

7. On July 25, CSA Mangrai, Deputy Sheriff Richard Jensen, and Sergeant Mark Weiss had dusted for fingerprints in the home in the areas where someone was likely to have entered or touched, such as walls, windows, mirrors, and door knobs. (11 RT 2167; 12 RT 2260-2262, 2267-2268, 2271-2272, 2276-2278, 2281-2282, 2340, 2365-2366, 2374-2376.) Mangrai had developed multiple prints from some of the Coke bottles and two picture frames, and at some point developed a print from the window screen found at the Rocke residence. (11 RT 2161; 12 RT 2348-2353, 2366-2372, 2375.) Further fingerprinting of the screen revealed prints belonging to Officer Robertson. (11 RT 2161; 12 RT 2432-2433.)

(12 RT 2425, 2442; 14 RT 2866.) The only matches were of the victim, Freeman, and two police officers. (12 RT 2425-2428, 2436-2437; 14 RT 2866-2868.) The other useable prints were not identified, and many recovered prints proved unidentifiable. (12 RT 2426, 2428-2440, 2473.) Many of the prints analyst Mambretti compared with those found at the crime scene came from the Automated Latent Print System at the state Department of Justice. The source of the ALP prints were from DOJ's master fingerprint file; i.e., fingerprints of individuals who had been arrested for felonies in California. (12 RT 2440-2444, 2046.) None of the ALP prints matched any of the prints lifted from the crime scene. (12 RT 2444.)

Sharon Binkley, a criminalist with the Alameda County Sheriff's Department, examined some biological specimens and other evidence for the presence of semen. The biological specimens were from Olsson's vaginal, mouth, and rectal areas, and the evidence was her pajamas, robe, bedding and throw rug. (13 RT 2574-2475, 2577-2578.) Binkley found no semen or spermatozoa anywhere. (13 RT 2576-2578.) Those negative findings did not eliminate the possibility that sexual intercourse had occurred between Olsson and her assailant, Binkley opined, since intercourse can occur without ejaculation. (13 RT 2576.)

Criminalist Binkley also examined the Buck knife found at Springtown Golf Course, a swab of blood collected from that knife, and a sample of Olsson's blood. (12 RT 2321-2324, 2360; 13 RT 2575, 2579.) Binkley observed soil and some fine animal hairs on the blade, saw that the tip of the blade was broken off, and also noted that the edge of the blade was chipped in two areas. (13 RT 2618-2619.) She also saw red-brown stains on the blade and across the top of the knife handle, which she scrapped off and tested a portion thereof for the presence of human blood. (13 RT 2580-2582.) That sample, as well as the swab of blood taken from the blade, proved consistent with Olsson's blood.

(13 RT 2579-2580, 2583-2587, 2613-2614.)

Binkley also observed visible prints on the handle of the knife. She knew additional examination of the knife for the presence of fingerprints was scheduled. (13 RT 2581.) She measured the knife blade as three-and-three-quarter inches long, and three-quarters of an inch at its widest point. The handle was four-and-three-quarter inches long. (13 RT 2580-2581.)

Binkley additionally examined Olsson's bed sheets and found blood stains that appeared to have been made by someone using the sheets to wipe off a bloody knife sequentially; i.e., first on one side of the blade and then on the other side. The person did this with the knife at at least twice. (13 RT 2590-2592, 2608-2611, 2632-2635.) The measurements of these blood stains on the sheets matched the Buck knife Binkley examined. (13 RT 2593-2600.)

Meanwhile, from August 1986 onward appellant was apparently still spending time at Chandler's home on Hollyhock as Chandler was still leaving messages for appellant, and appellant had keys to the house until mid-March 1987. (13 RT 2511, 2517-2521.) During that same period the authorities had no leads into the killing of Olsson, other than the unidentified fingerprints on the knife. (14 RT 2868.)

On March 17, 1987, based on a conversation with another officer, Sergeant Robertson submitted appellant's fingerprints to the state DOJ. (12 RT 2443; 14 RT 2827.) The analysts examined the prints, and identified appellant's right ring fingerprint as matching a fingerprint left on the brass end of the Buck 110 knife discovered at the Springtown Golf Course on July 25, 1986. (12 RT 2406-2423, 2449-2453; 14 RT 2872.)

On March 27, 1987, Sergeant Robertson arrested appellant in Pleasanton at about noon. (14 RT 2873, 2908, 2918.) At around 3:40 p.m. or so CSA Mangrai took fingerprints and palm prints from appellant. Later, the DOJ analysts identified appellant's right palm print on the knife from the golf course.

(12 RT 2341, 2406, 2408-2410, 2411, 2413, 2443, 2449-2453.)

Appellant's Statements To The Authorities

Livermore police interviewed appellant at the police station at about 8:00 p.m. on March 27, 1987. (14 RT 2873-2877; People's Exh. 5C.) Appellant acknowledged reading about the Olsson murder in the paper. Sergeant Robertson asked him, given what he had read, "what type of person, or what would you think would be the motive for something like that?" (14 RT 2876-2877; People's Exh. 5C.) Appellant first answered, "I don't know," then expounded, "it was "pretty bizarre really. First you know, I figure burglary. But looking at it I'd have to, I'd probably have to say I don't know. I guess it's somebody that might have been a lover, or something, or domestic type, because a relationship she had or something. And where they found her. Apparently somebody had a quarrel and obviously it got out of hand." (People's Exh. 5C.)

Appellant then repeated that he had initially thought it was a burglary, but on "closer examination it just didn't ring like a burglary," since "she didn't have a lot of shit stolen." (People's Exh.5C.) Plus, appellant continued, murder is "a bit extreme" for a burglar ("A burglar, why don't they, why don't they just tie her up, you know, gag her and all that good stuff like they do in the movies?"). (People's Exh. 5C.) Appellant opined that because there were no signs of forced entry at Olsson's house, and her body was found unclothed, this again indicated that the crime was committed by someone she knew, perhaps a former lover or boyfriend ("like a domestic type thing" that "got out of hand."). (People's Exhibit 5C; 14 RT 2893-2895.)

Sergeant Robertson knew that the newspapers had reported that Olsson had been found naked, but that the papers had inaccurately reported that there were no signs of forced entry. (14 RT 2894-2895.)

Sergeant Robertson told appellant that the police had identified his (appellant's) fingerprints as being on the knife that had killed Shirley Olsson. (14 RT 2873, 2906-2907.) Appellant denied involvement and stated that sometime in the spring of 1986 his knife had been stolen from his car. (14 RT 2873-2874.) Appellant denied knowing Olsson and denied ever being in her house. (14 RT 2875.)

Also on March 27, 1987, Robertson told appellant's wife Vicky that the police had identified appellant's fingerprints on the murder weapon. (14 RT 2896-2897, 2905-2908.)

On Sunday, March 29, 1987, Robertson received a call from another officer and based on that call met with appellant's wife, Vicky Tully, the next day. Later that same day, March 30, at about 8:00 p.m., Robertson and Detective Mike Newton interviewed appellant at the Santa Rita jail. (14 RT 2898, 2900; People's Exh. 6A, Exh. 6C at p. 1.)

Appellant waived his rights. (People's Exh. 6C at p. 2.) When the officers asked appellant to discuss the day of July 24, 1986, appellant asked them to "add" to the record their off-the-record discussions about "the Witness Protection Program." (*Id.* at p. 2.) One of the officers assured appellant that the police would pursue the program in the event that any information or testimony appellant provided, specifically that involving "the Hell's Angels," met Witness Protection Program criteria. (*Ibid.*)

Appellant then told the officers that on July 24, 1986, he and one "Doubting Thomas" (a Hell's Angel who appellant did not know the real name of) went to a house on Hollyhock Street in Livermore. (People's Exh. 6C at pp. 2-3.) Appellant did not know Doubting Thomas's true name, although he did know where Thomas and his wife lived in Livermore because appellant had been there before. (*Ibid.*) Appellant described Thomas as a "[s]craggy looking guy, long black hair, wavy, always needs to be combed, always wears leather jacket,

leather vest, excuse me. Every once in a while he'll being wearing a shirt that says Hell's Jangels Hell Angels down the side." (People's Exh. C at p. 2.)

More specifically, appellant told the officers that as the bars "were almost closing" on what would have been the early morning on July 25, he was driving to his friend Tom Tinsley's house when he saw Doubting Thomas walking down the street and picked him up. (*Id.* at pp. 3-4, 18-20.) Thomas told appellant he had just come from Tinsley's house where "there was nothing happening." (*Id.* at p. 19.) Appellant was drunk, having consumed four or five 12-ounce beers and four or five 4-ounce "kamikazes" in the preceding three hours at the Sunshine Saloon in Pleasanton. (People's Exh. 6C at p. 18.) In the previous 18 months appellant had associated with Thomas about six to twelve times. (*Id.* at p. 27.) Thomas was wearing his usual leather vest, a black and white long sleeve shirt, and jeans. (*Id.* at p. 19.) He told appellant he wanted to go to a woman's house on Hollyhock in Livermore so that he could "pick up some drugs" from her that she obtained from a hospital. (*Id.* at pp. 3-4, 19-20, 27.) Appellant knew Thomas had been drinking. (*Id.* at p. 17.)

Appellant told Doubting Thomas that he rented a room at John Chandler's residence on Hollyhock. (People's Exh. 6C at pp. 4-5, 20.) Thomas remarked on the coincidence ("that's where we're going"; "that worked out good"), and directed appellant to park at Chandler's because that was "only a couple of houses down" from their destination. (*Id.* at p. 20.) From Chandler's driveway the men walked to the woman's home. (*Id.* at pp. 4-5, 20.) Thomas didn't name the woman and appellant did not know anyone who lived in the home but Thomas said that "he'd known her for a while, that he could get drugs for money, for he'd buy drugs from her that she'd get from the hospital." (*Id.* at pp. 4, 15.) Doubting Thomas did not say how he knew the woman, what kind of drugs he purchased from her (he said it was "always something different"), or how long he had been buying drugs from her. (People's Exh. C at pp. 4, 19,

22.)

Appellant recounted for the officers that Doubting Thomas loudly knocked on the woman's front door a couple of times while he (appellant) waited in the front driveway leaning against a blue car. (People's Exh. 6C at pp. 5, 17.) Appellant wondered if the neighbors could hear the knock. (*Id.* at p. 17.) After a short time a woman answered the door voluntarily, and she and Thomas spoke for a moment before he stepped inside. (*Id.* at pp. 5, 17.) Within five minutes, however, with the front door still slightly open, Thomas motioned for appellant to enter as well. (People's Exh. 6C at pp. 5, 17.) Appellant complied. (*Id.* at p. 5.) Appellant waited in the hallway as Thomas and the woman spent time together in the bedroom. (*Id.* at p. 5.) Appellant had never seen her before. (*Id.* at p. 27.)

Appellant went to the living room and made himself comfortable on the couch. (People's Exh. 6C at p. 6.) Appellant repeated for the officers that he had been drinking that night and was already about "half-cocked," but nonetheless grabbed a bottle of alcohol that was on the lady's counter ("whiskey or some shit") and "took a few pulls off of that." (*Ibid.*) About five to ten minutes after appellant entered he heard Doubting Thomas and the woman talking in the bedroom. (*Ibid.*) Appellant could not make out any words, only that Thomas and the woman spoke calmly to each other at first before starting to argue a little bit. (*Ibid.*)

After the voices calmed down, appellant further told police, Doubting Thomas motioned for him to come into the bedroom. Appellant met him in the hallway. (People's Exh. 6C at p. 7.) Doubting Thomas asked appellant if he "wanted to have a little fun with her?" (*Ibid.*) Appellant, who was "in the mood," replied, "sure, why not." (*Ibid.*) He therefore entered the bedroom where the he found the lights already off and the woman sitting naked on the edge of the bed. (People's Exh. C at p. 7.) She said, "Hi, how you doing?" and

appellant responded likewise. (*Ibid.*) Thomas said, "If you want we can go and have some fun and games." (*Ibid.*) Appellant asked Thomas if he was "talking about a threesome or something?" (*Id.* at pp. 7-8.) Thomas replied that he "already had his before, so he's not into it tonight." (*Ibid.*) Thomas said, "You go ahead and head on." (*Ibid.*) Appellant again said "sure, why not," and "went in and disrobed." (*Id.* at p. 7.) Doubting Thomas went to another room. (*Id.* at pp. 8, 18.)

Appellant told the officers that after taking off his clothes he "started making out" with the naked woman and then "fucked her." (People's Exh. 6C at p. 8.) As he "mumbled and stumbled" his way through the sex appellant noticed that the woman was missing her right breast. (*Id.* at p. 8.) Appellant did not ejaculate because he was "too drunk" and lost his erection "pretty quick." (*Ibid.*) Because the intercourse did not last long appellant was in the bedroom for less than 10 minutes. (*Id.* at pp. 8, 18.) Appellant's failure left him feeling "kinda stupid." (*Id.* at pp. 8-9.) He dressed and apologized to the woman, stating that he "hoped it would be better next time." (*Ibid.*)

Appellant next told the officers that as the woman had put on some pajamas or a robe he left the room to find Doubting Thomas. (People's Exh. 6C at p. 9.) Doubting Thomas asked appellant how he "liked it" and appellant answered, "well you know, I was a little too drunk to really enjoy it." (*Ibid.*) Appellant also told Doubting Thomas that he (Thomas) "could probably have a hand at it." (*Ibid.*) As Doubting Thomas then reentered the woman's bedroom and talked with her some more appellant returned to the bottle of alcohol and "started hitting" it again "a few more times." (*Ibid.*)

Appellant heard the woman and Doubting Thomas start arguing again, but again could not hear the specific words ("I wasn't paying much mind to it"). (People's Exh. 6C at p. 9.) "It sounded like they were wrassling or he was knocking her around or something." (*Ibid.*) Appellant, holding the bottle of

alcohol, walked towards the hallway "to try and listen in a little bit, trying to know what the hell was going on." (*Ibid.*) As he then heard what sounded like "furniture and shit" getting knocked around he watched the woman, naked, come charging out of the bedroom and run right into him. (*Id.* at pp. 9-10.)

Appellant told police that Doubting Thomas was right behind the "struggling" woman and grabbed her by the throat and hair "and jerked her back into the room." (People's Exh. 6C at pp. 10, 25.) She "wasn't struggling much then." (*Id.* at p. 10.) Appellant asked him, "What the hell's going on?" (People's Exh. 6C at p. 10.) Doubting Thomas told appellant not to worry; that the woman was giving him a hard time. (*Ibid.*) Appellant, a little worried, said, "right on" and "hurry the fuck up." (*Ibid.*) He "wanted to get the hell out of there." (*Ibid.*)

Appellant told the police that about 45 minutes had passed since he and Doubting Thomas entered the house. (People's Exh. 6C at p. 10.) After Thomas pulled the woman back into the bedroom, appellant went into the living room where he heard a "scuffle" coming from the bedroom. (*Id.* at pp. 10-11.) Within a matter of minutes it "got kinda quiet" and Thomas exited the bedroom. (*Id.* at pp. 11, 25.) Appellant entered the bedroom to find out "what the hell" was going on and to see if Thomas "got anything from her or what." (*Id.* at p. 11.) With moonlight shining into the bedroom appellant saw the woman lying on the bed, naked and with multiple stab wounds to her back. (*Ibid.*) She was not moving. (*Ibid.*) Thomas said, "God damn fucking bitch." (*Ibid.*) Appellant was "freaked" and "couldn't believe what the hell was going on." (*Ibid.*) Appellant asked, "What the fuck you'd do, did you fucking kill her or what?" (*Id.* at p. 12.) Doubting Thomas replied, "Yes, she's fucking dead man." (*Ibid.*) Thomas did not explain why. (*Ibid.*) Appellant "froze" and then asked Thomas, "What the fuck's wrong with you man?" (*Ibid.*)

At some point appellant returned the bottle of alcohol to the counter, he next

told police. (People's Exh. 6C at p. 16.) He noted that Doubting Thomas was still wearing the black leather gloves he had been wearing the entire time. (*Id.* at pp. 21, 26.) At some point appellant went to his car to get his own pair of gloves because, as he told the officers, "after I saw what happened, I didn't want my fingerprints in the house." (*Id.* at pp. 21, 23.) Appellant returned to the house to find Thomas sitting on the living room couch rummaging through a bulky medium-sized purse he had taken from the lady's bedroom. For his part appellant tried to wipe down the areas around the doorway, the bedroom, the bottle, and the other items and areas he might have touched. (People's Exh. 6C at pp. 21-24.) Thomas helped appellant with the wipe-down but with little interest (he had been wearing gloves and "was in a hurry"). (*Id.* at p. 21.) As Thomas and appellant exited through the back sliding glass patio door Thomas had the purse in his possession. (*Id.* at pp. 12, 20-24.) Appellant was "freaking out" and "couldn't believe it" (*Id.* at p. 12.) Appellant had not used the bathroom at all while in the house. (*Id.* at p. 25.)

Once outside, appellant told police, Doubting Thomas handed him the knife he (appellant) had been storing in the console between the seats in his car. (People's Exh. 6C at pp. 12, 27.) Thomas said, "Here, here's your knife." (*Id.* at p. 12.) Appellant said, "You fucking asshole man, you fucking waste this chick man, you use my fucking blade." (*Id.* at p. 12, 27.) Appellant saw blood all over the opened knife, on his coat, and all over Thomas. (*Id.* at p. 12.) As they walked, with appellant carrying the still-extended knife, appellant, "still freaking," said, "Man, I don't know what the fuck we're gonna do, what the fuck we're gonna do." (*Id.* at pp. 12-13.) Thomas told appellant to "be calm" and "fucking be cool." (*Ibid.*) Appellant said, "we're gonna fucking fry for this man, go to the fucking chair." (*Id.* at p. 13.) Thomas told appellant "don't worry about it, we'll be covered." (*Ibid.*)

Doubting Thomas wanted to return to John Chandler's house but appellant

nixed that idea, saying "we can't go back over there, you know, looking like we do." (People's Exh. 6C at p. 13.) They then walked towards a duck pond that was on the golf course about 200 to 300 yards from the woman's house. About halfway to the pond, appellant grew "pissed off" and threw the knife into the backyard of a house on the opposite side of the course from the victim's home. (*Id.* at pp. 13, 15.) Appellant's throw angered Thomas, who then wanted to retrieve the knife. (*Ibid.*) As for the purse, Thomas took what he wanted from it ("rat-fucked it"), and threw it in the pond. (*Id.* at p. 13.) Appellant "didn't pay much mind" to any of the pictures he saw in the purse. Thomas noted that the woman worked at a V.A. Hospital. (*Id.* at p. 22.) Appellant told Thomas that they had to get rid of their "fucking clothes." (*Id.* at p. 13.) Appellant thus took off the sleeves to his coat, his shirt, and his tennis shoes, and gave them to Thomas. (*Ibid.*) Appellant told Thomas to wait by the duck pond while he went to get the car. (*Id.* at p. 14.) In his bare feet appellant ran on the sidewalk and through the streets back to his car and then returned to pick up Thomas. (*Id.* at pp. 14, 26.) Appellant noted that Thomas was no longer holding his clothes and had gotten rid of some of his own. (*Id.* at p. 14.) Appellant asked Thomas about the missing clothes and Thomas replied, "don't worry about it, I stashed 'em so they won't be found." (Id. at pp. 14, 26.) From there appellant drove Thomas back to where he had originally picked him up (*Id.* at pp. 14-15.) Appellant told Thomas that if "he went down I'd go down too." (*Id.* at p. 25.) Appellant then returned to Chandler's house and spent the night there. (*Id.* at pp. 14-15, 26.) Appellant did not return to the woman's house and take anything else. (*Id.* at p. 15.) He was unaware of Thomas having taken anything from the house other than the purse. (*Ibid.*)

Appellant told police he did no stabbing. (People's Exh. 6C at p. 15.) "I didn't even know he was gonna do that. I didn't even know he had my fucking knife." (People's Exh. 6C at p. 15.) In the one or two months after the

stabbing appellant ran into Doubting Thomas only a couple of times and they said nothing to each other. (*Id.* at pp. 23, 26.)[8/]

On March 30, 1987, at 11:30 p.m., an investigator from the District Attorney's Office and a deputy district attorney interviewed appellant at the Santa Rita Jail after he waived *Miranda* rights. (14 RT 2739-2746; People's Exh. 9A-9C.) Appellant again expressed interest in the Witness Protection Program because he had been present at the time of Olsson's homicide but he emphasized he didn't do it: "I expressed my fears for myself as well as my family. And uh, to say I'm concerned would be an understatement because uh, . . . this other fellow is associated with the Hells Angels and I want to make sure that myself and my family are both protected." (People's Exh. 9C at p. 2.) The prosecutor offered appellant no promises and reminded him that what he said could and would be used against him. (*Id.* at pp. 2-3.) The prosecutor also rebuffed appellant's overtures for a reduced charge and sentence. (*Id.* at p. 3.)

The prosecutor asked appellant why he told his wife a story different from what he told police on March 27. (People's Exh. 9C at p. 3.) Appellant answered by stating that he was going to "believe in" what Officers Robertson and Newton told him and added, "I hope like hell that, you know, they're telling me the truth and I'm sure they are so I'll go ahead and go on with what I had said earlier and tell you what I got here." (*Id.* at p. 4.) In appellant's ensuing answers to the questions posed to him by the prosecutor and the investigator, appellant essentially repeated what he had told the officers earlier regarding the events of July 25, 1986, with some additions and changes, summarized as follows:

---

8. At the request of the Livermore police, the chief nurse at the Livermore Veteran's Administration Medical Center researched which medications were handled by Olsson during her tenure there. (14 RT 2769.) Chief Nurse Brick testified that in the 27 years she was in charge there had been no shortages of any controlled substances. (14 RT 2769-2779.)

First, when Doubting Thomas and Olsson were together in her bedroom for the first time after appellant and Thomas entered the house it didn't sound to appellant like Olsson and Thomas were having sex. And, when Thomas offered Olsson to appellant, he (Thomas) did not say he had already had sex. (People's Exh. 9C at pp. 12-13.)

Second, during his sexual encounter with Olsson, appellant not only french kissed her and fondled her breast, but she kept her arms wrapped around him and when it was over asked him in a whisper, "Did you come?" (People's Exh. 9C at pp. 15-16.)

Third, when Olsson came running out of the bedroom before Doubting Thomas grabbed her and pulled her back in, she ran into appellant and knocked him over. (People's Exh. 9C at p. 19.) She said nothing to appellant at that time. (*Id.* at pp. 20, 33.)

Fourth, when Doubting Thomas pulled Olsson back into the bedroom she "wasn't resisting that hard." (People's Exh. 9C at p. 20.)

Fifth, during that time period nothing got disturbed; no pictures fell off the wall "or anything like that." (People's Exh. 9C at p. 21.)

Sixth, asked why Doubting Thomas would want to stab Olsson, appellant replied, "I have no idea. I didn't ask him." (People's Exh. 9C at p. 23.) "I asked him what the fuck he did that for?" (*Ibid.*)

Seventh, after obtaining his gloves from his car, the areas in Olsson's home that appellant wiped down included "the doorway, bottles of liquor, the knobs, the table in the bedroom, the little bit of the dresser." (People's Exh. 9C at pp. 24, 34.)

Eighth, as appellant did his wiping, Doubting Thomas rummaged Olsson's purse. Appellant did not state that Thomas helped him wipe things down. (People's Exh. 9C at p. 25.)

Ninth, in leaving Olsson's house they had to unlock the sliding glass patio

door to get out and appellant believed that Doubting Thomas re-locked it after they were outside. (People's Exh. 9C at p. 26.)

Tenth, this wasn't the first time in his life that a woman appellant did not know offered herself to him sexually immediately after meeting him. (People's Exh. 9C at p. 29.) Asked by the prosecutor, "how many times have you had sex with women where you don't say anything, she just spreads her legs and you start screwing?," appellant replied, "More times than I care to remember . . . I'd say more than, more than five, less than twenty." (*Id.* at p. 30.) "Sometimes it was party situations, sometimes it was just, um, what they call a pass-around chick." (People's Exh. 9C at p. 30.) "It's not an unusual occurrence." (*Ibid.*) Appellant elaborated further: "Well, you know, if you go over to parties or anything like that, biker chicks, that kind of thing." (*Id.* at p. 29.) Appellant conceded that Olsson did not strike him as a "biker chick." (*Ibid.*)

Eleventh, once outside Olsson's home, appellant saw blood on his jacket and "figured" it got there when Olsson bumped into him. (People's Exh. 9C at pp. 32-33, 35.) Even though he was very drunk that night appellant could remember what occurred in vivid detail because it was "pretty dramatic event." (People's Exh. 9C at pp. 39-40.)[9/]

---

9. People's Exhibits 5E, 6C, and 9C are the transcripts made from the tape recordings (People's Exhs. 5C, 6A, 9A-B) that the prosecution played for the jury. Presumably the prosecution prepared these transcripts to comply with rule 243.9 of the California Rules of Court. The jury used Exhibits 6C and 9C to follow along as the prosecution played the corresponding tapes. We cite to those transcripts herein, not the tapes. (14 RT 2745-2746, 2748-2749, 2898-2900.) By contrast, the prosecution did not provide Exhibit 5E to the jury. (14 RT 2876-2877.) Because the prosecution did not provide 5E to the jury, we are citing only to the tape, Exhibit 5C. The prosecution did not introduce the Exhibit 6C and 9C transcripts into evidence. (15 RT 2990-2992.) Rule 31(b)(11), which governs the normal record on appeal, and rule 243.9(a), both provide that transcripts of tapes furnished to the jury or tendered to the court must be included in the clerk's transcript on appeal. Rule 34.1, which governs the contents and form of the record in a capital appeal, specifically provides that

The police ultimately determined that "Doubting Thomas" was one Thomas Pillard. (14 RT 2902.) The police subsequently interviewed Pillard, obtained a set of fingerprints from him, and submitted those fingerprints to the analysts at the state Department of Justice. (14 RT 2903-2904.)

Appellant's Guilt-Phase Defense Case

Expert criminalist Sharon Binkley testified that if a strand of hair from an unknown source is different from a strand of hair from a known source, one can conclude that the unknown does not originate from the known individual. (14 RT 2931-2934.) Criminalists cannot determine whether a discarded strand of hair is from a male or female, but can sometimes determine the race of the person the examined hair belongs too. (14 RT 2934.)

In this case, Binkley examined several pieces of hair evidence: pubic and head hair from Olsson, pubic and head hair from appellant, hair found in Olsson's bedroom (from her sheets, blankets, pillowcases pajamas, robe) and hair brushed from Olsson's vaginal area (a "pubic brush" is "where a comb is run through the pubic hair of the victim at the coroner's office" and "the idea is to pick up any loose pubic hairs or anything that is in the pubic hair of the victim"). (14 RT 2935-2938, 2950-2951, 2978-2979.)

Except for some reddish brown animal hairs on a pillow case, and two human head hairs on a knitted blanket, all of the hairs Binkley examined were consistent with having come from Olsoon, and inconsistent with appellant's hair. (14 RT 2939-2943, 2958, 2978.)

---

rule 31(b)(11) is applicable and thus transcripts are to be included in a capital record. (Cal. Rules of Court, rule 34.1(a)(1)(A).) Because the transcripts that comprise Exhibits 5E, 6C, and 9C were not included in the clerk's transcript in this case, the People, subsequent to the filing of this Respondent's Brief, and pursuant to rule 12(b)(1) of the California Rules of Court, will file a motion in Alameda County Superior Court to augment the record with those transcripts.

The Prosecution's Guilt-Phase Rebuttal Case

Sandra Walters, Olsson's daughter, testified that on July 19, 1986, she went to her mother's home to visit and brought her dog, a Setter and Lab mix, with reddish-brown hair that the dog would regularly shed. (14 RT 2982.)

The Prosecution's Penalty-Phase Case

On January 7, 1988, at around 5:45 p.m., in the maximum security housing unit at the Santa Rita jail, appellant engaged in a fist fight with another inmate during meal time. (16 RT 3412-3414.) Appellant received a split lower lip that required hospital treatment. (16 RT 3414.) The other inmate had no visible injuries. (16 RT 3415.)

On September 26, 1991, at around 4:00 p.m., during meal time, appellant and another inmate were in a "wrestling hold" with each other. (16 RT 3418-3419.) "They continued holding on and, like trying to grasp each other, and eventually . . . they separated, tried to throw a couple of punches at each other, and then ended up back in the grasp in wrestling kind of situation." (16 RT 3419.) Neither inmate complied with demands to separate and the authorities had to forcibly separate them. (16 RT 3420.) Appellant had some bumps and bruises to his face and the other inmate required treatment for an eye injury. (16 RT 3422.) While appellant stood five foot seven inches tall and weighed 155 pounds, the other inmate was six feet tall and weighed 175 pounds. (16 RT 3422-3423.)

Sandra Walters, Sandy Olsson's daughter, was very close to her mom; they were best friends who visited often ("we would love to shop") and spoke on the phone. (16 RT 3425, 3438.) They talked together about "everything and anything." (16 RT 3425.) Olsson was a very loving, caring, and wonderful person. (16 RT 3425.) She "meant everything" to Walters. (16 RT 3425.)

Learning of her mother's death and its details left Walters "[l]ost and very,

very afraid, very scared." (16 RT 3428-3432.) In her words, "I didn't know who was going to take care of me if my mom wasn't around." (16 RT 3432.)

Despite receiving grief counseling, Walters remained very angry that her mother had been taken from her. (16 RT 3437, 3439-3440.) Although Olsson had always wanted one or more grandchildren, as Walters explained, her mother's death had left her with intimacy difficulties. (16 RT 3427.) Walters also explained, "I don't want to have children because I don't want anybody to have to go through what I have, to lose your mother." (16 RT 3427-3427.) "It's very hard for me to be close with somebody. I prevented myself to be close enough to love somebody because I am afraid they're going to go away like my mother did." (16 RT 3439.)

Olsson had once had breast cancer, and, testified Walters, "I think because she had a mastectomy, I realized because of that, that one, she would die sometime, and I—I think I expected it to be by cancer. But if she would have died by cancer, I could have at least said good bye to her. I would have had some time." (16 RT 3434, 3436.) Walters thought of her mother daily, and "unfortunately, the first thought is the horror of how she died." (16 RT 3432.) "Without ever thinking about it before, a knife was a utensil. And now, every time I see any kind of a knife, it's how my mom died, represents the horror in her death." (16 RT 3432.)

In 1992, six years after her mother's death, Walters still slept with a night light and a hatchet under the bed. (16 RT 3432.)

Sandra Walters's brother, Elbert Walters III ("Trip") (16 RT 3463), testified that his mom enjoyed life and cared for others at all times (16 RT 3441). She "was a happy human being." (16 RT 3441.) She was also Trip's "anchor." (16 RT 3444.) As he put it, "She was always there for me. She was my friend." (16 RT 3444.) Olsson had unconditional love for Trip, even as he struggled through some problems earlier in his life. (16 RT 3444, 3450.)

Olsson's death left Trip feeling as if he were having a nightmare, and he desperately hoped that he was going to wake up. (16 RT 3442.) It wasn't until he finished the distribution of his mom's effects and the "hell" that that entailed, that he realized she "was really dead." (16 RT 3442-3443.) That realization, according to Trip, "turned my whole world upside down. I was very depressed. The loss of my mother, to me, I, I—can't—I do not know how to put that into words. It was devastating." (16 RT 3446.)

Trip particularly missed the comfort his mother brought him during bad times, and missed sharing with her the good things that had happened to him since her death. (16 RT 3446.) "Unfortunately we live life on life's terms. If my mother dies of cancer or an automobile accident or something like that, I am sure I would be able to understand it. For her to be murdered, I cannot understand that. And I can—I—I cannot understand that; it's absolutely asinine." (16 RT 3449.)

Olsson's sister, Jan Dietrich, testified that they were great friends who did a lot of traveling and sharing together. (16 RT 3459.) Dietrich knew that her sister had planned to work only three more years and was saving money so that she would have the freedom to do even more traveling in retirement. (16 RT 3459.)

Dietrich lived in Washington D.C., and when she was phoned with the information regarding her sister's murder, couldn't get on an airplane right away. (16 RT 3460-3461.) She dreaded having to tell her father, believing the news might cause his death too. (16 RT 3461.) "I was afraid he would have a heart attack." (16 RT 3461.) Mr. Sandberg was expecting the planned arrival of Olsson when Dietrich arrived at his home in Topeka, and, according to Dietrich, "my dad was getting all set and prepared for her. He was making the chicken dinner when I walked in the door." (16 RT 3462-3463.) "I didn't tell him right away. I told him we lost Sandy, and it took about two hours before

I could tell him what happened. And he's awful smart, so he finally, after about two hours, he said, 'Okay, Jan, what really happened.'" (16 RT 3461.)

From Topeka Dietrich made immediate arrangements to travel to Livermore, and as she waited in the airport she struggled with the knowledge that one of planes arriving at that time was the plane her sister was supposed to have been on. (16 RT 3463.) On arrival in the Bay Area Dietrich took on the responsibility of trying to arrange for her sister's funeral in an area with which Dietrich was not familiar, all while also trying to answer police questions. (16 RT 3664-3466.) The day after the funeral was Mr. Sandberg's 85th birthday, and it was painful for Dietrich to watch him open the presents Olsson had already bought and wrapped for him. (16 RT 3468.)

The following day a memorial service was held for Olsson at the Livermore Veteran's Administration Medical Center at the insistence of the hospital administration. (16 RT 3468, 3476.) "The head of the hospital spoke, as well as many of the nurses, and then even patients spoke of what Sandy meant to them." (16 RT 3468.)

When Dietrich was finally allowed to access her sister's home, she found it "alien and awful," full of fingerprint powder and blood on the floors. (16 RT 3469.) Television cameras were also outside the house, and, on the request of police, Dietrich went on camera to ask anyone who knew anything regarding the crime to come forward. (16 RT 3470.)

The manner of her sister's death left Dietrich with a constant worry about Olsson's last 15 or 20 minutes, when, in Dietrich's words, "I wasn't there to help her." (16 RT 3473.) Dietrich had no closure. (16 RT 3474.)

Olsson's father, Mr. Sandberg, 91 years of age in 1992, last saw his daughter Sandy on Memorial Day 1986, and last spoke with her on the phone in mid-July. (16 RT 3485, 3487.) Both he and Olsson were looking forward to her planned 1989 retirement, as they were planning to buy a vehicle together,

equip it, and then begin traveling. (16 RT 3486.) Mr. Sandberg noted "that the first summer after her retirement, we were going to go up to Canada and up to the Yukon." (16 RT 3486.)

At his age, Mr. Sandberg had experienced the death of a number of people close to him, but the manner of his daughter Sandy's death had bothered him greatly, and caused him to experience difficulty sleeping. (16 RT 3487-3488.) Many times a day he was reminded of her. (16 RT 3488.)

Appellant's Penalty-Phase Defense Case

The mitigation evidence appellant presented focused primarily on his family background.

Appellant's maternal grandfather was an Apache Indian who lived on a reservation in New Mexico until he was 35 years old. (17 RT 3573.) He married a woman who was half-Indian and half-French; they both spoke Spanish and had a Spanish surname, DeHerrera. (17 RT 3573-3574.) Appellant's mother Louise was born in 1934. (17 RT 3577, 3586.)

Louise eventually had five children: She gave birth to a daughter, Shirley, in 1952, and a son, Roger was born 11 months later on February 20, 1953. Their father left home in between those births, never to return. Louise remarried two to three years later and gave birth to Regina in 1955. (17 RT 3519-3521, 3558-3559, 3594.) When the children were very young Louise often left them with their grandparents, and Roger remembered an incident when he was about five years old and asked his grandmother if she was "a Mexican." (17 RT 3575.) According to Roger, she told him to approach her, "so I got up to her thinking she's going to tell me some magnificent family secret and she slapped my face. I was stunned and taken aback, so I went to my mother and I said, 'Mother, I asked momma if we were Mexican and she slapped me. Why did she do that?' And my mother told me, "Because it's

none of your business.'" (17 RT 3575-3576.)

After later divorcing Regina's father, appellant's mother married Richard Ross Tully, and appellant was born on March 19, 1959. Mrs. Tully gave birth to a third son, Russell, in 1969. Russell's paternity was uncertain. (17 RT 3519-3521, 3535, 3558-3559; People's Exh. 6C at p. 1.)

In any event, appellant was born in Turkey, while the family was stationed there as part of Mr. Tully's service in the United States Air Force. (17 RT 3520, 3532, 3561.)

The elder Mr. Tully had a drinking problem, and on one occasion during their stay in Turkey Shirley recalled that Mr. Tully, while drunk, attempted to spank Regina for no reason at all. Their maid prevented it. (17 RT 3522, 3532-3533.) Roger recalled that while in Turkey his mother and stepfather turned their base apartment into "a social club" for parties and forced the children to stay in their bedrooms where all of the furniture had been placed. (17 RT 3570.) During one such party Roger left his room and saw his stepfather on the floor "knocked out cold" with a skillet on his head or stomach and food on his stomach. (17 RT 3570.) Mrs. Tully then rounded up the children and took them to the house of another military family. (17 RT 3570.)

It was during the family's stay in Turkey that doctors diagnosed Regina with learning disabilities ("she may have been borderline retarded") and recommended counseling for her. (17 RT 3561.)

Appellant was approximately 18 months old when the family left Turkey. (17 RT 3532.) At some point after that, when Shirley and Roger were between 8 and 10 years old, Mr. Tully was assigned to a base in Greenland for a six-month period while the rest of the family lived in Wyoming. For a portion of that period Mrs. Tully had a live-in lover, and indeed on one occasion Roger saw his mother "naked and on top of her friend, who was also naked." (17 RT 3524, 3536-3538, 3577-3578.) Roger further recalled that as a child, he and his

siblings "were constantly taken to visit friends" of his mother's, "male friends," who, she told the children, were never to be disclosed "to that God awful Richard Tully." (17 RT 3577.)

At some point after Wyoming the entire family was living together in Alaska. (17 RT 3522-3523.) There, Shirley became even more aware of her stepfather's drinking, and became very embarrassed and ashamed by it. (17 RT 3525.) According to Shirley, in Alaska, if Mr. Tully "wasn't at the club, he was downstairs in the basement drinking." (17 RT 3525.) As the oldest it fell to Shirley to clean the basement up after Mr. Tully, "and it always smelled of stale alcohol and beer." (17 RT 3525-3526.) Shirley further recalled that her stepfather's drinking not only cost him an Air Force rank and required him to spend time in a rehabilitation center, but it caused financial problems for the family and physical fights with Mrs. Tully. (17 RT 3523-3524, 3526, 3546.) Mrs. Tully was the aggressor, said Shirley: "They were always fighting. [¶] Yes, at times my mother would get really mad, and my stepfather would have to hold her back because of her anger. . . . [¶] Well, he would come home late at night, or from the weekend, and they would start fighting, naturally, because he was gone and he would be drinking. And it didn't end there. They would not speak to each other for days." (17 RT 3524.)

Shirley recalled that her stepfather had no respect for animals; on one occasion she saw him throw a Chihuahua down a flight of stairs. (17 RT 3527.) He also seemed to have continuing animosity towards Regina, and once tried to make her sleep in the bed that appellant had wet. (17 RT 3527.) When Shirley was 11, she remembered, Mr. Tully came into her room and asked her if she wanted "to learn how boys kissed." (17 RT 3526, 3543.) And then, according to Shirley, "he tried to lay me down on the bed, and I wouldn't lay down on the bed, because I felt just terrible. It was wrong." (17 RT 3527.) When Shirley told her mother about this, "it seemed like it didn't sink in." (17

RT 3527.) According to Roger, up until this time the family was somewhat religious and attended church on holidays. (17 RT 3586.)

Like Shirley, Roger recalled his stepfather's alcoholism well, remembering that Mr. Tully was a good worker despite the fact that he sometimes drank to the point of hallucination. (17 RT 3563, 3576.) One time, in Alaska, appellant (then six), Roger, and Mr. Tully went camping near a lake. (17 RT 3576, 3592.) "And while we were there, we parked the camper where it overlooked the lake, and Richard Ross drank himself into such a stupor that he thought we were in the lake, and he began screaming, 'Get out, get out, get out. We're going down, we're going down.'" (17 RT 3576.) On a number of other occasions, Roger recalled, Mr. Tully either did not return home in the evening, or else was accompanied home by military police. (17 RT 3563, 3577.) On some occasions Mr. Tully came home with black eyes. (17 RT 3563, 3576-3577.) And one time, when Roger was 12, Mr. Tully "came home with an elbow that was just swollen up like a softball and his face was swollen shut." (17 RT 3577, 3593-3594.)

Mrs. Tully often accused Mr. Tully of being unfaithful. (17 RT 3577.) According to Roger, "In my mind, it was constantly that my mother would berate Richard Ross Tully for being a drunkard, a whoremonger, chasing women." (17 RT 3571.) Although Roger remembered his stepfather "as a very quiet man with very little input into the home" (17 RT 3571), he also recalled quite a lot of physical aggressiveness between his parents, with his mother usually becoming the aggressor (17 RT 3563, 3569-3570). "That's when we generally had an argument situation in our house. And more times than I care to remember, we were jerked up out of sleep in the middle of the night and hauled off to a friend's house or a neighbor's house because of various reasons that my mother would cite that my father was drunk, he was no good, he was dangerous and what have you for a stepfather." (17 RT 3563.) Affection in the

Tully family was "up and down." (17 RT 3569.)

When Mr. Tully would leave the house to escape his wife's anger and hostility she turned that anger and hostility toward her children. (17 RT 3571.) She would berate them for essentially no reason, and often ordered them to work around the house at all hours of the day or night. (17 RT 3571.) "Of course," stated Roger, "it didn't matter what we were doing, we weren't doing it right or well enough or quick enough." (17 RT 3571.) According to Shirley, Mrs. Tully was "worse than a drill sergeant," who offered her children no compliments on anything, only demands for a better job. (17 RT 3525.) In a word, according to Shirley, her mother was very "difficult," and often did things to Shirley that "crushed" her. (17 RT 3528.)

Roger testified that Mrs. Tully meted out discipline on changing rules; thus, "you never really quite knew when you were line for something, something you might do today might be all right and tomorrow might be the very wrong thing to do." (17 RT 3572.) Mrs. Tully "used whatever was handy" to hit her children, including a belt. (17 RT 3572, 3599.) On one occasion Mrs. Tully broke a finger "disciplining" Roger with "her bare hand," and another time smacked him in the head with her fist. (17 RT 3572.) Appellant seemed to catch the greatest bulk of Mrs. Tully's anger and discipline. (17 RT 3573, 3597, 3600.)

When the family was living in San Bernadino during Roger's ninth grade year, he discovered pornographic paperbacks in his parents' bedroom: "Some of them dealt with incest with the father making it with the daughter. These were just little paperback books, cheap ones put together I guess that you would find in X rated stores." (17 RT 3578.)

All of the dysfunction and commotion in the family not only turned Shirley inward, where she tried to block everything out, but it turned Roger into a very confused young man by the time he was 15. (17 RT 3528-3529, 3564.) He

"acted out," turned to drugs, and ran away with the circus for a six-week period of time when the family was living in Cheyenne. (17 RT 3564-3566.)

As for appellant, Shirley tried to provide love, support, and care for him, and Roger tried to be a good big brother to him, playing with him, fighting with him, comforting him, and helping him with his schoolwork. (17 RT 3562, 3583-3584.) Mr. Tully was still hardly ever home (he worked two jobs), and Mrs. Tully sometimes worked too. (17 RT 3562, 3586.) Appellant looked up to Roger and Roger loved appellant. (17 RT 3582.)

When Roger was 16 and the family was living in Sacramento he ran away from home, feeling compelled to do so by another loud argument between his stepfather and mother. (17 RT 3565-3566.) At some point Roger returned home, and the family moved to Dublin, California, where Roger began his senior year of high school. (17 RT 3567, 3593.) Shirley stayed behind in Sacramento after her graduation from high school. (17 RT 3528-3529, 3533, 3569.) During his senior year of high school, just before his 18th birthday in February 1971, Roger had a religious conversion. (RT 3567, 3594.) He then began spending so much time with his church friends that one day his mother, in his words, "packed a bag for me, put it on the front lawn, and told me to go live with them." (17 RT 3567.) Roger did so. (17 RT 3535-3536, 3567.) And when he left home that day it was the last time he ever spoke with his stepfather. (17 RT 3571-3572.) Living with the church family was "a different life" for Roger. (17 RT 3567.) He learned "what a normal life" was like, and learned about people whom he previously didn't know existed: "people who didn't drink all night, people who didn't throw things. It was kind of nice to come home in the evening. I even had a part-time job. After that it was always nice to find somebody there that cared about you and was concerned about you and was concerned about your job and talked to you about other things. Somebody you [could] sit down and discuss the conditions of life with." (17

RT 3568.)

Appellant was then 12 years old, and had just stopped wetting the bed and sucking his thumb. (17 RT 3571, 3583-3584.) Roger still came to see him, and tried to still provide support for him. (17 RT 3571.) Roger tried to bring his religion to appellant and he spoke to appellant about it; because Roger had been ostracized by the Tully family, however, appellant was forbidden from going to church with him. (17 RT 3587-3588, 3599.) Roger left for college in the fall of 1971. (17 RT 3567, 3594-3595.)

Shirley recalled visiting the family on an occasion when appellant was 13. Mrs. Tully constantly called appellant "stupid," which caused him to cry and be upset. (17 RT 3528.) Mrs. Tully commonly told appellant "that he was just like his father." (17 RT 3582.) When appellant was about 14 his parents finally split up. (17 RT 3534, 3583.)

Roger graduated from college in 1975 with a degree in Theology. He returned to the Bay Area for a while and lived with the family he had lived with during his senior year of high school. (17 RT 3560-3561, 3596.) He had a brief visit with appellant in 1976. (17 RT 3590-3591.) Thereafter, Roger engaged in some missionary work. (17 RT 3560-3561.)

By 1980 Mrs. Tully had injured her back in a fall and was living in Louisiana. (17 RT 3591.) Roger moved there to locate his mother "and help her out." Once there, he began a career as a Baton Rogue police officer, serving part of that time as a homicide detective. (17 RT 3557-3560, 3591.) In 1981 appellant moved to Louisiana as well. (17 RT 3591.) Russell was living there too. (17 RT 3591-3592.) At some point appellant joined the Marines. (17 RT 3590.)

In 1982 Regina was arrested for distribution of marijuana and placed on diversion. (17 RT 3589-3590.) Meanwhile, Shirley had had five children of her own but lost custody of them because she could not take care of them.

Twice in 1984 she was hospitalized for mental and emotional problems. (17 RT 3529-3530.) During one of her breakdowns, she apparently attacked a highway patrolman. (17 RT 3588-3589.) Around 1986, on a therapist's recommendation, Shirley joined a group called the Adult Children of Alcoholics, and the group meetings helped her. (17 RT 3529, 3533.)

Sometime in 1986 Roger needed to transport his mother to the hospital because of an attempted suicide by taking a drug overdose. (17 RT 3579-3582.) Roger had to handcuff her to prevent her from ingesting more pills. (17 RT 3582.) This was the last contact he had with her. (17 RT 3546, 3582.) He found her to be volatile: "she can be very sweet, give you the shirt off her back, but then make you pay for it later. But to describe her personality, as people get to know her, she really doesn't have what I call close friends or sustained relationships." (17 RT 3578.) She "goes off" at the slightest provocation. (17 RT 3579.)

Between 1987 and 1992 Russell was arrested in Louisiana for cultivation of marijuana but was never prosecuted. (17 RT 3589-3590.) He and Roger had no relationship. (17 RT 3598-3599.) Nor did Regina and Mrs. Tully. (17 RT 3546.) A few years before 1992, when Shirley tried to renew her relationship with her stepfather, he offered her money to have sex with him. (17 RT 3547-3548.)

Shirley had visited and corresponded with appellant regularly during his incarceration, and she hoped to continue to be able to do that. (17 RT 3531.)

Shirley's daughter Ursula, 18 years old in 1992, became acquainted with her uncle, appellant, only after he went into custody. (17 RT 3548-3550.) They confided in each other and he offered her advice, which she hoped would continue. (17 RT 3551-3552.)

According to Roger, the only thing that kept him from being in appellant's situation was that he had a religious conversion. (17 RT 3568, 3590.) "The

only thing between me being up here and him being there, was the fact that I had a religious conversion when I was 18. I knew what road I was going down. I knew what it was going to lead to and I was able to get out of it, but I was 18 and he was 12 when I left. It's his responsibility, he's got to take his responsibility for his reactions, but as far as how it all came out, it didn't, as strange as it might seem, it's the most normal, natural result. I don't blame him." (17 RT 3568.)

Appellant had two children, Tony and Tanya. (17 RT 3531, 3602-3604.) Tony had written letters to his father in custody and had spoken with him on the phone, and wanted his father to live. (17 RT 3602-3603.)

Finally, the inmate who fought appellant in the Santa Rita jail in January 1988, Derek Mendoca, testified that he threw the only punch in that fight, hitting appellant in the mouth, and did so because appellant had "wiped some mustard or ketchup" on Mendoca's shirt. (17 RT 3513-3515.) They had been friends before the fight and remained friends afterwards. (17 RT 3515, 3517.) Mendoca had 12 separate felony convictions: four counts of robbery, four counts of kidnaping, and four counts of rape. (17 RT 3514-3517.)

ARGUMENT

I.

THE MISSING PORTIONS OF THE RECORD DO NOT DEPRIVE APPELLANT OF AN ADEQUATE RECORD ON APPEAL

Appellant states that well over 50 hearings or proceedings in his case, beginning in municipal court and continuing all the way through the penalty phase, went unreported. (I AOB 16, 19-20, & fn. 6.) Appellant contends that this renders the appellate record so incomplete and inadequate that this Court will be unable to conduct a meaningful review. (I AOB 16-23.) Appellant claims in turn that this constitutes a violation of his Sixth Amendment right to competent counsel on appeal, his Eighth Amendment right to a reliable determination of guilt and penalty, and his Fourteenth Amendment rights to due process and equal protection (as well as his parallel rights under article I of the state constitution), requiring reversal of both the guilt and death judgments. (I AOB 16-23.)

Appellant's assertions are meritless. He has not met his burden of demonstrating that the existing appellate record is not adequate to permit meaningful appellate review.

A. The Law Is Well Settled

There is no federal constitutional requirement that all trial proceedings be transcribed. (*People v. Howard* (1992) 1 Cal.4th 1132, 1166.) "Under the Fourteenth Amendment, the record of the proceedings must be sufficient to permit adequate and effective appellate review." (*People v. Howard, supra*, 1 Cal.4th at p. 1166; citing *Griffin v. Illinois* (1956) 351 U.S. 12, 20 [76 S.Ct. 585, 100 L.Ed.2d 891]; *Draper v. Washington* (1963) 372 U.S. 487, 496-499 [83 S.Ct. 774, 9 L.Ed.2d 899].) "Under the Eighth Amendment, the record

must be sufficient to ensure that there is no substantial risk the death sentence has been arbitrarily imposed." (*People v. Howard, supra*, 1 Cal.4th at p. 1166; citations omitted.)

With respect to state law, at the time of appellant's trial section 190.9, subdivision (a), read in pertinent part substantially as does subdivision (a)(1) today: "In any case in which a death sentene may be imposed, all proceedings conducted in the justice, municipal and superior courts, including proceedings in chambers, shall be conducted on the record with a court reporter present."

Where a trial court fails to comply with section 190.9, or where portions of the record of trial court proceedings are missing for other reasons, the defendant must proceed with other methods of reconstructing the appellate record, such as through "settled statement" procedures (see Cal. Rules of Court, rule 7), if available, in order to obtain review. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 66, *People v. Frye* (1998) 18 Cal.4th 894, 941.) The defendant is entitled to no remedy provided the incomplete record is adequate to permit meaningful appellate review. (*People v. Frye, supra*, 18 Cal.4th at 941; accord, *People v. Cummings* (1993) 4 Cal.4th 1233, 1334, fn. 70.) It is the "defendant's burden to show that deficiencies in the record are prejudicial"; i.e., it is the defendant's burden to show that he or she has been left with a record that is not adequate to permit meaningful appellate review. (*People v. Howard, supra*, 1 Cal.4th at p. 1165.) "As we said in *People v. Chessman* (1950) 35 Cal.2d 455, 462, '[i]nconsequential inaccuracies or omissions in a record cannot prejudice a party; if in truth there does exist some consequential inaccuracy or omission, the appellant must show what it is and why it is consequential.' (*Ibid.*) The Penal Code is to the same effect: 'After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties.' (§ 1258; see also §§ 960, 1404.)" (*People v. Howard, supra*, 1 Cal.4th

at p. 1165.)

B. Appellant Shows No Prejudice

On November 10, 1997, the trial court held a hearing to conduct a preliminary review of appellant's post-judgment motions to correct, augment, and settle the record on appeal. (11/10/97 RT 1-2.) The court directed the deputy clerk in charge of appellate issues and records to determine whether the allegedly missing transcripts of proceedings or hearings identified by appellant had in fact been transcribed. If so, the court stated it would order them produced; if not, the court wanted "some level of certification" that they did not exist or could not be reported. (11/10/97 RT 7-9.) The court also directed appellate counsel and the prosecutor to review the existing transcripts to determine if the judge who presided over the memorialized hearings and proceedings had stated for the record his recollection and understanding of any off-the-record discussions or conferences. And, the court continued, if additional material was needed, defense counsel and the prosecutor should prepare a proposed settled statement. (11/10/97 RT 10-12.)

Subsequently, appellant filed supplemental motions to correct and augment the record on appeal, and on August 12, 1998, he filed a second supplemental motion to augment. (51 CT 15365-15376; 15377-15381.)

On February 23, 1999, appellant filed "Appellant's Draft Settled Statement Settling The Trial Court Record." (51 CT 15396-15417.) On April 13, 1999, Judge Philip V. Sarkisian initialed and adopted appellant's draft as the "Settled Statement Settling The Trial Court Record." (51 CT 15396, 15418) On July 16, 1999, the court held an off-the-record conference in chambers regarding the status of appellant's motion for corrections of the record. (51 CT 15423.) On August 30, 1999, appellant filed a list of items that remained outstanding, including a list of proceedings for which no reporter's transcripts existed. (51

CT 15424-15431.) Several court reporters filed declarations stating that they had no stenographer notes for some of these proceedings. (ACT 1-9.)

On September 3, 1999, the court issued an order to correct the record. (51 CT 15432-15439.) That same day, the court acknowledged that the settled statement had been filed and the court dropped the matter from the calendar. (51 CT 15439.)

1. Two Of The Transcripts Appellant Claims Are Missing Are Not

Appellant's inability to show that the existing appellate record is inadequate to permit meaningful appellate review begins with the fact that two of the proceedings he claims went unreported, proceedings on January 27, 1992 (I AOB 20, citing 8 CT 1744), and August 14, 1992 (I AOB 20, citing 8 CT 1974) were indeed reported. The transcripts are in the appellate record.

The transcript for the proceeding dated January 27, 1992, where the court continued the matter to set a trial date, is included in the augmented clerk's transcript. (ACT 116-117.)

The transcript for the proceeding dated August 14, 1992, where, among other things, the court and counsel conferred in chambers regarding instructions and exhibits, where exhibits were marked for identification and the court admitted them into evidence, and where the court placed jury instructions on the record, is included in the reporter's transcript. (15 RT 2988-3022; 8 CT 1974.)

2. The Settled Statement Reconstructs Many Unreported Proceedings And Discussions

As noted, the superior court initialed and adopted "Appellant's Draft Settled Statement Settling The Trial Court Record" as the court's "Settled Statement Settling The Trial Court Record." (51 CT 15396-15417.) The settled statement

makes clear that many of the unreported proceedings that appellant complains of dealt only with routine procedural or scheduling issues, which establishes an absence of prejudice from the missing transcript.

For example, appellant complains that a September 10, 1987 hearing in Livermore Municipal Court went unreported. (I AOB 19, citing 5 CT 1128.) The clerk's transcript indicates that on September 10, 1987, Detective Jensen did not appear with compliance discovery materials; the prosecutor reported that there would be a substitution of counsel; and the court vacated the date set for the preliminary hearing and maintained that date for a compliance hearing. (5 CT 1128.) While no reporter's transcript memorializes this event, the settled statement indicates that "all the information [Assistant Public Defender] Byron Brown recalls concerning this hearing is contained in the Municipal Court Clerk's Docket and Minutes for this date." (ACT 8; 51 CT 15398.)

Second, appellant complains about missing reporter's transcripts for November 18, 1987 preliminary hearing bench conferences and proceedings. (I AOB 19, citing 2 CT 526, 538, 564.) The record otherwise indicates that on November 18, 1987, Detective Jensen requested an in camera hearing to claim his privilege to refuse to disclose certain police records. (2 CT 525.) The court discussed whether it would be more efficient to hold the in camera proceeding at another time and proceed with other witnesses. The prosecutor told the court that he only had one witness available that day, and there was a "discussion off the record." (2 CT 526-527.) The settled statement indicates that Defense Counsel Brown believed the unreported discussion "concerned whether the parties should complete the in camera proceeding and continue with Thomas Marshall as the witness, or if they should take other witnesses' testimony." (51 CT 15411.)

Third, the record otherwise also indicates that on November 18, 1987, Detective Newton claimed his privilege not to disclose police-file information

regarding work that witness Marshall had done for the Livermore police department. (3 CT 557-559.) Defense counsel proposed that the court pre-approve questions that he wanted to ask Marshall on cross-examination, so that the court would not have to repeatedly recall Detective Newton to the stand to assert his privilege on a question-by-question basis. (3 CT 564.) There was then a "side bar discussion." (3 CT 564.) The settled statement indicates that Assistant Public Defender Brown believed that the unreported "discussion concerned whether Officer Michael Newton was going to have to return to court and assert the claim of privilege every time the issue of privileged information was raised." (51 CT 15412.)

Fourth, appellant complains about a missing reporter's transcript for a December 1, 1987 preliminary hearing bench conference and proceeding. (I AOB 19, citing 5 CT 1105.) The preliminary hearing transcript indicates that on that day the court held appellant to answer; ordered him to appear for arraignment on December 15, 1987; and that the prosecutor informed the court that a police officer would pick up the blood in evidence for refrigeration. A "discussion off the record" then occurred, after which the court set the next court date. (5 CT 1105.) The settled statement indicates that Defense Counsel Brown recalled that the unreported "discussion concerned the preservation of the blood samples and other refrigerated evidence." (51 CT 15414.)

Fifth, appellant complains about a missing December 15, 1987 reporter's transcript for an Alameda County Superior Court pretrial and in limine proceeding. (I AOB 19, citing 6 CT 1543.) The clerk's transcript indicates that on December 15, 1987, appellant's arraignment was continued to January 19, 1988. (6 CT 1543.) While the record does not contain a reporter's transcript for this event, the settled statement indicates that Defense Counsel Brown recalled that "the reporter's transcript for the preliminary hearing had not yet been prepared at the time of [the] appearance. Therefore, the arraignment was

continued for four weeks." (51 CT 15398.)

Sixth, appellant complains about the destruction of the court reporter's notes for a January 19, 1988 hearing. (I AOB 16, fn. 6.) The clerk's transcript indicates that on January 19, 1988, appellant's arraignment was again continued, this time until January 25, 1988. (6 CT 1544.) While the record does not contain a reporter's transcript of this event, the settled statement indicates that Assistant Public Defender Brown recalled that the arraignment was continued because the reporter's transcript of the preliminary hearing was not yet ready. (51 CT 15399.)

Seventh, appellant complains about a missing April 15, 1988 reporter's transcript for an Alameda County Superior Court pretrial and in limine proceeding. (I AOB 19, citing 6 CT 1584.) The clerk's transcript indicates that on April 15, 1988, the court continued a hearing on a motion to dismiss until May 6, 1988. (6 CT 1584.) While no reporter's transcript exists for this date, the settled statement indicates that Defense Counsel Brown believed that "since the Penal Code section 995 motion was filed that same day, the motion hearing was continued." (51 CT 15400.)

In other words, again all that is missing is a reporter's transcript for a routine scheduling matter.

Eighth, appellant complains about missing superior court transcripts for pretrial and in limine proceedings held on April 18, 1988, and June 6, 1988. (I AOB 19-20, citing 7 CT 1593, 1626.) The clerk's transcript indicates that on both dates appellant was not present and the court dropped the defense suppression motion without prejudice. (7 CT 1593.) Although there are no reporter's transcripts memorializing these events the court reporter has certified that her "shorthand notes reflect that on [both dates] when the court called the case of Richard Tully, the defendant was not present in court and the pending matters were dropped from calendar." (ACT 1.) The settled statement states

the same. (51 CT 15400.)

Ninth, appellant complains about a missing reporter's transcript for June 17, 1988, concerning another superior court pretrial and in limine proceeding. (I AOB 20, citing 7 CT 1131.) The clerk's transcript indicates that on June 17, 1988, the court continued a motion to correct the record to June 21, 1988. (7 CT 1631.) This event is not memorialized in a reporter's transcript. However, the settled statement indicates that Assistant Public Defender Brown recalled that the "Deputy District Attorney [Mike Gaffey], wanted to talk to Deputy District Attorney David Whitman about the proposed corrections to the record. The hearing was then continued." (51 CT 15402.)

Tenth, appellant complains about a missing reporter's transcript for a trial proceeding held on November 2, 1992. (I AOB 20, citing 9 CT 2144.) The clerk's transcript indicates that on that day, on defense request, the court continued the "report and sentence" that had been calendared for that day. It is true that the continuance was not reported. (9 CT 2144.) The settled statement indicates that Defense Counsel Wagner "did not recall what occurred at this court appearance." However, "[t]he majority of court appearances following Mr. Wagner's appointment related to scheduling matters []." (51 CT 15410.)

Eleventh, appellant complains about an unrecorded or untranscribed bench conference and proceeding which occurred during trial, on September 9, 1992. (I AOB 20, citing 17 RT 3601.) What the extant reporter's transcript does indicate is that on September 9, 1992, the court asked if appellant's brother, Roger Tully, could be excused as a witness. Defense counsel asked if they could approach the bench and there was an off- the-record discussion between the court and counsel in chambers. Afterwards, the court excused Roger, subject to recall. (17 RT 3601.) The settled statement indicates that defense counsel Wagner believed the unreported "discussion concerned holding or

excusing witness Roger Tully." (51 CT 15415.)

Not only does the settled statement, in whole or in part, reconstruct many of the unreported proceedings to show that those proceedings dealt only with routine scheduling or procedural issues, but the settled statement, in whole or in part, reconstructs many of the other missing reporter's transcripts.

For example, appellant complains about a missing reporter's transcript from a Livermore Municipal Court hearing held on August 11, 1987. (I AOB 19, citing 5 CT 1122.) The clerk's transcript indicates that on that day, the court conducted a discovery hearing prior to the preliminary hearing. The clerk's transcript provides a detailed account of the hearing. (5 CT 1122-1124.) The reporter's transcript does not contain this hearing, but the settled statement indicates that "[a]ll the information Byron Brown recalls concerning this hearing is contained in the Municipal Court Clerk[']s Docket and Minutes for this date (5 CT 1122)." (ACT 8; 51 CT 15397.)

Second, appellant complains about a missing reporter's transcript from a Livermore Municipal Court hearing held on August 19, 1987. (I AOB 19, citing 5 CT 1124, 1126.) The clerk's transcript indicates that on that day the court heard argument and ruled on a discovery motion. (5 CT 1124, 1126.) Again, although the appellate record does not contain a reporter's transcript for this hearing, the settled statement indicates that "[a]ll the information Byron Brown recalls concerning the hearing is contained in the Municipal Court Clerk[']s Docket and Minutes for this date (5 CT 1124, 1126)." (ACT 8; 51 CT 15397.)

Third, appellant complains about unrecorded or untranscribed bench conferences and proceedings at the preliminary hearing on November 17, 1987. (I AOB 19, citing 2 CT 488, 514.) The existing preliminary hearing transcript indicates that on that day, defense counsel moved to exclude testimony of prosecution witness Marshall regarding admissions made by appellant while

Marshall and appellant were in jail together. (2 CT 483.) Defense counsel and the prosecutor presented argument and a discussion was held off the record. (2 CT 488.) The settled statement indicates that Defense Counsel Brown recalls that the discussion was about "the time frames Thomas Marshall was working with the Livermore Police Department." (51 CT 15410.) The preliminary hearing transcript also indicates that after the direct examination of Marshall, two "break[s] [were] taken" (2 CT 514.) Appellant additionally complains that there is no reporter's transcript of an in camera hearing purportedly taken during one of the two "breaks." (I AOB 19; citing 2 CT 514; see 51 CT 15410.) However, the record does not suggest that an in camera hearing was taken during either break. The settled statement indicates that Defense Counsel Brown had no recollection of a proceeding held during either of the "breaks." (51 CT 15410.) The Livermore Municipal Court Clerk's Docket and Minutes indicate the same. (5 CT 1141.)

Fourth, appellant complains about unrecorded or untranscribed bench conferences and proceedings held on November 19, 1987, at the preliminary hearing. (I AOB 19, citing 2 CT 586; 3 CT 709.) The preliminary hearing transcript indicates that on November 19, 1987, witness Marshall took the stand, and the court stated that it would ask Officer Newton about certain information the defense had requested. A "discussion [was] held off the record." The settled statement indicates that Defense Counsel Brown believed that the "discussion concerned information regarding the time frame of [when] the monetary compensation [was] paid to Thomas Marshall by the Livermore Police Department and the number of payments Marshall received." (51 CT 15412.)

Furthermore, the preliminary hearing transcript indicates that on November 19, 1987, the prosecutor objected to a response given by Marshall on cross-examination as nonresponsive, and objected to a question asked by defense

counsel as speculative and calling for a legal conclusion. The court sustained the objections and requested the parties to meet with it in chambers. The transcript indicates that a "sidebar discussion" was held. (3 CT 709; see also 5 CT 1153.) The settled statement and Livermore Municipal Court Clerk's Docket and Minutes indicate that the in-chambers discussion and sidebar discussion were one and the same. And the settled statement indicates that Defense Counsel Brown believed that the "discussion concerned simplifying the questions for the witness, Thomas Marshall." (51 CT 15412; 5 CT 1153.)

Fifth, appellant complains about unrecorded or untranscribed bench conferences and proceedings that took place at the preliminary hearing on November 24, 1987. (I AOB 19, citing 5 CT 1043, 1046, 1078, 1079.) The preliminary hearing transcript indicates that on that day defense counsel requested from the prosecutor certain information the prosecutor had developed on potential suspects. (5 CT 1045-1046.) A "discussion off the record" occurred and the court ordered a 30-minute recess to talk with the attorneys about what investigative materials might have to be provided to the defense. (5 CT 1046.) The settled statement indicates that Defense Counsel Brown believed the "discussion concerned what leeway he would be given in questioning the witness, Scott Robertson, about the focus of the police and the other leads and suspects that the police had in the case." (51 CT 15413.)

Sixth, appellant complains about a missing reporter's transcript for an August 13, 1992, in-trial and in-chambers conference regarding guilt phase instructions and exhibits. (I AOB 20, citing 8 CT 1975.) The clerk's transcript indicates that on August 13, 1992, counsel submitted proposed jury instructions, court and counsel conferred in chambers regarding jury instructions and exhibits, and the matter was continued for further conference. This proceeding was indeed unreported (8 CT 1975) but the settled statement indicates that Defense Counsel Wagner recalled "conferring on guilt phase

instructions and believe[d] the results of these discussions were later put on the record." (51 CT 15409.) The record indeed memorializes a discussion on August 14, 1992, between the court and counsel, regarding instructions, and the offering of, objections to, and admission of exhibits. (15 RT 2988-3022.)

Seventh, appellant complains about a missing reporter's transcript for a September 10, 1992 in-trial and in-chambers conference regarding penalty phase jury instructions. (I AOB 20, citing 8 CT 2018.) The clerk's transcript indeed indicates that on September 10, 1992, the court and counsel conferred in chambers regarding jury instructions. This conference went unreported. (8 CT 2018.) The settled statement indicates that Defense Counsel Wagner recalled "conferring on penalty phase instructions and believe[d] the results of these discussions were later put on the record." (51 CT 15409.) They were. (17 RT 3624-3625.)

Eighth, appellant complains about missing September 9, 1992 reporter's transcripts for in-trial bench conferences and proceedings. (I AOB 20, citing 17 RT 3601, 3611.) The reporter's transcript in existence indicates that on September 9, 1992, the prosecutor, on cross-examination, asked appellant's son what he had done with his father the last time they were together before appellant was taken into custody. (17 RT 3610-3611.) Defense counsel objected and an off-the-record discussion took place between the court and counsel in chambers. The court then overruled the objection. (17 RT 3610-3611.) The settled statement indicates that defense counsel Wagner believed the "discussion concerned [co-counsel] Spencer Strellis's beyond the scope of direct examination objection to Kenneth Burr's cross-examination question of Richard Anthony Tully . . . ." (51 CT 15416; 8 CT 1974.)

3. The Settled Statement And Court Summaries Reconstruct Many Unreported Proceedings And Discussions

In our view, the settled statement together with the court summaries made on the record reconstruct many of the unreported discussions of which appellant complains.

For example, as noted, appellant complains about unreported or untranscribed preliminary hearing proceedings from November 24, 1987. (I AOB 19, citing 5 CT 1043, 1046, 1078, 1079.) The preliminary hearing transcript indicates that on that day, a defense witness, Sergeant Robertson, testified that as part of the Olsson murder investigation he had assigned additional patrol officers to stop and question people, including those known to have a history of violence. (5 CT 1041-1042.) The court stated that defense counsel was entitled to "explore other suspects," but was uncertain of the focus of counsel's examination. (5 CT 1042.) A "discussion off the record" took place. Subsequently, the court explained that the off-the-record discussion addressed the "possible problems in light of this line of questioning." (5 CT 1043.) Similarly, the settled statement indicates that Defense Counsel Brown believed the "discussion concerned what leeway he would be given in questioning the witness, Scott Robertson, about the focus of the police and the other leads and suspects that the police had in the case." (51 CT 15413.)

Second, appellant complains about a missing June 25, 1992 reporter's transcript of a trial matter. (I AOB 20, citing 8 CT 1975.) The clerk's transcript indicates that on June 25, 1992, counsel and appellant were present in the courtroom and counsel conferred off the record regarding jury "questionnaires." (8 CT 1887.) The memorialized transcript shows that the court summarized the unreported conference as follows: That after 160 potential jurors had completed questionnaires, counsel conferred so that they could excuse certain prospective jurors for cause by way of stipulation. (2 CT

370.) The settled statement confirms this as it indicates that defense counsel believed that the "'unreported sessions' involved discussions with the prosecutor regarding juror questionnaires, which led to later stipulations made on the record." (51 CT 15414.)

Third, appellant complains about a missing July 1, 1992, reporter's transcript. (I AOB 20, citing 8 CT 1908.) The clerk's transcript indicates that on that day counsel and appellant were present in the courtroom; that counsel conferred off the record regarding "questionnaires"; and that the court excused prospective jurors for cause by way of stipulation of counsel. (8 CT 1908.) The reporter's transcript shows that the court explained, on the record, the unreported conference in detail:

> THE COURT: The record will reflect defendant is present, as are all counsel. Further, that counsel have been, as I understand it, conferring this morning in the courtroom, as I further understand it, in the presence of the defendant with respect to the questionnaires completed by the third and fourth jury panels that have been assembled here with regard to prospective jurors, and I'm referring now to the morning panel of June 29th and the afternoon panel of June 29th.
>
> It's my further understanding that based on their conference that counsel have agreed that certain jurors who I will identify by way of juror number on each respective list of jurors will be excused for cause pursuant to stipulation, and that the range of reasons which underlie the stipulations are the same as were earlier set forth on the record with regard to the first two panels; am I correct, Mr. [Prosecutor]?
>
> [THE PROSECUTOR]: Yes, your Honor.
>
> THE COURT: [Defense Counsel]?
>
> [Defense Counsel]: Yes, your Honor.

(2 RT 462.)

At this point the court identified the jurors it would excuse for cause by way of stipulation. (2 RT 462-464.) The settled statement, likewise, indicates that Defense Counsel Wagner believed the "unreported sessions involved discussions with the prosecutor regarding juror questionnaires, which led to

later stipulations made on the record." (51 CT 15414.)

Fourth, appellant complains about an unrecorded or untranscribed bench conference and proceeding that took place during trial on August 12, 1992. (I AOB 20, citing 14 RT 2927.) The reporter's transcript in existence for that day indicates that after the lunch recess, defense counsel withdrew the last question he had asked Criminalist Binkley regarding DNA testing of hair, "in light of the stipulation." (14 RT 2977.) After the trial court excused Binkley as a witness, the prosecutor placed on the record the stipulation between counsel that while "DNA testing on hair torn from the head with tissue on the roots may provide information as to the donor of the hair," the hair at issue in this case, hair found on an afghan or blanket in Olsson's bedroom "remain unidentified, that is, it doesn't belong to Sandy Olsson, does not belong to the defendant." (14 RT 2979.) "Those two hairs were not pulled from the head, and thus do not have the necessary tissue for DNA processing. Thus there is very little likelihood that DNA testing would provide any information about the donor of that hair." (14 RT 2979.) The clerk's transcript shows the same. (8 CT 1956.) While the settled statement indicates that there exists no reported transcript of the "proceeding at which a stipulation was discussed," the settled statement also indicates that Defense Counsel Wagner "vaguely recalls that as a result of his question to Sharon Binkley at RT 2962:24 ("You can DNA type them, can't you?"), an in camera discussion was held and the parties reached a stipulation that appears at RT 2979. . . ." (51 CT 15415.)

Fifth, appellant complains about the untranscribed or unreported bench conference and proceeding held September 3, 1992, during trial. Appellant's citation to the record in this regard (I AOB 20, citing 16 RT 3404), makes clear that he is referring to an unreported proceeding that took place on September 1, 1992. (See 16 RT 3398.) The reporter's transcript in existence indicates that on Tuesday, September 1, 1992, out of the presence of the jury, the court made

an extensive ruling regarding victim impact evidence. (16 RT 3404.) Afterwards, the court stated it was ready to proceed with the next phase of the proceedings, but was informed that the jury had not been asked to return until Thursday morning. An off-the-record discussion then took place. (16 RT 3398-3404.) The court stated for the record that during the unreported discussion, the parties had requested a copy of the court's ruling on the victim impact evidence, and the court agreed to make copies available as soon as possible. (16 RT 3404.) The settled statement confirms this, as Defense Counsel Wagner believe[ed] the "discussion concerned the court's issuance of a written ruling on victim impact evidence." (51 CT 15415.)

Sixth, appellant complains about three unrecorded or untranscribed bench conferences and proceedings which occurred during trial on September 15, 1992. (I AOB 20, citing 18 RT 3727, 3731, 3816.) With respect to one of those complaints, the reporter's transcript indicates that at the end of September 15, and at the end of the prosecutor's closing argument, the court called defense counsel to the bench, and then held an "off the record discussion" between it and all counsel in chambers. (18 RT 3816.) After that unreported discussion, the court stated:

> All right, ladies and gentlemen, as I expect you have surmised that we've been discussing the issue on scheduling. Based on the that discussion, in the sequence here, it would be an appropriate place to take the afternoon recess a bit early.

(18 RT 3816.)

Similarly, the settled statement indicates that Defense Counsel Wagner believed that the "conversation concerned Mr. Wagner's request to begin the final argument" the next day. (51 CT 15416.)

Seventh, appellant complains about an unrecorded or untranscribed bench conference and proceeding which occurred during trial on September 16, 1992. Appellant's citation to the record (I AOB 20, citing 18 RT 3890) makes clear

that he is referring to an unreported matter from September 17, 1992. (18 RT 3890.) The reporter's transcript in existence for that day shows that an unreported conference between the court and counsel took place to discuss a question posed by the jury. (18 RT 3890.) The court stated, for the record:

> Yesterday, the court received from the jury the following request, it reads: "We, the jury in the above entitled cause, request the following: Life definition—" the word "definition" is crossed out, "definition of life," and then it goes on to say, "legal definition of life in prison without possibility of parole."
>
> The court and counsel have conferred with regard to the issue of a response to this matter, and it has been agreed the court will respond to this inquiry as follows: for the purpose of determining the appropriate sentence for this defendant, you should assume that either the death penalty or confinement in state prison for life without the possibility of parole would be carried out. You are not to consider or speculate as to any other possibility or any circumstance that might preclude either of the two penalties from being carried out.
>
> And that response is based in part on *People v. Thomas*, 45 Cal.3d 131, *People v. Witt* at 51 Cal.3d 620, *People v. Ramos* 37 Cal.3d 159, and *People v. Fiero*, FIERO, [*sic*] at 1 Cal. 4 at page 250.
>
> All right. With that, Mr. Bailiff, if you'll bring the jury down, we will respond to the inquiry.

(18 RT 3890-3891.)

Likewise, the settled statement indicates that defense counsel Wagner "knows that this discussion involved answering the jury's question and considering various authorities, which resulted in the agreement that is stated on the record." (51 CT 15416.)

As demonstrated above, the settled statement, together with the court summaries made on the record, reconstruct many of the unreported discussions of which appellant complains.

4. Court Summaries Alone Reconstruct Many Unreported Proceedings And Discussions

The appellate record before this Court reflects that the trial court and counsel put on the record the sum and substance of many of the unreported discussions appellant is currently protesting the absence of.

For example, appellant complains about an unrecorded or untranscribed bench conference and proceeding that took place during trial on July 24, 1992. (I AOB 20, citing 1 RT 190.) The reporter's transcript in existence for July 24, 1992, shows that at some point the court and counsel met off the record to review photographs and videotapes. (9 RT 1905.) Both counsel stated for the record a detailed account of their requests and objections regarding the admission of the photographs and video tape into evidence. (9 RT 1905-1925.) (It thus matters not that in the settled statement, Defense Counsel Wagner stated that he "did not recall this review of the exhibits." (51 CT 15414.))

Second, appellant complains about an unrecorded or untranscribed bench conference and proceeding that took place during trial on August 4, 1992. (I AOB 20, citing 13 RT 2522.) The reporter's transcript for that day shows the prosecutor asking prosecution witness John Chandler if appellant had a hard time keeping a job six months before the murder occurred. Defense counsel objected on the grounds of relevance and requested an offer of proof outside the presence of the jury. The court and counsel then conferred off the record and the court overruled the objection. (13 RT 2522-2523.) The court, prior to breaking for lunch and outside the presence of the jury, put on the record the details of the bench conference:

> I simply want to memorialize for the record the subject matter of the last bench conference, which occurred at approximately 11:45. It was with respect to the witness Chandler, and, with regard to that, there had been a question asked by [the prosecutor] generally relating to the subject matter of the defendant's employment situation prior to the killing. That was objected to. We—there was an approach to the bench

on that issue. There was discussion relating to the relevance of that question, also with regard to the relevance of the defendant's appearance during the period that was being discussed before the killing and also with regard to the issue of possible drug use or involvement with drugs.

At the end of that discussion the Court indicated that the Court would, and the record reflects that, the Court did overrule the objection relative to the defendant's work history and the period of time being discussed before the killing. Finding there to be relevance to that line of inquiry also I permitted the prosecutor, and indicated that I would to ask specific questions relative to the defendant's appearance during that period.

I also indicated that there was not to be, and there was not, any specific question relating to the subject of drug use and particularly this witnesses conclusion as to what situation may have or not related in the change in appearance that he attributed to the defendant.

And I think, if you agree with the accuracy of that recollection, we'll take our recess and return at 1:45.

(13 RT 2536-2537.)

Third, appellant complains about an unrecorded or untranscribed bench conference and proceeding that took place during trial on August 11, 1992. (I AOB 20, citing 14 RT 2903.) The reporter's transcript in existence for that day indicates that at one point the prosecutor asked police witness Robertson about Thomas Pillard, a.k.a. "Doubting Thomas," a potential suspect in the murder investigation. Defense counsel objected to the questions, and the court and counsel then conferred off the record. (14 RT 2902-2903.) The court, at the end of direct examination and after excusing the jurors for the day, memorialized the bench conferences held earlier that afternoon. In relevant part, the court stated:

At approximately 3:40 p.m. there was a further discussion relating to a question by [the prosecutor] concerning the issue of the investigation relating to the individual identified as Thomas Pillard and as to whether or not there had been discussion between the police and Mr. Pillard's father. There was a discussion at bench relating to the relevance of that line of questioning.

> The Court indicated at the conclusion of that discussion the Court would permit a further question, in addition to the questions that had already been asked and to which there were answers relating to that subject, would permit an additional question concerning whether or not the police had conducted an investigation relating to Mr. Pillard.

(14 CT 2924-2925.)

Fourth, as noted earlier, appellant complains about untranscribed or unreported bench conferences and proceedings that took place during trial on September 15, 1992. (I AOB 20, citing 18 RT 3727, 3731, 3816.) The reporter's transcript in existence for that day shows the prosecutor, in his penalty phase opening summation, arguing victim impact evidence. Defense counsel objected twice, each time followed by a "discussion in chambers, not reported." (18 RT 3727, 3731.) Following the noon recess, the court memorialized for the record the unreported conferences, as follows:

> I simply wanted to memorialize for our record that there were two bench conferences this morning during the course of the prosecution argument, both were requests of the defense counsel.
>
> With regard to the first bench conference, counsel expressed concern relative to speculation and argument concerning the victim's state of mind. There was discussion by court and counsel with regard to recognition of certain permissible argument concerning the—placing the jury in the victim's place, and certain argument being permissible in that regard. But the court indicated that such argument was not without limitation, that victim impact argument like victim impact evidence was likewise, in the court's view, not without limitation, and that that was the guidance provided at that time in terms of that dimension of argument.
>
> There was a second conference relating to a portion of the prosecution having utilized certain charts as demonstrative assistance throughout the course of argument. [Defense Counsel] Mr. Wagner and Mr. Strellis raised a concern about a portion of one chart which I believe reflected something to the effect of bargaining with him. And with regard—there is an objection made to that. That objection, the objection basically, as I recall, being that such a statement was without supporting the evidence, it was inviting the jury to speculate. The court sustained that objection and at defense request gave a—defense requested a specific admonition which was given. That's my recollection of those

two conferences.

(18 RT 3758-3759.)

The prosecutor added that he supplied counsel with a hard copy of the chart which had the phrase "dealing with bargaining" on it, and defense counsel acknowledged this. (18 RT 3759-3760.)

5. The Existing Record Apart From The Court Summaries And Settled Statement Reconstruct Many Unreported Proceedings And Discussions

The existing reporter's and clerk's transcripts indicate that at least four of the unreported or untranscribed bench conferences and proceedings appellant protests dealt only with routine scheduling or procedural matters.

For example, as noted previously, appellant complains about unreported or untranscribed matters from the preliminary hearing on November 24, 1987. (I AOB 19, citing 5 CT 1043, 1046, 1078, 1079.) The preliminary hearing transcript in existence for that day shows that after the defense rested, the court asked if the prosecutor and defense counsel wanted to present argument then or later. Defense counsel stated that he wanted the court to read certain newspaper articles before argument, after which the parties engaged in an off-the-record discussion. The court then assigned the date and time for argument. (5 CT 1079.) (It matters not that the settled statement indicates Assistant Public Defender Brown could not recall this unreported discussion. (51 CT 15413.))

Second, appellant complains about an unreported or untranscribed bench conference and proceeding that occurred during trial on June 11, 1992. (I AOB 20, citing 1 RT 110.) The record shows that on that day, at a pretrial proceeding, while defense counsel was cross-examining a witness, the court ordered witnesses, who were to testify at any proceeding in the case, to not be present in the courtroom. There was then a "discussion off the record," and defense counsel resumed questioning the witness. (1 RT 110.) The clerk's

transcript indicates that during the off-the-record discussion the court and counsel marked several exhibits for identification. (7 CT 1844.)

Third, appellant complains about an unreported or untranscribed bench conference and proceeding that occurred during trial on August 20, 1992. (I AOB 20, citing 16 RT 3261.) The reporter's transcript in existence for August 20, 1992, indicates that after the jury began to deliberate, the court stated that there remained matters for it to address with counsel: A review of the verdict forms, items of evidence referred to as the "envelopes" (which the court had "already covered [] on the record"), and how to accommodate any jury request for tapes and transcripts. (16 RT 3261.) The court ordered a recess and an off-the-record discussion occurred. (16 RT 3261.) Undoubtedly that discussion concerned the insignificant procedural matters.

Fourth, appellant complains about an unreported or untranscribed bench conference and proceeding that occurred during trial on August 27, 1992. (I AOB 20, citing 16 RT 3335.) The reporter's transcript indicates that at one point on that day the court stated that it had conducted an unreported "brief scheduling conference" with counsel. (16 RT 3335.)

Thus, it appears that the above unreported proceedings had to do only with scheduling or other purely procedural events. Appellant has failed to indicate what the missing records might otherwise contain and there is "no realistic possibility that anything that occurred during these unreported conferences could have resulted in reversal of the judgment." (*People v. Seaton* (2001) 26 Cal.4th 598, 700.)

6. Nothing That Occurred In The Unreported Proceedings And Discussions That Cannot Be Reconstructed Could Have Resulted In Reversible Error

Just as the existing record reconstructs many of the missing reporter's transcripts and shows there is "no realistic possibility that anything that occurred during these unreported conferences could have resulted in reversal of the judgment" (*People v. Seaton, supra*, 26 Cal.4th at pp. 698-701), that same conclusion applies to the missing transcripts that the record and parties cannot reconstruct.

For example, appellant complains about unreported or untranscribed bench conferences and proceedings from the preliminary hearing on November 18 and 19, 1987. (I AOB 19, citing 2 CT 526, 538, 564, 709.) At one point on that day the court held an in camera hearing with Deputy Jensen and Detective Newton regarding their claimed privilege to not disclose information regarding work that witness Marshall had done for the Livermore police department. (3 CT 538.) This event is not memorialized by the reporter's transcript, and the settled statement indicates that Assistant Public Defender Brown "was not present for the in camera proceeding." (ACT 8; 51 RT 15411.)

The preliminary hearing transcript also indicates that on November 19, 1987, defense counsel on cross-examination, twice asked Marshall about whether he and jailmate Shane had talked about Shane threatening appellant's life. There was a "discussion off the record," after which defense counsel continued to ask Marshall about his conversation with Shane. (3 CT 746-747.) The reporter's transcript does not memorialize this discussion, and the settled statement reads that Defense Counsel Brown did not recall this sidebar discussion. (51 CT 15413.)

It is unfortunate that the trial court and counsel could not reconstruct what was specifically discussed between the court, Jensen, and Newton in camera at the preliminary hearing, or what the court and counsel discussed at the bench

during cross-examination of Marshall during the preliminary hearing. However, Marshall never testified at trial and therefore appellant cannot demonstrate any unfairness at his trial. (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.)

This same conclusion applies to the unreconstructed bench conference and proceeding that at one point occurred during the preliminary hearing on November 24, 1987. (I AOB 19, citing 5 CT 1078, 1079.) The preliminary hearing transcript indicates that one point on that day defense counsel asked the court to strike testimony about the type of bed clothing Olsson wore at night when her father stayed at her house. (5 CT 1072-1073, 1075-1076, 1078.) There was a "discussion off the record," after which the court admitted the testimony for the purpose of showing that Olsson wore nightclothes when she went to bed. (5 CT 1078-1079.) It is unfortunate that the trial court and counsel could not reconstruct what they discussed at this bench conference during the preliminary hearing. However, appellant objected to this same testimony at trial and the discussion as to the admissibility of this evidence was fully placed on the record. (14 RT 2757-2762.) He thus can suffer no prejudice from the missing portion of the preliminary hearing transcript. (*People v. Pompa-Ortiz , supra*, 27 Cal.3d 519, 529.)

We recognize that appellant protests that reporter's transcripts are missing for proceedings that occurred on these dates: June 17, 1991; September 23, 1991; November 25, 1991; January 30, 1992; February 11, 1992; March 10, 1992; March 20, 1992; April 17, 1992; May 6, 1992; May 26, 1992; and June 9, 1992. (I AOB 16, 19-20, & fn. 6.) What occurred on those dates has not been definitively reconstructed. However, we know from the clerk's transcript and the settled statement that counsel waived the presence of a court reporter for the proceedings of February 11, 1992; March 10, 1992; March 20, 1992; April 17, 1992; May 6, 1992; May 26, 1992, and June 9, 1992. (7 CT 1739,

1744, 1745, 1750, 1751, 1825.) We also know that the majority of the proceedings dealt only with scheduling matters (such as the setting of a trial date). (7 CT 1665, 1666, 1668, 1737, 1738, 1739, 1744, 1745, 1750, 1751, 1804; 51 CT 15405-15409.)

Finally, appellant protests that the trial court's "personal notes" are not part of the appellate record. (I AOB 21.) On December 4, 1992, the court denied appellant's motion to modify the death verdict to one of life in prison without the possibility of parole. (18 RT 3914.) The court stated that, in making its determination, it had examined and reviewed all evidence, and "also reviewed its own personal notes relating to the evidence received as to all phases of the case." (18 RT 3914.) The absence of those notes from the record has not prevented appellant from litigating any issue the case presents, where the court's decisions and the evidence in support of the decisions are contained in the record.

In summary, any missing portions of the record in this case do not foreclose adequate and meaningful appellate review. The settled statement, the clerk's transcript, the reporter's transcript, and the summaries of the court and counsel memorializing for the record the unrecorded proceedings, provide the content for most of the unreported proceedings and discussions. (51 CT 15396-15417.) Appellant is simply wrong when he contends that the memorialized court summaries "fail to reflect the substance of the proceedings" and that the "settled statement and augmented record do not adequately reconstruct the substance of the missing records and incomplete transcripts." (I AOB 16-17.)

In addition, many of the unreported proceedings or discussions dealt with routine scheduling and procedural matters, how to preserve physical evidence, or with the clerical marking of exhibits. It is also simply inconceivable that anything of consequence could have happened at or prior to the preliminary hearing, which are when many of the unreported proceedings that appellant

complains of took place. (*People v. Cook* (2006) 39 Cal.4th 566, 586.) Accordingly, one can hardly call those missing portions of the record "substantial" in the sense that they affect the ability of this Court to conduct a meaningful review. (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1334, fn. 70.) The record is more than "sufficient to ensure that there is no substantial risk the death sentence has been arbitrarily imposed." (*People v. Howard*, *supra*, 1 Cal.4th at p. 1166.)

People v. Pinholster (1992) 1 Cal.4th 865, is instructive. There, the trial court refused to order the reporter to memorialize every bench conference between the court and counsel. Thus, 133 sidebar conferences went unreported. (*Id.* at p. 919.) Defendant argued to this Court that the trial court's action violated, among other thing, his right to due process, to effective assistance of counsel, and to a fair and reliable review of the guilt and penalty determinations as guaranteed by article I, sections 7, 15, 16 and 17 of the California Constitution, and by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (1 Cal.4th at p. 919.) This Court rejected the claim:

> We are convinced that no "substantial" portion of the record is missing in this case. The record in this appeal consists of 56 volumes of reporter's transcripts, covering 7,557 pages, 4 volumes of clerk's transcripts, covering 1,208 pages, as well as augmented clerk's and reporter's transcripts of several volumes. We have before us the reporter's transcript of the preliminary hearing, of hearings on all the pretrial motions, of voir dire, of the opening and closing arguments of the prosecutor and both defense counsel, of the testimony of every witness, and of the trial court's every word to the jury, including, of course, jury instructions. We have all the parties' pleadings and written motions, as well as the reporter's transcript of the hearing on defendant's motion for new trial, the application for modification of sentence, and the formal sentencing. For the purpose of appeal, a settled statement was prepared, supplying the recollection of the parties and the court of the content of the unreported sidebar discussions. The parties were able to fully settle the record as to 66 sidebar discussions; as to 40 more, they recalled at least part of the discussion, and as to 27 discussions, no settled statement is provided. Of the 133 unreported

> sidebar discussions, 58 took place during jury selection and before the taking of testimony. To put the matter in perspective, we note that the trial extended over 53 court days. Most importantly, the trial court told counsel it was appropriate to put their objections on the record; it was only their sidebar arguments the court refused to order reported in every instance. Many sidebar conferences were in fact reported. Counsel followed the court's advice; the record bristles with hundreds of evidentiary and other objections, and the court's rulings thereon. With respect to every issue raised on appeal, we have found the record sufficient to permit review. It is in this context that we must find that any abuse of discretion, assuming it existed, was not prejudicial, because the record is clearly adequate for meaningful appellate review.

(*People v. Pinholster*, *supra*, 1 Cal.4th at pp. 921-922.)

Likewise here, the record in this appeal consists of 18 volumes of reporter's transcripts, covering 3,921 pages, and 51 volumes of clerk's transcripts, covering 15,463 pages. There are also additional volumes of reporter's and augmented reporter's transcripts. This Court has before it the reporter's transcript of the preliminary hearing, of the hearings of the pretrial motions, of voir dire, of the opening and closing arguments of the prosecutor and defense counsel, of the testimony of every witness, and of the trial court's every word to the entire jury, including, of course, jury instructions. It appears that this Court has before it all the parties' pleadings and written motions, as well as the reporter's transcript of the hearing for the application for modification of the verdict, and the formal sentencing.

As in *Pinholster*, the present record is clearly adequate for appellate review. This conclusion is supported by the fact that in discussing the record appellant not only does not focus on what the record contains, but also fails to persuasively assert that what is missing has prevented him from litigating any issue the case presents.

Finally, appellant argues that "if this Court fails to find prejudice," in the alternative it must apply a reversible per se standard whenever there are missing and unreconstructed portions of an appellate record in a capital case. (I AOB

22.) However, "[w]ith the exception of the Fifth Circuit, every Court of Appeals that has addressed the issue of incomplete or unavailable transcripts has required that the appellant show that the Act's violation specifically prejudiced their ability to perfect an appeal." (*United States v. Kelly* (8th Cir. 1999) 167 F.3d 436, 438; see *United States v. Brand* (1st Cir. 1996) 80 F.3d 560, 563; *United States v. Sierra* (3rd Cir. 1992) 981 F.2d 123, 125; *United States v. Gallo* (6th Cir. 1985) 763 F.2d 1504, 1530; *United States v. Antoine* (9th Cir. 1990) 906 F.2d 1379, 1381.)

This Court's rule is that prejudice is not presumed from missing appellate records. This Court should not abandon its rule that it is the defendant's burden to show that deficiencies in the record are prejudicial (*People v. Howard*, *supra*, 1 Cal.4th at p. 1165), in favor of a rule of per se reversal whenever any portion of the record is missing, no matter how insignificant. This Court should continue to weigh the burdens and benefits of reversal on a case-by-case basis so that a defendant does not get the windfall of reversal where, as here, nothing suggests that the missing portions of the appellate record includes anything of consequence. Appellant's first contention fails in its entirety.

II.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S SUPPRESSION MOTION

Appellant contends that on March 7, 1987, in many different ways, the police violated numerous of his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as his rights under article I of the California Constitution. Appellant contends that these violations led to the discovery of the fingerprint evidence against him, as well as the inculpatory statements he gave to the authorities on March 27 and March 30, 1987. Appellant assigns prejudicial error to the trial court's rejection of his constitutional arguments and its concomitant ruling refusing to suppress the fingerprint evidence and his inculpatory statements. (I AOB 24-65.)

Appellant claims are baseless. He was not the victim of any constitutional violation. And even if he was the victim of one or more such violations, the discovery of the inculpatory finger and palm print evidence was not tainted by or the fruit of the illegalities (see *Wong Sun v. United States* (1963) 371 U.S. 471 [83 S.Ct. 407, 9 L.Ed.2d 441]), and the police would have inevitably obtained that evidence in any event. Accordingly, appellant would have also inevitably given his incriminating statements. The trial court properly denied his suppression motion.

A. The Evidence Adduced At The Suppression Hearing Is Denied

After the discovery of the homicide of Sandy Olsson and the recovery, on the golf course behind her house, of a Buck knife with a fingerprint and partial palm print on it, the Livermore police conducted a neighborhood check by contacting the residents of 150 to 200 houses in Olsson's neighborhood for leads to potential suspects. The police marked, on an area map, the houses where they successfully made contact with a person. (3/30/92 RT 4-9, 16-17,

33, 41-46.)

Between July 1986 and March 1987, police investigated about 30 people as possible suspects. Appellant was not included. (3/30/92 RT 8-9.) Also during that time period the Livermore police sent all of the fingerprints in their records to the Department of Justice for comparison with the fingerprint on the recovered Buck knife. (3/30/92 RT 8, 17-18.) Appellant's fingerprints from a 1973 juvenile arrest were among those sent and compared. (3/30/92 RT 10, 18-19, 26.) The analyst only compared the right-middle fingerprint on the fingerprint cards provided him by the Livermore police with the fingerprint found on the Buck knife. (3/30/92 RT 19.) He made no match. (3/30/92 RT 8-9, 19.)

On March 7, 1987, at about 8:00 p.m., as Livermore police officers Trudeau, Painter, and Shweib surveilled the residence of a known narcotics offender and probationer, Kenneth Perry, at 353 North "I" Street, two men in a Fiat drove by twice and then parked three car lengths away from Perry's residence. (3/30/92 RT 49-52, 108.) Trudeau told Painter that he recognized the passenger as Ed Snyder, but could not recall the driver's name although he (Trudeau) had previously stopped the Fiat. (3/30/92 RT 50-52, 90, 108-109.)

Snyder stayed in the car as the driver exited and walked to Perry's residence. (3/30/92 RT 53.) Shortly thereafter, Perry and the driver looked out a window at Officer Shweib, as he drove away on a call with his overhead lights on. (3/30/92 RT 55, 86-87.) Painter told Trudeau that he thought appellant was the driver of the Fiat. (3/30/92 RT 53, 109.) Painter explained that about a week earlier he had taken a report in which appellant was suspected of vandalizing a truck with a knife. Appellant had been purportedly retaliating for a narcotics transaction gone sour, and Painter further told Trudeau that the vandalism victim and a friend had claimed appellant was a heavy narcotics user who was normally armed. Painter advised that appellant

had a suspended driver's license and that Snyder had a warrant out for his arrest. (3/30/92 RT 53-54, 70-71, 76, 84-85, 91, 109-111, 119-120; 4/6/92 RT 126-127, 134-135.)

Twenty-five minutes later appellant walked out of Perry's apartment. (3/30/92 RT 53-55.) He got in the Fiat, backed up one-half block without turning on his lights, made a U-turn, and drove northbound. Officer Trudeau followed him for six blocks, confirmed that appellant had a suspended license, and then initiated a traffic stop. (3/30/92 RT 56-57, 76-78, 92, 109.) Officer Painter followed two blocks behind. (3/30/92 RT 57-58.)

Trudeau proceeded to the driver's side of the Fiat and asked appellant for his registration and driver's license. Appellant spent a short time looking for his car registration and finally, provided only his license, which identified him as Richard Tully and his address as 1572 Hollyhock, in Livermore. (3/30/92 RT 58, 89-90, 101.) Meanwhile, Painter, rejoined by Officer Shweib, stood at the passenger side of the Fiat. Painter spoke to Snyder and arrested him. Painter and Shweib moved Snyder to a patrol car. (3/30/92 RT 58-59, 90, 93, 101, 111-112; 4/6/92 RT 125.)

As Shweib waited in the patrol car with Snyder, Painter walked back to appellant, who was standing outside the driver's side door of the Fiat with Trudeau. When Trudeau walked back to his patrol car to complete a citation for appellant having driven with a suspended license, Painter began speaking with appellant about the prior vandalism incident. (3/30/92 RT 59-60, 74-76, 95-97, 113-114; 4/6/92 RT 125, 127, 135-136, 139.) Painter told appellant that he (the officer) had heard that appellant was a heavy narcotics user, and was "heavily" armed with a knife. Painter told appellant that he wanted to search him and asked him for permission to do so. (3/30/92 RT 60, 75, 90, 96-97, 114; 4/6/92 RT 128-129, 131, 137.) "I told him I would like to search him; if he mind if I search him." (3/30/92 RT 114.) Appellant responded

affirmatively. (3/30/92 RT 61, 114.) "'Sure, I don't have anything on me.'" (3/30/92 RT 114.) Using a flashlight, Officer Painter looked inside appellant's belt line and pockets and removed a clear plastic bindle containing white powder from one of appellant's front pants' pockets. (3/30/92 RT 94, 114-115, 131-132, 138, 140.) Painter believed the powder was methamphetamine and gave it to Officer Trudeau. (3/30/92 RT 61, 115-116, 135.) Trudeau then asked appellant if he could search the Fiat. Appellant replied, "'Sure, go ahead.'" (3/30/92 RT 62, 94, 115-116; 4/6/92 RT 132-134, 138, 140.)

Under the ashtray Trudeau found two or three hyperdermic syringes, and a bent and burned spoon. At that point the officers arrested appellant for possession of methamphetamine, possession of hyperdermic syringes, and driving with a suspended driver's license. (3/30/92 RT 62-63, 116.) The police transported appellant to the Livermore Police Station. (3/30/92 RT 63, 116-117.)

At headquarters Trudeau conducted another search of appellant. He found seven or eight clear plastic coin bags containing methamphetamine in appellant's underwear. (3/30/92 RT 63, 98, 117.) Trudeau then read appellant his *Miranda* rights. Appellant waived them. (3/30/92 RT 63-64, 79.) Trudeau explained to appellant that he was going to ask him questions about the items the officers had found on him. Appellant said he didn't want to talk, so Trudeau stopped the conversation. (3/30/92 RT 64-65, 79-80.) Subsequently, however, appellant initiated a conversation concerning his desire to not go to Santa Rita jail that evening. (3/30/92 RT 65.) Trudeau replied that there were ways for that not to happen; that perhaps they could come to an agreement where appellant could "work off his offense." (3/30/92 RT 65.)

At that point appellant and Trudeau talked about who appellant could buy methamphetamine from. (3/30/92 RT 65.) Trudeau also asked appellant if he wanted to talk to the narcotics detective. Appellant said yes. (3/30/92/RT 65.)

As they then waited for that narcotics officer, Detective Jensen, Trudeau and appellant talked about appellant's background. (3/30/92 RT 65-66.) Appellant discussed his service in the Marine Corps, his problems with home life, and his problems with methamphetamine use, including that he was using four or five times a day by injection. (3/30/92 RT 66.) Appellant also admitted that he supported his habit by breaking into cars and houses and selling the stolen items, and that he was being treated for a stomach problem at the Veteran's Hospital. (3/30/92 RT 66.) Officer Trudeau told appellant that the information regarding his methamphetamine use and how he supported his habit would not be used against him and Trudeau did not include this information in his police report. (3/30/92 RT 81.) When Detective Jensen arrived he spoke to appellant privately about striking a deal. Later Jensen told Trudeau that appellant had agreed to "work off his case." (3/30/92 RT 67.) Because of that the police released appellant that night. (3/30/92 RT 67, 103.)

A few days later, Trudeau realized that he still had possession of appellant's driver's license from the traffic stop. (3/30/92 RT 68-69.) Trudeau called Jensen to see if he was in touch with appellant. Jensen replied that he was going to file the original charges against appellant because appellant had breached his end of their bargain. (3/30/92 RT 69.) When Trudeau drove to the address shown on appellant's driver's license, 1572 Hollyhock in Livermore, he realized that appellant lived only two houses away from where homicide victim Olsson had lived. (3/30/92 RT 69, 87-89.) Trudeau also recalled that appellant had said he was getting treatment for a stomach condition at the Veteran's Hospital, and Trudeau knew that Olsson had been a nurse at the Livermore VA Hospital. (3/30/92 RT 69-70.) Trudeau also recalled that the FBI profile of the Olsson killer indicated that the perpetrator more than likely lived in the area, knew the area, and was probably a drug user. (3/30/92 RT 71.) Trudeau thus believed appellant to be a suspect in the Olsson killing.

(3/30/92 RT 87.) Trudeau found no one home at 1572 Hollyhock. (3/30/92 RT 71.)

On March 17 or 18, 1987, Officer Trudeau contacted Officer Robertson. According to Trudeau, he told Robertson about March 7 and the contact with appellant and the subsequent breached deal. (3/30/92 RT 71-72, 81-82.) Trudeau also told Robertson about his attempt to return appellant's driver's license, that appellant lived two houses away from victim Olsson, and that appellant had stated he was a methamphetamine user who broke into houses to support his habit and who was being treated at the VA Hospital where Olsson had worked. (3/30/92 RT 72, 83-84.)

Robertson testified that he did not recall Trudeau telling him about appellant's statements concerning appellant's methamphetamine use and how he supported his habit. (3/30/92 RT 21-22, 25-29.) Robertson did recall that Trudeau told him about the traffic stop and searches, and that Trudeau had discovered that appellant lived only a couple doors away from the victim's house. (3/30/32 9-10, 21-23, 25-26.) Trudeau also suggested that perhaps appellant's prints should be re-checked against the prints found in the Olsson case. (3/30/92 RT 10, 21, 26-28.) Trudeau and Robertson briefly looked at the area map used for the neighborhood check. There was no indication that appellant lived in the area or had been contacted. (3/30/92 RT 33-34, 72-73, 81, 83-84.)

As Trudeau left the office he ran into Officer Leal and told him what he suspected about appellant. Leal replied that he knew of appellant because he had recently taken a report about a knife crime in which appellant was a suspect. (3/30/92 RT 73, 85.) Trudeau then relayed this additional information to Robertson. (3/30/92 RT 10, 73.) Robertson ran a records check on appellant, learned of past arrests, and found in the police files appellant's fingerprints from the 1973 juvenile case. (3/30/92 RT 10; 4/6/92 RT 172.)

On March 25, 1987, Robertson hand carried appellant's 1973 prints to Sacramento and gave them to analyst Rienti at the DOJ. Rienti determined that appellant's right-ring fingerprint—as opposed to the right-middle fingerprint compared previously—matched the fingerprint on the Buck knife. (3/30/92 RT 10-11, 19, 26-27.)

On March 27, 1987, at 11:10 a.m., a detective called and advised Livermore Police Sergeant Jack Stewart that appellant's car was at 4097 Churchill Drive in Pleasanton. (4/6/92 RT 148.) The police had two warrants for appellant's arrest (neither was for the murder of Olsson). (4/6/92 RT 149, 169.) Stewart notified Officer Robertson of this development, and Robertson was aware that this was the address where Vicky Tully, appellant's wife, lived. (4/6/92 RT 149-150, 169.) Officers immediately traveled there. (3/30/92 RT 12; 4/6/92 RT 150.) When Stewart knocked on the front door a woman answered and not only said that Mrs. Tully was not home, but that appellant was not allowed to be there. (4/6/92 RT 150-151.) Stewart identified himself as a police officer and asked the woman if they could talk to her about the whereabouts of appellant. The woman invited the officers inside. (4/06/92 RT 151-152.) After officers walked into the living room Stewart asked the woman if she knew where Mrs. Tully or appellant were. The woman repeated that she didn't know where Mrs. Tully was and that appellant was not allowed in the house. (4/6/92 RT 152.)

Stewart next heard a door open down the hall and saw who he believed to be Vicky Tully walk out of one room and towards another. Stewart asked her if she was Vicky Tully. (4/5/92 RT 152, 161, 164.) She replied affirmatively and asked why. (4/6/92 RT 152-153.) Stewart identified himself and said he was looking for appellant. Mrs. Tully looked at the door she was walking towards and said, "'Yes, Richard is in there. He is asleep. I will get him. He doesn't have any clothes on.'" (4/6/92 RT 153, 165.) Mrs. Tully opened the

door to the room. Stewart saw a man laying on his stomach on the bed. Stewart drew his weapon and quickly moved down the hall and told Mrs. Tully that the police would retrieve appellant. (4/06/92 RT 153-154, 160, 162, 165-167.) Sergeant Stewart and another officer entered the room. They yelled at the man to wake up, asked if he was appellant, and Stewart identified himself as a police officer. (4/6/92 RT 154, 167.) The man slowly awoke and said, "'Yeah, yeah, I'm Richard.'" (4/6/92 RT 154.) Stewart told him the police had a warrant for his arrest and handcuffed him. (3/30/92 RT 12-13; 4/06/92 RT 154-155, 169.)

Officer Robertson spoke to Mrs. Tully on the front porch. (3/30/92 RT 13-14, 30.) She gave signed consent for the police to search the bedroom where appellant was found. (3/30/92 RT 14, 30; 4/6/92 RT 155, 168.) From the bedroom the officers seized clothes and indicia of appellant's identity. (3/30/92 RT 15-16.)

Officers transported appellant to the police department. (3/30/92 RT 12; 4/06/92 RT 154-155.) There, Robertson arrested appellant for murder. (3/30/92 RT 24.) Appellant gave his address as 1572 Hollyhock in Livermore. (4/6/92 RT 170.) The police fingerprinted appellant. (3/30/92 RT 16.) A few days later, the police drove the prints to Sacramento and gave them to analyst Rienti. (3/30/92 RT 16.) Appellant's palm print matched the partial palm print on the Buck knife. (3/30/92 RT 16-17.)

On March 27, 1987, appellant made a statement to law enforcement at the police department. (3/30/92 RT 17, 21; see pp. 25-26, *ante*.) On March 30, 1987, at the Santa Rita jail, appellant made two additional statements to law enforcement. (3/30/92 RT 17, 21; see pp. 26-35, *ante*.)

We will present additional facts adduced at the suppression hearing where relevant to our discussion of the issues.

B. Appellant's Arguments At Trial And On Appeal

At trial appellant contended first that the methamphetamine the police seized from his person at the traffic stop needed to be suppressed because (1) his consent to search was the product of an un-*Mirandized* interrogation concerning the vandalism offense; and (2) the search exceeded the scope of the consent. (7 CT 1740-1741, 1770-1774, 1779; 4/6/92 RT 171; 6/1/92 RT 202-204, 216, 220.)

Appellant contended next that the trial court needed to suppress the syringes and burnt spoon seized from his car on March 7 on the ground that the consent appellant gave to that search was tainted by the unconstitutional search of his person. (7 CT 1740-1741, 1779-1780.)

Appellant contended next that absent these illegal searches and seizures the police would have had no probable cause to arrest him on March 7. Thus, the search of his person incident to that arrest at the police station was unconstitutional and the trial court needed to suppress the eight bindles of methamphetamine seized from his person at that time. (7 CT 1740-1741, 1780.)

Appellant contended next that his statements to Officer Trudeau that he used methamphetamine, broke into houses and cars to support his habit, and was being treated at the Livermore Veteran's Hospital, needed to be suppressed because (1) Trudeau elicited the statements after appellant invoked his *Miranda* rights; and (2) appellant gave the statements involuntarily. In support of that second argument appellant contended that Trudeau had made him a direct promise of leniency when Trudeau told him the statements would not be used against him. (7 CT 1740-1741, 1774-1776, 1781; 6/1/92 RT 204-212.)

Appellant contended next that the trial court needed to suppress the evidence seized from the bedroom he was arrested in on March 27, 1987, because the police committed a knock-notice violation prior to entering the

bedroom, and because Mrs. Tully's consent to search the bedroom was the product of the knock-notice violation. (7 CT 1741, 1776-1778; 4/6/92 RT 172; 6/1/92 RT 172.)

Appellant next contended that the fingerprint evidence the police uncovered post-arrest needed to be suppressed because it was tainted by and was the fruit of the above-outlined constitutional violations. (7 CT 1741, 1781-1786; 4/6/92 RT 172, 175.) Appellant argued that the prosecution could not show that the fingerprint evidence was purged of the original illegalities or that the police would have inevitably discovered it. (7 CT 1783-1785; 6/1/92 RT 212-215.)

Appellant lastly contended that because the authorities confronted him with the fingerprint evidence when interrogating him on March 27 and 30, 1987, and because that confrontation was the motivating force behind his inculpatory statements, the trial court needed to suppress those statements. (7 CT 1786-1787; 4/6/92 RT 172.)

The trial court rejected all of appellant's arguments but one: The court found that the police elicited involuntary statements from appellant on March 7 (that he used methamphetamine, burglarized houses and cars to support his habit, and was being treated at the Livermore Veteran's Hospital) and the court ordered those statements suppressed. The trial court refused to suppress any evidence as tainted by or as the fruit of the involuntarily-elicited statements, however. (6/8/92 RT 220-222.)

As stated, in this Court appellant contends that the police violated certain of his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as his rights under article I of the California Constitution. (I AOB 24-65.) While he agrees with the trial court that he gave involuntary statements to the police on March 7, 1987 (I AOB 45-50), he contends that before then the police unconstitutionally detained him on the traffic stop and unconstitutionally searched his person at that time (I AOB

32-44). He contends that the subsequent search of his car was also unconstitutional either on its own or as a fruit of the prior illegalities, and that his subsequent arrest and search of his person incident to that arrest, were tainted by and the fruits of the prior illegalities. (I AOB 44-45.) Appellant apparently recognizes that at trial the prosecution did not present any of the evidence the police uncovered as a result of the March 7 traffic stop and searches, and the subsequent arrest and search incident to the arrest. He nevertheless wants this Court to find those actions amounted to constitutional violations, and asks this Court to rule that those violations, and the involuntary-statement violation, led to the discovery of evidence the prosecution did introduce at trial: The fingerprint evidence against him, and the inculpatory statements he gave to the authorities on March 27 and March 30, 1987. Again, appellant's bottom line is that all of the constitutional violations he suffered compelled suppression of the fingerprint evidence against him and the inculpatory statements he made to the authorities on March 27 and 30. (I AOB 60-64.) Appellant wants a reversal of the guilt and penalty judgments as a remedy. (I AOB 64-65.) "None of the constitutional errors are harmless beyond a reasonable doubt." (I AOB 64, citing *Chapman v. California* (1967) 386 U.S. 18, 23 [87 S.Ct. 824, 17 L.Ed.2d 705].)

This Court should reject all of appellant's contentions. All are without merit and in support of them he makes many claims that are procedurally defaulted.[10/]

---

10. Theories of inadmissibility not presented to the trial court are forfeited on appeal, including theories of inadmissibility premised on the federal Constitution. (*People v. Thomas* (1992) 2 Cal.4th 489, 519-520; *People v. Partida* (2005) 37 Cal.4th 428, 437-438; see also Evid. Code, § 353.) We do not read this Court's teaching in *People v. Avila* (2006) 38 Cal.4th 491, 527, fn. 22, as changing the general rule. There, this Court stated that an appellant may make a federal constitutional argument for the first time on appeal where the argument does "not invoke facts or standards different from those the trial court was asked to apply," but instead merely asserts "that the trial court's error, insofar as it was wrong for the reasons actually presented to that court, had the

C. Appellant's Attacks On The Constitutionality Of What Occurred At The Traffic Stop All Fail

Appellant erroneously contends that the police committed numerous violations of his constitutional rights when they stopped him in the Fiat on March 7, 1987.

1. The Police Did Not Unduly Detain Appellant

Appellant does not challenge the inception of the traffic stop. He seemingly concedes that the police had a reasonable basis to pull him over to investigate whether he was driving with a suspended license. (I AOB 32.) Instead, he claims that the first constitutional violation he suffered was that the police detained him for an unlawfully long duration. And, he continues, because it was during this unlawful period that the police obtained the consent to search his person (resulting in a seizure of methamphetamine and commencement of the process that led to the fingerprint evidence), the consent to search "was tainted." (I AOB 32-36.)

Because appellant did not make this argument at trial (see pp. 86-87, *ante*) it is forfeited on appeal. Fourth Amendment theories are waived unless they were presented to the lower court. (*People v. Rogers* (1978) 21 Cal.3d 542, 547-548; *People v. Watkins* (1994) 26 Cal.App.4th 19, 32.)

---

additional legal consequence of violating the federal Constitution." That appears to be what appellant is doing here with his Sixth and Eighth Amendment invocations—arguing that the trial court's suppression-motion error had the additional consequence of violating his Sixth and Eighth Amendment rights. Again, *Avila* does not hold or suggest that an appellant may raise a federal constitutional argument for the first time on appeal, including a theory of inadmissibility, when the argument is that the trial court erred for reasons not presented to that court. We will note where such forfeiture occurs here.

Moreover, appellant's argument is also meritless. Police must carry out detentions in a manner "'reasonably related in scope to the circumstances which justified the interference in the first place.'" (*People v. Rivera* (1992) 8 Cal.App.4th 1000, 1006, citation omitted.) That's what occurred here. After Officer Trudeau stopped the Fiat he proceeded to the driver's side door and asked appellant for his car registration and driver's license. Trudeau spoke to appellant while appellant looked for his car registration. Officer Painter arrested passenger Snyder on an outstanding arrest warrant and moved him to a patrol car. (3/30/92 RT 58-59, 90, 101, 111-112; 4/6/92 RT 125.) Officer Shweib stayed with Snyder while Painter walked to appellant, who was standing next to his Fiat, and Trudeau then walked back to his own car to write the citation. Painter began talking to appellant about an unrelated vandalism case in which appellant was alleged to have used a knife to vandalize a car in retaliation for a drug deal that had gone sour. Painter told appellant that the victim and the victim's friend had said that appellant was a heavy narcotics user and armed with a knife. Painter asked if he could search appellant. (3/30/92 RT 110, 114; 4/6/92 RT 125-132, 135-137, 139.) Trudeau reapproached appellant to finalize the citation by obtaining some minor information and appellant's signature. By the time Trudeau reached the car, Painter had already asked appellant for his consent to search his person, which appellant gave. (6/30/92 RT 60-62.) Accordingly, appellant was not the victim of an "unreasonably prolonged" detention that rendered invalid the consent to search he gave during that detention.

2. The Police Did Not Need Reasonable Suspicion To Ask Appellant Questions Unrelated To The Traffic Stop Or For Consent To Search His Person

Appellant contends that even if he was not the victim of an unreasonably prolonged traffic stop, he was the victim of a constitutional violation because Officer Painter questioned him about the alleged vandalism during the stop, and asked for consent to search his person, without "reasonable suspicion" to support the vandalism questioning. Appellant believes that this improper questioning makes the consent he gave to search his person "fruit of the poisonous tree." (II AOB 32-36.)

For a second time appellant is offering a Fourth Amendment theory he did not offer at trial. (See pp. 86-87, *ante*.) It is therefore waived. (*People v. Rogers, supra*, 21 Cal.3d at pp. 547-548; *People v. Watkins, supra*, 26 Cal.App.4th at p. 32.)

It is also without merit. Police may ask a detainee about matters unrelated to the detention without reasonable suspicion that the detainee is involved in those matters. (*People v. Brown* (1998) 62 Cal.App.4th 493, 498-500; *People v. Bell* (1996) 43 Cal.App.4th 754, 767-768.) During a traffic stop an officer may not only also ask questions about matters unrelated to the stop, but may also request consent to search, where such actions do not prolong the detention beyond the time it would otherwise take. (*People v. Bell, supra*, 43 Cal.App.4th at p. 767; citing *United States v. Shabazz* (5th Cir. 1993) 993 F.2d 431, 434-437.) And, of course, facts which come to light during the detention may provide reasonable suspicion to prolong the detention. (See, e.g., *People v. Warren* (1984) 152 Cal.App.3d 991, 995-997; *United States v. Perez* (9th Cir. 1994) 37 F.3d 510, 513-514.)

Here, Officer Painter's brief conversation with appellant about the unrelated vandalism case did not require "reasonable suspicion" that appellant was involved in the vandalism, and, as set forth above, the consent to search that

Painter obtained from appellant occurred before Officer Trudeau completed the traffic stop by finalizing appellant's citation for driving with a suspended license. Put differently, Painter's conversation and request for consent to search did not extend appellant's detention beyond the time justified for the traffic stop. (*People v. Bell, supra*, 43 Cal.App.4th at p. 767.)

3. Appellant Validly Consented To A Search Of His Person

Appellant offers three reasons why the consent he gave Officer Painter for a search of his person at the traffic stop was invalid. (I AOB 36-40.) Appellant thus faults the trial court for not finding that this constitutional infirmity began the tainted process towards the fingerprint evidence and inculpatory statements. (I AOB 36-40.)

First, appellant contends that he gave an involuntary consent because he was being unconstitutionally detained. (I AOB 36-37.) However, this argument is forfeited because at trial appellant not only made no claim that he *involuntarily* consented to a search of his person at the traffic stop, but, as we have already demonstrated, appellant made no "unconstitutional detention" argument below either. (See pp. 86-87, *ante*; *People v. Rogers*, *supra*, 21 Cal.3d at pp. 547-548; *People v. Watkins, supra*, 26 Cal.App.4th at p. 32.) In any event, he was not unconstitutionally detained. (See pp. 89-90, *ante*.)

Second, appellant finally makes an argument he did raise below: He complains that he was not given his warnings per *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] prior to Painter asking him questions about the alleged prior vandalism incident and asking him for consent to search his person. (I AOB 38-39.) "The officers were required to advise [appellant] of his *Miranda* rights and obtain a waiver of them before asking him any questions. The subsequent 'consent' by [appellant] was tainted by this *Miranda* violation." (I AOB 39.)

Appellant's position does not withstand scrutiny. *Miranda v. Arizona, supra*, 384 U.S. 436, requires that the police admonish a criminal suspect *who is in custody* "of specified Fifth Amendment rights." (*People v. Morris* (1991) 53 Cal.3d 152, 197.) The well-known *Miranda* warnings (the right to remain silent, the right to consult a lawyer, the right to have a lawyer present during questioning, and the right against self-incrimination) are designed to protect the privilege against compelled self-incrimination from "the coercive pressures that can be brought to bear upon a suspect in the context of custodial interrogation." (*Berkemer v. McCarty* (1984) 468 U.S. 420, 428 [104 S.Ct. 3138, 82 L.Ed.2d 317].) Absent "'custodial interrogation,' *Miranda* simply does not come into play." (*People v. Mickey* (1991) 54 Cal.3d 612, 648.)

In determining "whether a suspect is in custody for the purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." (*California v. Beheler* (1982) 463 U.S. 1121, 1125 [103 S.Ct. 3517, 77 L.Ed.2d 1275]; internal quotation marks omitted.) That a person may be seized for Fourth Amendment purposes because a reasonable person in his or her shoes would not feel free to walk away from the police (*California v. Hodari D.* (1991) 499 U.S. 621, 625-628 [111 S.Ct. 1147, 113 S.Ct. 690]), does not necessarily mean he or she is in custody for *Miranda* purposes. Indeed, the "noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purpose of *Miranda*." (*Berkemer v. McCarty, supra*, 468 U.S. at p. 440.) As the prosecutor persuasively pointed out to the trial court below, the present record contains no suggestion that at the traffic stop there was restraint on appellant's freedom of movement of the degree associated with a formal arrest. (7 CT 1789-1790.)

At no point did Officer Painter's vandalism questioning cease to be brief

and casual and become sustained and coercive. (*People v. Salinas* (1982) 131 Cal.App.3d 925, 936.) Nor did Painter ever draw his gun (see *People v. Taylor* (1986) 178 Cal.App.3d 217, 229), handcuff appellant (see *United States v. Purry* (D.C. Cir. 1976) 545 F.2d 217, 220), or put him in a patrol car (see *People v. Natale* (1978) 77 Cal.App.3d 568, 572). Instead, Painter, by himself, simply spoke with and inquired of appellant for a few minutes about the alleged prior vandalism as appellant stood outside his own car. Meanwhile, Officer Trudeau was completing the traffic citation and Officer Schweib was with passenger Snyder. (3/30/92 RT 59-60, 74-76, 95-97, 113-114; 4/6/92 RT 125, 127-129, 131, 135-137, 139.)

Findings as to whether a custodial interrogation occurred, "which appears to be a predominately factual mixed question," is "reviewed for substantial evidence." (*People v. Mickey*, *supra*, 54 Cal.3d at p. 649.) Substantial evidence supports the trial court's rejection of appellant's argument that he was the victim of a *Miranda* violation at the traffic stop. (6/8/92 RT 220.)

Next, appellant returns to the forfeited argument that he did not voluntarily consent to a search of his person, asserting that the involuntariness is shown by the fact that he "was not told that he had the right to refuse consent," and by the fact Officer Trudeau was holding his driver's license when Officer Painter asked him for his consent to search. (I AOB 39). However, police "need not always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search." (*United States v. Drayton* (2002) 536 U.S. 194, 206-207 [122 S.Ct. 2105, 153 L.Ed.2d 242], citing, e.g., *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227 [93 S.Ct. 2041, 36 L.Ed.2d 854].) Furthermore, that Trudeau was holding appellant's license is irrelevant given that Painter asked appellant if he "would mind" being searched (3/30/92 RT 114), thereby indicating to a reasonable person that he or she would be free to refuse. Absolutely nothing in the record suggests that Painter's request for

consent to search was coercive or that appellant's consent was involuntary.

4. The Search Of Appellant's Person Did Not Exceed The Scope Of His Consent

Appellant next renews another argument he made at trial: That if nothing else, the unconstitutional journey towards police acquisition of the fingerprint evidence against him and the inculpatory statements he gave authorities began at the traffic stop when the search of his person exceeded the scope of his consent. (I AOB 40-44.) Appellant claims his consent was limited to a search for weapons and thus, Officer Painter exceeded the scope of that consent when he reached into one of appellant's pants' pockets and retrieved the methamphetamine. (I AOB 40.) Appellant's claim is unwarranted.

The trial court expressly found that Officer Painter asked for and received appellant's consent for the search of his person and that "the search did not exceed the scope of the consent given." (6/8/92 RT 220.) In reviewing this ruling this Court will defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, this Court exercises its independent judgment. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)[11/] Here, the trial court ruled correctly.

Florida v. Jimeno (1991) 500 U.S. 248 [111 S.Ct. 1801, 114 L.Ed.2d 297], sets forth the standard for evaluating the scope of consent to search under the Fourth Amendment. The High Court explained that where consent would be

---

11. In exercising their independent judgment California appellate courts, after the passage of Proposition 8 in 1982, apply the federal Constitution, as interpreted by the United States Supreme Court, not California law (to the extent California law is inconsistent) when confronted with Fourth Amendment questions and requests for the exclusion of evidence. (*In re Lance W.* (1985) 37 Cal.3d 873, 890, 896.)

reasonably understood to extend to a particular place or thing, the Fourth Amendment provides no grounds for requiring a more explicit authorization:

> The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable. [Citation.] Thus, we have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so. [Citation.] The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect? [Citations.]

(500 U.S. at pp. 250-251.)

Here, it is plain that Officer Painter acted within the scope of appellant's consent. Painter testified that he had taken a prior police report in which appellant was a suspect for vandalizing a truck with a knife. Painter testified that he explained to appellant that the victim and victim's friend had said that appellant was a "heavy" narcotics user and was "heavily" armed with a knife. Painter asked appellant if he would mind being searched. (3/30/92 RT 113-114; 4/6/92 RT 127-128, 137.) Appellant answered, "Sure, I don't have anything on me." (3/30/92 RT 114.) Painter, using a flashlight, opened and looked inside appellant's pockets. In the left front pocket of appellant's pants Painter found a clear plastic bindle containing white powder that appeared to be methamphetamine. (3/30/92 RT 115.) Painter testified that he had specifically told appellant that he wanted to search him for weapons and narcotics. (4/6/92 RT 129.) On cross-examination, Painter acknowledged that he had previously testified that he told appellant he wanted to search him for a knife. (4/6/92 RT 130-131.) However, on redirect examination, Painter testified, "I recall mentioning the weapon and I recall mentioning the narcotics use. But I—apparently made reference in the transcript of searching for weapons. But I don't recall exactly narrowing my scope of my search at that point." (4/6/92 RT 137-138.) It was the trial court who had the "power to

judge the credibility of witnesses," and "resolve any conflicts in the testimony." (*People v. Lawler* (1973) 9 Cal.3d 156, 160; see also *People v. Williams* (1988) 45 Cal.3d 1268, 1301.) Because this Court reviews the evidence in the light most favorable to the lower court's ruling (*People v. Renteria* (1992) 2 Cal.App.4th 440, 442), it must presume the trial court found that Painter asked appellant if he could search him for narcotics and weapons.

Phrased another way, because Officer Painter explicitly told appellant that he had been informed that appellant was a heavy narcotics user and heavily armed with a knife before asking to search his person, it is reasonable for the officer and appellant to have understood that the search was to encompass any pockets in appellant's clothing where a knife or narcotics could reasonably be concealed, even appellant's coin pocket. It is plain that Painter was searching for both drugs and weapons and that appellant had consented to that.

Nevertheless, appellant argues that Officer Trudeau "was sure Painter did not mention drugs when Painter obtained [appellant's] consent to search." (I AOB 41.) Appellant, however, fails to mention that Trudeau testified that he was at his car writing the traffic citation when Painter was talking to appellant and that Trudeau did not hear most of the conversation between Painter and appellant. Specifically, Trudeau made clear that he did not hear Painter's request for consent to search, "word for word." (6/30/92 RT 75.)

Appellant also argues that because Officer Painter testified on cross-examination that he did not expect to find a knife in the coin pocket (see 4/6/92 RT 133-134), that this somehow shows the scope of search exceeded the consent given. (II AOB 42.) We note initially that there existed some confusion over where Painter found the methamphetamine. Trudeau testified first that he saw Painter remove the methamphetamine from appellant's left front pants' pocket. (3/30/92 RT 61.) Trudeau testified later that Painter seized the drugs from the coin pocket of appellant's Levi's jeans. (3/30/92 RT 94.)

Painter testified that he found the drugs in appellant's left pocket. (3/30/92 RT 115.) Later Painter reiterated that he seized the bindle from appellant's left pocket, but acknowledged that he had previously testified that he found the bindle of drugs in the coin pocket. (4/6/92 RT 132-133.) He also thought he had previously testified that he did not remember if the bindle was in appellant's coin pocket or left front regular pocket. (4/6/92 RT 133.) Painter noted that he was confused because he thought he found the drugs in appellant's left front pocket, yet he believed a coin pocket was only on the right front side of a pair of Levi's jeans. (4/6/92 RT 132.) In light of all of this testimony the trial court could have reasonably concluded that Painter found the drugs in appellant's left front pocket, and not the coin pocket.

In any event, even if Officer Painter found the drugs in the right front coin pocket, his testimony that he did not expect to find a knife in the smaller pocket did not mean he could not have found a knife there. He testified that the coin pocket was two inches deep (4/6/92 RT 133), which could easily fit a small fold-up knife. As explained above, Painter's request to search would have been properly interpreted by a reasonable person as extending to any pocket that could carry drugs or weapons. Appellant's general assent did not delimit the scope of the request to search. Painter's subsequent explanations of his actions at the suppression hearing cannot retroactively restrict the scope of appellant's general consent to a broad request for a search for weapons and drugs.

Accordingly, appellant's claim that the search exceeded the scope of his consent is without merit.

5. The Police Did Not Unconstitutionally Search Appellant's Car, Arrest Him, Or Search Him Incident To That Arrest

Because appellant's claim that the search of his person on March 7, 1987, exceeded the scope of his consent is without merit, his next argument

necessarily fails.

To explain, appellant asserts that the search of his car, which occurred after the search of his person, "was tainted by the first illegal search." (I AOB 44.) "Based on these two searches, [appellant] was arrested. . . . Since the only basis for this arrest was the illegally seized evidence, the arrest was illegal since it was not supported by any independent factual basis providing probable cause at the time it was made. . . . [¶] At the police station, another search of appellant was conducted. . . . Since [appellant] was being illegally detained at the time, the search was illegal as it was a direct fruit of the illegal arrest and tainted by all the prior illegal events." (I AOB 44-45.)

Again, as we demonstrated above, the premise of appellant's argument is flawed. The police constitutionally searched his person at the traffic stop. There was therefore nothing wrong with the subsequent consent search of appellant's car (wherein the officers seized drug paraphernalia), the arrest, and the search incident to the arrest (where the officers seized numerous additional baggies of methamphetamine).[12/]

D. Appellant Did Not Make Involuntary Statements On March 7, 1987

The trial court, in agreement with appellant, ruled that appellant's incriminating March 7 statements to Officer Trudeau that "he was committing burglaries to support his drug habit and the related statements about his drug use and his treatment at the V.A. Hospital were involuntary and must be

---

12. Appellant also argues that the search of his car was illegal "for the same reasons as discussed above." (I AOB 44.) To the extent appellant is currently arguing that the search of his car exceeded the scope of the consent he gave to the search of his car, or that his consent was invalid because he was being "unconstitutionally detained" at the time, the arguments are procedurally barred. He made no such arguments at trial (See pp. 86-87, *ante*; *People v. Rogers, supra*, 21 Cal.3d at pp. 547-548; *People v. Watkins, supra*, 26 Cal.App.4th at p. 32.)

suppressed. He was expressly told that these statements would not be used against him." (6/8/92 RT 220-221.)

The admissibility of inculpatory statements in California is governed by federal standards. (See Cal. Const., art. I, § 28, subd. (d); *People v. Peevey* (1998) 17 Cal.4th 1184, 1188.) The admission of an involuntary statement as evidence against a defendant violates the defendant's due process rights under both the California and United States Constitutions. (*Jackson v. Denno* (1964) 378 U.S. 368, 385-386 [84 S.Ct. 1774, 12 L.Ed.2d 908]; *People v. Ditson* (1962) 57 Cal.2d 415, 438-439.) Use of such involuntary statements in a criminal prosecution is prohibited because "it offends 'the community's sense of fair play and decency' to convict a defendant by evidence extorted from him." (*People v. Atchley* (1959) 53 Cal.2d 160, 170.) In general, statements are considered voluntary "if the accused's decision to speak is entirely . . . without 'any form of compulsion or promise of reward'" (*People v. Thompson* (1980) 27 Cal.3d 303, 327-328, citation omitted); i.e., the police treat the accused in such a way that his statements are the product of a rational intellect and a free will (*Colorado v. Connelly* (1986) 479 U.S. 157, 163-164 [107 S.Ct. 515, 93 L.Ed.2d 473]; *Blackburn v. Alabama* (1960) 361 U.S. 199, 208 [80 S.Ct. 274, 4 L.Ed.2d 242]; *Brown v. Mississippi* (1936) 297 U.S. 278 [56 S.Ct. 461, 80 L.Ed.2d 682]).

In this Court appellant reiterates his agreement with the trial court's "involuntary statement" ruling, and offers the position that the court could have excluded these March 7 statements on four additional grounds: (1) Trudeau elicited the statements in violation of appellant's *Miranda* right to silence (I AOB 45-47); (2) appellant made the statements involuntarily because Trudeau had promised him he would be released and not prosecuted (I AOB 47-48); (3) fundamental fairness as guaranteed by the due process clause of the Fourteenth Amendment mandated suppression (I AOB 48-49); and (4) appellant made the

statements while being unconstitutionally detained (I AOB 49). From this, of course, appellant repeats his view that the trial court should have excluded the fingerprint evidence, and his inculpatory statements on March 27 and 30, 1987, as tainted by or being the "related fruits" of the unconstitutional March 7 statements. (I AOB 47, 50.)

Appellant is wrong on the latter point because he is wrong on the former points.

The trial court erroneously held that appellant's March 7 statements to Officer Trudeau were involuntary. The factual basis of the trial court's ruling is not supported by substantial evidence, as it needs to be to be valid. (*People v. Williams* (1997) 16 Cal.4th 635, 659-660.) The trial court found that appellant gave the statements involuntarily because, as a factual matter, appellant "was expressly told that these statements would not be used against him." (6/8/92 RT 220-221.) *However, the only evidence on this point was that Trudeau made the promise after appellant made the incriminating statements.* (3/30/92 RT 81.) It is manifest that Trudeau could not have made a promise specific to appellant's statements about his methamphetamine use and what he did to support his habit, until after Trudeau knew the content of appellant's statements. Therefore, appellant's statements were not induced by Trudeau's promise and were not coerced.

We can challenge the trial court's contrary ruling on this point here because "the People may, on an appeal by the defendant and pursuant to the provisions of section 1252, obtain review of allegedly erroneous rulings by the trial court in order to secure an affirmance of the judgment of conviction." (*People v. Braeseke* (1979) 25 Cal.3d 691, 700-701, vacated and cause remanded (1980) 446 U.S. 932 [100 S.Ct. 2147, 64 L.Ed.2d 784], reaff'd (1980) 28 Cal.3d 86.)

As for appellant's claim that Officer Trudeau elicited the March 7 incriminating statements in violation of appellant's *Miranda* right to silence (I

AOB 45-47), that argument fails as well. When an in-custody subject invokes his or her *Miranda* rights, law enforcement must abandon all attempts to question the subject, unless the accused him or herself initiates further communication. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [101 S.Ct. 1880, 68 L.Ed.2d 378].) "An accused 'initiates' such dialogue when he speaks words or engages in conduct that can be 'fairly said to represent a desire' on his part 'to open up a more generalized discussion relating directly or indirectly to the investigation.'" (*People v. Mickey, supra*, 54 Cal.3d at p. 648.) It is undisputed that appellant, in this case, reinitiated the conversation with Trudeau after he had invoked his right to silence earlier. (3/30/92 RT 64-65.) Accordingly, the conversation which followed relating to appellant's general history, including his use of methamphetamine, how he supported his habit, and his medical treatment at the VA Hospital, did not violate appellant's *Miranda* rights.

Appellant even acknowledges that he "initiated further conversation with Trudeau after invoking his rights," but somehow tries to fashion a *Miranda* violation by claiming that Trudeau did not "scrupulously honor" his right to silence, but instead "questioned" and "cajoled" him into incriminating himself. (I AOB 46.) According to appellant then, if a suspect invokes his right to silence, but later initiates a desire to speak with police, the police must decline the opportunity. Appellant's failure to cite authority in support of this argument is telling and requires rejection of it.

Appellant next argues that the Fourteenth Amendment's due process clause guarantee of fundamental fairness compelled suppression of his March 7 statements because Officer Trudeau told Officer Robertson about those statements after having promised appellant the statements would not be used against him. (I AOB 48-49.) This argument is forfeited because appellant did not make it at trial. (See pp. 86-87, *ante*; *People v. Rogers, supra*, 21 Cal.3d at

pp. 547-548; *People v. Watkins, supra*, 26 Cal.App.4th at p. 32.)[13/]

Appellant's fundamental fairness argument is also without merit. Officer Trudeau did not promise that he would not disclose appellant's statements to anyone else, but instead told appellant that the statements would not be used against him. The record suggests that Trudeau and appellant understood their exchange to mean that appellant's statements would not be used in a court of law to prosecute him for the drug charges for which the police had arrested him. Their exchange did not apply to any other offense for which appellant could be prosecuted. After all, the officers had just seized methamphetamine and drug paraphernalia from appellant's person and car. The officers arrested appellant for possession of drugs and drug paraphernalia. Appellant was booked at the police station for possession of drugs. Detective Jensen and appellant struck a deal so that appellant would not have to go to jail and face prosecution for the drugs he possessed. When Trudeau told appellant that the information about his methamphetamine use and how he supported his habit would not be used against him, the totality of the circumstances mandates that appellant would have understood Trudeau to mean only that the police would not use that information to prosecute him in a court of law for the drugs found in his possession. Appellant's drug possession was the only crime Trudeau was investigating and the offense that appellant was going to "work off." Trudeau did not expect to discover information about any other crimes. He testified that at that time it never entered his mind that appellant could be a murder suspect.

---

13. Also waived are appellant's current arguments that this Court should rule the March 7 statements inadmissible because appellant involuntarily made them on a promise from Trudeau that he would be released and not prosecuted (I AOB 47-48), and because appellant made the statements while being unconstitutionally detained (I AOB 49). (See pp. 86-87, *ante*; *People v. Rogers, supra*, 21 Cal.3d at pp. 547-548; *People v. Watkins, supra*, 26 Cal.App.4th at p. 32.) And in any event, as we have already established, appellant was not being unconstitutionally detained.

(3/30/92 RT 68.) On March 7 Trudeau knew very little about the murder investigation of Olsson. (3/30/92 RT 67.) Under these circumstances, it was not fundamentally unfair to appellant for Trudeau to tell Officer Robertson about appellant's statements on March 17 or 18, after Trudeau learned that appellant's address was two homes away from where Olsson had lived.

Appellant's attacks on his March 7, 1987 incriminating statements are without merit.

E. Under No Circumstances Is Appellant Entitled To A Suppression Of The Fingerprint Evidence Against Him Or Suppression Of The Inculpatory Statements He Gave Police On March 27 And 30, 1987

Assuming the trial court ruled correctly in excluding appellant's incriminating March 7, 1987 statements as unconstitutionally obtained, appellant is wrong in arguing that he was due suppression of the fingerprint evidence the police later uncovered against him, or the inculpatory statements he gave police on March 27 and 30. (I AOB 60-64.) As the trial court also ruled, "the fingerprint evidence sought to be suppressed was not tainted by the illegally obtained statements and is admissible." (6/8/92 RT 221.)

> At the time the involuntary statements were obtained, the officer had no reason to suspect or believe the conversation would turn up evidence of any crime other than the narcotics offenses. In the court's view, this was a case of investigatory serendipity, as that word is used in the cases. It was not a case where the object of the illegality was to secure evidence of the fingerprint match sought to be suppressed. I also note that this is not a case involving egregious police conduct designed to wear down a suspect's resistance. Without minimizing the seriousness or significance of the mistakes leading up to the involuntary statements, this was a somewhat technical violation of the defendant's rights, albeit one which requires suppression of the statements themselves.

(6/8/92 RT 221.)

As became clear at the suppression hearing below, the concept of "investigative serendipity" arises from *United States v. Bacall* (9th Cir. 1971)

443 F.2d 1050, 1057, where the court stated:

> Where the evidence sought to be suppressed was discovered through utilization of some legally obtained leads as well as some illegally obtained leads, the substantiality of the legally obtained leads may influence the determination whether the evidence ought to be suppressed.

(*Id.* at p. 1056.)

The *Bacall* court added:

> [W]hen officers through serendipity discover evidence concerning a suspect whom they are unlawfully investigating in connection with another, different crime, the new evidence is not tainted where the officers discovered it only because their unlawful investigation fortuitously put them in a position to do so and where their unlawful investigative intent did not extend to the additional evidence.

(*Id.* at p. 1057.)

In *Allen v. Cupp* (9th Cir. 1970) 426 F.2d 756, 759, the court explained the rationale for this rule: "Deterrence can have its effect only when it can be said that an object of the illegal conduct was the securing of the evidence sought to be suppressed."

That is not this case. Trudeau had no intention or expectation that evidence related to the Olsson investigation would surface from his March 7 conversation with appellant. Trudeau specifically testified that up to that point, he knew very little about that case, and did not have any suspicion that appellant would be a suspect in it. (3/30/92 RT 68.) Serendipitously, Trudeau forgot to give appellant his driver's license back on March 7. And a few days later, when Trudeau drove to appellant's house to return the license, the officer realized that appellant lived only two doors away from where victim Olsson had lived. It was this fortuitous event, combined with appellant's statements and Trudeau's knowledge of the FBI profile of the Olsson killer, that led to Trudeau viewing appellant as a suspect in Olsson's murder, and led him to contact Officer Robertson and fill him in. (3/30/92 RT 87.) As Trudeau left the office

after talking to Robertson he ran into Officer Leal and told him what he suspected about appellant. Leal replied that he knew of appellant because he had recently taken a report about a knife crime in which appellant was a suspect. (3/30/92 RT 73, 85.) Trudeau then relayed this additional information to Robertson. (3/30/92 RT 10, 73.) Robertson ran a records check on appellant, learned of past arrests, and found in the police files appellant's fingerprints from the 1973 juvenile case, and resubmitted them to the DOJ, where a match with the fingerprint on the murder weapon finally occurred. (3/30/92 RT 10-11, 19, 26-27; 4/6/92 RT 172.)

Viewed another way, granting establishment of the allegation that the police involuntarily obtained statements from appellant on March 7, the fingerprint evidence did not come by exploitation of that illegality, but by means sufficiently distinguishable to be purged of the primary taint. (*Wong Sun v. United States*, *supra*, 371 U.S. at pp. 487-488.)

The People additionally submit that even if appellant suffered constitutional violations on March 7, 1987, in addition to the elicitation from him of involuntary statements, suppression of the fingerprint evidence remains out of order. As the trial court held:

> I find the police would inevitably have again compared [appellant's] prints with those found on the knife found at the murder scene.
>
> Based on all of the evidence, including but not limited to Sergeant Stewart's testimony, which I find to be credible, the People have established a reasonably strong probability that in the normal course of the continuing murder investigation, [appellant] would have emerged as a prime suspect quite apart from the statements he gave to the Officer Trudeau. The police planned to do further computer searches on all residences in the area, including [appellant's] residence. This search would have revealed information which, when coupled with other properly obtained evidence about this [appellant], would have caused the police to ultimately resubmit the [appellant's] fingerprints for comparison with the prints found on the knife. The fingerprint match would ultimately have been discovered by lawful means.

(6/8/92 RT 221-222.)

The inevitable discovery doctrine provides that the fruit of a constitutional violation may be admitted into evidence where the prosecution can establish by a preponderance of the evidence that the evidence would have been discovered through proper police procedures. (*Nix v. Williams* (1984) 467 U.S. 431, 444 [104 S.Ct. 2501, 81 L.Ed.2d 377]; *People v. Clark* (1993) 5 Cal.4th 950, 994; *People v. Superior Court (Tunch)* (1978) 80 Cal.App.3d 665, 681 [a reasonably strong probability that the police would have obtained the evidence lawfully].)

A preponderance of substantial evidence supports the trial court's inevitable discovery ruling in this case. Sergeant Jack Stewart testified that starting January 1, 1987, he was assigned to supervise Officer Robertson on the Olsson murder case. (4/6/92 RT 143-144.) At the end of January, Stewart reviewed the neighborhood check which had been previously conducted by the police. (4/6/92 RT 144, 158.) He found many discrepancies between the police reports and the area map which purported to show which houses had been contacted and which residents had been identified by the police. (4/6/92 RT 144, 146.) In mid-February, Stewart told Robertson that he wanted the police to reconduct the entire neighborhood check—and definitively determine the owner of each house, who lived there, whether the house was a rental, and whether there had been people living or visiting the house at the time of the murder. (3/30/92 RT 20-21, 31, 41-48; 4/6/92 RT 147, 159-160.) If that had meant a "triple check" of some houses, Stewart testified, so be it. (4/6/92 RT 159-160.) Stewart testified that he also wanted the police to run a check through the computer systems at the police department and at the Department of Motor Vehicles, in an attempt to determine if any of the people living in the neighborhood had had any prior police contact. (4/6/92 RT 147-148.) Stewart testified that he did not have a chance to assign a date or department staff to reconduct the neighborhood check prior to appellant's arrest on March 27, 1987. (6/1/92 RT

199-200.)

Dale Brearcliffe, Livermore Police Department Crime Analyst, in charge of the records computer system, testified that had the address 1572 Hollyhock been entered into the department computer in late March or early April 1987, the computer would have produced a report listing the residents of the address as John Chandler, appellant, and Vicky Tully. Entering appellant's name into the computer would have produced a report listing appellant's prior contacts with the Livermore police, including that on March 5 1987, he became a suspect in a Penal Code section 245, subdivision (a)(1) investigation. (6/1/92 RT 181-188, 192-193.)

Sergeant Stewart testified that if he had had the chance to carry out his plans to have a police computer system examination of all of the addresses in Olsson's neighborhood, it would have produced the names of the residents at 1572 Hollyhock and their criminal history. A DMV computer run also would have produced the criminal history for those residents. (6/1/92 RT 194-198.) At that point, the police would have learned that appellant was a resident at 1572 Hollyhock, that he had a criminal history, and was a suspect in an assault with a deadly weapon offense. (6/1/92 RT 194-198.) Stewart testified that at that point he would have submitted fingerprint cards from the department file of all residents with a criminal history, including appellant's (again), to DOJ in Sacramento. As a result, the police would have found that appellant's ring finger and palm print matched those prints on the Buck knife used to stab Olsson to death. (6/1/92 RT 194-198.)

Lastly, with respect to appellant's argument 2 attack on the admissibility of his March 27 and 30, 1987 statements, the only argument he made at trial in this regard is that because the authorities confronted him with the fingerprint evidence when interrogating him on March 27 and 30, and because that confrontation was the motivating force behind his inculpatory statements, the

trial court needed to suppress those statements. (7 CT 1786-1787; 4/6/92 RT 172.) However, because, as we have proved, the fingerprint evidence was admissible, appellant's trial attack on the admissibility of the statements necessarily fails.

In conclusion, appellant's argument 2 garners him no relief whatsoever. He has presented this Court with absolutely no cognizable basis to conclude that the trial court should have suppressed the fingerprint evidence and the March 27 and 30 inculpatory statements.

III.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENTS

Appellant contends that the trial court prejudicially erred in denying his motion to suppress the statement he made to law enforcement on March 27, 1987, and the two he made on March 30, 1987. (I AOB 66-102.) Appellant claims that the admission of these statements violated his Fifth Amendment right against self-incrimination, his Fourteenth Amendment right to due process, his Eighth Amendment right to "'heightened reliability' at all phases of a capital case," and his parallel rights under article I of the California Constitution. (I AOB 66, 81, 101-102.)

The trial court did not err in denying appellant's motion to exclude the three statements at issue from evidence, but if it did, the error was harmless beyond a reasonable doubt.

A. The Evidence Adduced At The Suppression Hearing Is Detailed

On Friday, March 27, 1987, at about noon, the police arrested a shoeless and shirtless appellant at his wife's house on two separate warrants for narcotics violations and transported him to the Livermore Police Department. (1 RT 53-55, 78-80.) Officer Robertson also believed that he had probable cause to arrest appellant for the murder of Sandy Olsson because his fingerprint had been identified on the Buck knife found near the scene of the crime. (1 RT 80-82.)

Appellant's wife, Vicky Tully, was present at his arrest. (1 RT 84-85.) Police either asked, or told Mrs. Tully to proceed to the police station. They were investigating her possible commission of check fraud. Mrs. Tully drove herself to the station house. (1 RT 81, 83-85, 95.)

At the police station, Mrs. Tully confessed to writing fraudulent checks but

officers did not take her into custody. (1 RT 85-86, 143.) And, at 4:00 p.m., Officer Robertson and Detective Newton commenced an interview with her. (1 RT 62; People's Exhs. 7A, 7B.) According to standard police practice, the officers did not arrest her on the check fraud but referred it to the District Attorney's Office for a determination on possible prosecution. (1 RT 86, 143-144, 151-152.) During the interview, which concerned only appellant's background, neither Robertson nor Newton referenced Mrs. Tully's check fraud as Robertson did not view it as relevant to the murder investigation (1 RT 86-87.)

After her interview ended Mrs. Tully asked the officers several times for permission to talk to appellant. The police said they would try to arrange that before they transported him to jail. (1 RT 62-63, 96.)

At around 6:00 p.m., after giving him some candy bars, a coke, and cigarettes, Robertson and Newton commenced an interview with appellant. (1 RT 54-55, 144-145, 162-163, 175.) The police turned on the microphone or "body wire" that was hidden under the table in the interview room. (1 RT 55-56, 124, 147-148.) Almost immediately Robertson asked appellant how he felt. (1 RT 94.) During the next four minutes, Robertson asked appellant for biographical, family history, and other booking information. (1 RT 91-95, 146, 175.) At 6:07 p.m. Robertson read appellant his *Miranda* rights, which appellant expressly waived, both orally and in writing. (1 RT 54-57, 94-95, 146-147, 164, 175.) The officers spoke with appellant for 20 to 30 minutes before taking a break, during which time they discovered that their tape was producing distorted and almost incomprehensible voices. (1 RT 58-59, 61, 93-94, 147, 163, 175-180; People's Exhibit 4.)

During the break, which lasted 90 minutes or so, police gave appellant some water, some pizza, a cigarette, and permitted him to use the restroom. (1 RT 145, 164-165.)

At 7:52 p.m., Robertson and Newton resumed the interview using a regular tape recorder. (1 RT 59, 134-135, 179; People's Exhs. 5A-C, 5D.) Within the first hour of the interview the officers gave appellant another cigarette and permitted him to use the restroom again. (1 RT 145.) At 9:20 p.m. they gave him another soda and at 10:00 p.m. another cigarette. (1 RT 145.) Also around that time the following colloquy occurred:

Q. Oh, before I forget, the next couple of days we're going to get a hold of a polygraph examiner. You know what a polygraph is?

A. Uh-huh.

Q. Okay. Would you be—submit yourself to a polygraph examination?

A. Do I have a choice?

Q. Well, I ain't got a gun to your head, right?

A. No.

Q. Do I have a rubber hose?

A. No.

Q. Hot lamp?

A. No.

Q. Water dripping on your face?

A. No.

Q. Got all your fingernails?

A. I think so.

Q. Okay. No bamboo underneath them?

A. I don't think so. If I do, no telling, heh-heh.

Q. There's your choices.

A. Well, this charge you placed on me and the, ah, the accusations, to say the least are serious, I think it would be—

Q. In the State of California there is nothing more serious than murder.

A. Okay.

Q. Period.

A. Then I think it would behoove me to consult a lawyer.

Q. Okay. Before submitting to a polygraph examination?

A. Um, yeah, before submitting to any question I wouldn't want to answer.

Q. And that's where we've been at tonight, right? We're not here to talk to you about no dope shit, so what, you know, who cares, dope's dope.

A. You know, too, the polygraph is only as good as the man running the machine. The machine is fallible too.

Q. You think you could beat that?

A. Machines are fallible, too.

Q. Do you think you could beat a polygraph?

A. I don't know, I—

Q. You ever taken one?

A. No, I've never had experience with 'em.

Q. You think you could beat the polygraph machine?

A. I have no idea, I have no experience with them.

DETECTIVE ROBERTSON: You've maintained though that everything you've told us is the truth.

A. Uh-huh.

Q. I think we'd probably find out differently.

A. Well, like I said the polygraph is only as good as the man who runs it, and once again you've got a machine. Machines are fallible as I well know. I'm a machine operator.

DETECTIVE NEWTON: And it just depends who runs the, we get the best. That's just part—

A. The machine is fallible. You're only as good as machine and humans are made to error.

Q. So what. You're, maybe, and maybe I'm, maybe I'm not hearing you right. But before you gonna be completely truthful here, you're going to wait and talk to an attorney; is that correct?

A. Well, no. What you're saying here is that you don't believe what I'm

saying.

Q. No, I don't.

A. So, you'd take, you'd rather take the, uh—

Q. —word of a machine.

A. Right, and that's in the area of, stepping into that area I'm even more unknowledgeable than this area I'm involved in right now.

Q. More than you know about.

A. I think it best that if, I wanted to face, I think it would be best if I consult a lawyer.

Q. You know about polygraphs?

A. I heard of them.

Q. And you know how they work?

A. Basically.

Q. How do they work?

A. I guess they hook up a couple of wires to you.

Q. Well, you guess so you don't know?

A. Yeah, exactly.

Q. Very good.

A. That's right. I don't know, that's why I'd like to talk to someone who does.

Q. 2200 hours. I'm going to stop for a few minutes.

(1 RT 114-117, 136-139; People's Exh. 5D at 71-74.)

During the ensuing 14-minute break Robertson consulted with Officer Trudeau, who wanted to help and offered to participate in the in the interview. The officers decided to substitute in Trudeau for Newton. (1 RT 100, 140-141, 147, 149-151, 170.) The interview re-commenced this way.

DETECTIVE ROBERTSON: The time is now 2234 hours, still March 27, 1987. Present in the room is myself, Detective Scott Robertson. Joining me now is Officer Scott Trudeau. Richard, do you know Officer Trudeau?

A. Yes.

Q. Okay. Before we move too far along now, are you tired?

A. Not anymore tired than I was earlier.

Q. Heh-heh. Do you feel like continuing to talk to us?

A. Sure.

Q. All right, good. When we last left this tape, we were talking about polygraph and you mentioned talking to the lawyer. Do you want a lawyer now?

A. No. I'm all right.

Q. You're sure?

A. Yeah.

(1 RT 140-141; People's Exh. 5D at 74.)

Officer Trudeau then began questioning appellant. (People's Exh. 5D at 74.) At no point during the rest of the interview did appellant request a lawyer. (1 RT 141-142.) Towards the end of the interview the officers put appellant in an ankle shackle ("we were kind of in and out of the room and wanted to maintain security"). (1 RT 89-90.) Appellant made no admissions about the homicide during the interview (1 RT 99), although he did offer some opinions about the crime that the prosecution eventually presented to the jury (see pp. 25-26, *ante*).

This interview ended at 12:05 a.m. on March 28, 1987. (1 RT 59-62, 88-89, 90, 124.) Mrs. Tully had been waiting in the police lobby, asking to speak with appellant, gone home for awhile, and then returned to the station, still desiring to speak with appellant. (1 RT 95-97, 101-102, 112.) At the end of their interview with appellant the officers consented to Mrs. Tully's request and permitted her and appellant to speak privately to each other, in the interview room, for about five minutes. (1 RT 61-63, 95-98, 113.) Mrs. Tully left and the police transported appellant to the Santa Rita jail. (1 RT 63, 65.)

On Sunday, March 29, 1987, Mrs. Tully called the Livermore police

headquarters and asked to speak to Officer Robertson or Detective Newton, but neither was working. Arrangements were therefore made to have Mrs. Tully meet with the officers on March 30. (1 RT 64-65.) And on that day, at 1:30 p.m., Mrs. Tully told Robertson and Newton that when she had spoken with appellant in the police interview room two days before he said he had been in Olsson's house, in another room, when "Doubting Thomas" stabbed and killed Olsson. Appellant also told Mrs. Tully, she relayed to the officers, that he had subsequently thrown away the knife. (1 RT 65, 69, 121-122, 194.)

Robertson asked Mrs. Tully if she would make a taped statement, but she refused. She feared retaliation from "Doubting Thomas," who was supposedly connected with the Hell's Angels. (1 RT 66.) Perhaps in response to a question Robertson told Mrs. Tully about the Witness Protection Program and explained that if it were true that "Doubting Thomas" had killed Olsson, arrangements could be made for her and appellant to participate in that program. (1 RT 66-67, 117-121.) At some point Newton, who had stepped out of the room, returned wearing a body wire and taped the rest of the conversation with Mrs. Tully. (1 RT 67, 194; People's Exhs. 8A, 8B.) Newton asked Ms. Tully if she would wear a body wire and talk to appellant at the Santa Rita jail. (1 RT 66-67, 96-97, 99, 213; People's Exh. 8B at pp. 9-10.) Mrs. Tully again refused. (1 RT 67-68; People's Exh. 8 B at pp. 9-10.) Robertson reiterated the Witness Protection Program possibility, but, he continued, it was the District Attorney's Office, not the police, who would determine if she and appellant qualified for the program. (1 RT 66-67, 117-121; People's Exh. 8B at pp. 10-11, 13-14.) Newton told Mrs. Tully that if "Doubting Thomas" was in fact Olsson's killer, and she helped the police "with that," they, in turn, to help her deal with her fear, would "work the State Witness Protection Program" for her and her children. (1 RT 120-121; People's Exh. 8B at p. 12.) "[Y]ou and kids, no way they find, they'd give you a residence, they give you a new identity, new place

to live, if it comes to that. If your life is so in jeopardy, that for the State or Witness Protection Program, they'll move you away. Plain and simple." (1 RT 120-121; People's Exh. 8B at p. 12.)

Later that day, Officers Robertson and Newton went to the Santa Rita jail to interview appellant about the "Doubting Thomas" information Mrs. Tully had given them. (1 RT 68-69, 103-104, 193.) Mrs. Tully followed in a separate car, again hoping to visit appellant. (1 RT 69-70, 212, 214.)

In an interview room, Robertson and Newton spoke to appellant. (1 RT 70, 195.) The officers were not taping the conversation at this point. They spoke with him for 30 minutes or slightly more. (1 RT 122-127.)

According to Robertson, the officers told appellant that they had spoken with his wife, and that she had explained his version of the Olsson murder. They then asked him if he wanted to give an additional statement. (1 RT 70-71, 103-104, 125.) Appellant did not respond. (1 RT 71, 103-104, 121-123.) The officers repeated the information Mrs. Tully had provided them. (1 RT 71, 104, 130.) Appellant remained silent. (1 RT 104, 130.) Newton told appellant that they knew he might be frightened of "Doubting Thomas" and that he might need assistance from the Witness Protection Program if he (appellant), was telling the truth. (1 RT 130.) At that point appellant asked the officer what promises they could make him and his family about what he would receive from a Witness Protection Program. Newton explained that if it were true that appellant was merely present at the murder scene and that his family might be harmed, the police could refer him and his family to the District Attorney's Office for consideration to be placed in a protection program. (1 RT 71-72, 130-131.) Appellant asked to speak to his wife. (1 RT 72, 104-105.)

According to Newton, he told appellant that he had just talked with Mrs. Tully, and that she had said appellant wanted to change his story. (1 RT 198-199.) When appellant did not reply, Newton asked him, "is that true?" (1 RT

199-201, 202-203.) Newton then told appellant that he knew appellant might be frightened of "Doubting Thomas" and might require assistance from the Witness Protection Program. (1 RT 195, 200-201, 203-204.) Appellant asked about the program and what promises the police could make him regarding his family and what he would receive from the program. Detective Newton next told appellant that the police did not have the final say on the Witness Protection Program, and that appellant had to be telling the truth in order to qualify. (1 RT 201, 204.)

Both Newton and Officer Robertson recalled that appellant asked to speak to his wife. (1 RT 72, 125, 209-210.) The officers agreed to that request and Mrs. Tully entered the room and spoke privately with appellant for a few minutes. Appellant then told the police he would give a statement. (1 RT 72-73, 113, 125, 209-212.) The police asked Mrs. Tully to leave the room. (1 RT 74.)

A few minutes later, at 8:08 p.m., on tape, the officers re-affirmed that appellant had been advised of his *Miranda* rights and waived them, and began interviewing him. (1 RT 74-76, 123, 125, 127; People's Exhs. 6A, 6B at p. 2.) Appellant immediately asked the police to put on tape "the part about the Witness Protection Program." (1 RT 127-128; People's Exh. 6B at p. 2.) Newton reiterated on tape that the police had discussed with appellant and his wife that appellant might provide testimony concerning the Oakland Hell's Angels, and if that information met the criteria for the Witness Protection Program, the police would work to enroll appellant and his wife into the program. (1 RT 128; People's Exh. 6B at p. 2.) Appellant confirmed that this was "correct." (1 RT 128-129.) Appellant then provided the detailed taped account of what had happened to Sandy Olsson on July 24, 1986, that the prosecution eventually presented to the jury. (See pp. 26-32, *ante*.)

Both during the March 30 interview and after it, Newton called Deputy

District Attorney Charles Fraser and informed him of the interview. (1 RT 76, 206, 211.) Fraser wanted to listen to the tape and then conduct his own interview. (1RT 76.) Fraser, along with an investigator, did in fact conduct a second March 30, 1987 taped interview of appellant, during which appellant waived *Miranda* (1 RT 182-191; People's Exhs. 9A-9B, 9C at pp. 1-2), and gave more statements that the prosecution ultimately played for the jury (see pp. 32-35, *ante*).[14/]

Appellant testified at this suppression hearing as well. He stated that during his March 30, 1987 conversation with his wife Vicky at the jail, he asked her, "'Why did you snitch me off?'" (1 RT 218-219, 224.) She explained that she was scared for herself and the children. (1 RT 219.) Vicky told appellant that the police "were holding the check issue" over her head and he assumed, based on what officers had told him, that they were threatening her with charges as an accessory to murder. (1 RT 225-227.)

Appellant then told her what the officers had told him about the Witness Protection Program. (1 RT 219.) "She said they had spoke to her about it also

---

14. People's Exhibits 5A-5C are the tapes of the entire March 27, 1987 police interview of appellant, and People's Exhibit 5D is the transcript of those tapes. (1 RT 134-136.) People's Exhibit 6A is the tape of the first March 30 interview of appellant, and People's Exhibit 6B is the transcript of that tape. (1 RT 142.) (Exh. 6B and Exh. 6C are identical transcripts. (9 CT 2132.)) People's Exhibit 7A is the tape of the March 27 police interview of Vicky Tully, and People's Exhibit 7B is the transcript of that tape. (1 RT 142.) People's Exhibit 8A is the tape of the March 30 police interview of Vicky Tully, and People's Exhibit 8B is the transcript. (1 RT 142.) People's Exhibits 9A and 9B are tapes of the second March 30 interview of appellant, and People's Exhibit 9C is the transcript of those tapes. (1 RT 183-184.) The trial court admitted all of these tapes and transcripts into evidence for purposes of the instant suppression hearing. (1 RT 158-159, 231-232.) The transcripts were not made a part of the record on appeal, although they should have been. (Cal. Rules of Court, rules 31(b)(11), 34.1(a)(1)(A), 243.9(a).) We will therefore make these transcripts part of the augmentation motion we discussed earlier. (See p. 35, fn. 9, *ante*.)

and it was something that she wanted to do and felt it was necessary to do." (1 RT 220.)

Appellant and Vicky discussed the program some more, with Vicky more than willing to participate. (1 RT 220.) The possibility of the program played the "key" part in appellant's decision to talk to the police. (1 RT 220.) "Well, detectives, when they first came out to speak with me, they had told me about how I was arrested on this 187, Vicky—had confessed to the check charges and so she had to be fair, that she could certainly do some time with me. That being the case, there was talk of the kids being put in the foster home, and if I cooperated, on the other side of the coin, my family would go in the program, be taken cared of and provided for. So, on the one hand, if I didn't cooperate, my wife was going to join me in the jail, and my children were going to foster homes. On the other hand, if I did cooperate, my family would be protected." (1 RT 220-221.) Appellant spoke with police because he was afraid of Vicky going to jail and also the fear of "Doubting Thomas" and wanted assurances that neither of those fears would be realized. (1 RT 227-228.)

B. Appellant's Arguments At Trial And The Trial Court Ruling

Appellant moved for suppression of his March 27, 1987 statement, as well as both March 30, 1987, statements, on essentially three grounds.

Appellant argued that during the March 27 interview the police ignored his invocation of his right to counsel, and that this *Miranda* violation not only required suppression of the March 27 statement, but both statements he gave on March 30 because he didn't have counsel there. (1 RT 238; 2 RT 286-291, 312.)

Appellant argued next that during the untaped portion of his March 30 interview with Newton and Robertson the officers ignored his invocation of his right to silence, and that this *Miranda* violation required suppression of

everything he told them thereafter, and also required suppression of his second statement on March 30, as fruit of the poisonous tree. (1 RT 238; 2 RT 291-293, 297-301, 312.)

Appellant argued next that the trial court should suppress his first March 30 statement on involuntariness grounds. More specifically, he asserted that the police elicited the statement from him through a Witness Protection Program inducement. (1 RT 238; 2 RT 301-311.) As part of this argument appellant contended that the police had unconstitutionally used his wife as their "agent," getting her to not only provide him with witness protection information, but also to "soften him up" for questioning. (2 RT 312-314.) Appellant alleged that the involuntariness of his first March 30 statement rendered his second statement that day fruit of the poisonous tree. (1 RT 312-314.)

The trial court rejected appellant's motion as follows:

> That based on the totality of the circumstances, the [appellant's] motion to suppress is hereby denied on all grounds promulgated. The statements were preceded by adequate warning of constitutional rights and a voluntary and knowing waiver thereof that was freely and intelligently made.
>
> The dispositive question here, however, is whether the defendant invoked his 5th Amendment right to counsel in the statement of March 27, '87. If he did, clearly, none of his subsequent statements would be admissible.
>
> The court will find that the [appellant] did not therein unambiguously invoke his right to counsel. If the implication of a *Miranda* right is equivocal or ambiguous, the police are permitted to continue talking as they did here with respect to the polygraph examination issue for the purpose of clarifying whether the defendant had invoked such a right.
>
> Further, the court will find that the [appellant's] momentary delay in responding or failure to immediately reply to police questioning on March 30, '87, did not constitute an implied implication of his 5th Amendment right to remain silent and/or his 5th Amendment right to counsel.
>
> Finally, the court will also find that the prosecution has sustained its

burden of proving that these same statements were voluntary.

> With specific regard to the statements of March 30, '87, and the Witness Protection Program issue, the court will determine, again, based on the totality of the circumstances, including the preceding conversation with the police and Vicky Tully, their uncertainty as to what to believe and as to the defendant's status as a suspect or a witness, [appellant's] initial reaction to their questions and a necessity as truthfulness as a prerequisite, that the statements on that subject fall short of inducement or promise of lenient treatment and did not result in a violation of [appellant's] 5th Amendment rights. Accordingly, as I say, [appellant's] motion in that regard is hereby denied.

(9 RT 1928-1929.)

In this Court appellant lodges numerous attacks on the trial court's ruling. (I AOB 66-100.) His claims are either procedurally barred, without merit, or both.

C. The Standard Of Review Is Well Established

The trial court's findings as to the circumstances surrounding the statements at issue—including "the characteristics of the accused and the details of the interrogation—are clearly subject to review for substantial evidence." (*People v. Benson* (1990) 52 Cal.3d 754, 779.) Also affirmed if supported by substantial evidence are the trial court's resolution of disputed facts and reasonable inferences from the facts, and its credibility evaluations. (*People v. Crittenden* (1994) 9 Cal.4th 83, 128; *People v. Wash* (1993) 6 Cal.4th 215, 235.)

Determinations as to the validity of a waiver of *Miranda* rights, a predominately legal mixed question, are reviewed independently (*People v. Mickey, supra*, 54 Cal.3d 612, 649), although the question of whether a defendant invokes his *Miranda* rights is a factual one reviewed for substantial evidence (*People v. Crittenden, supra*, 9 Cal.4th at p. 131).

A "trial court's determinations concerning whether coercive police activity

was present, whether certain conduct constituted a promise and, if so, whether it operated as an inducement, are apparently subject to independent review as well. The underlying questions are mixed; such questions are generally scrutinized de novo." (*People v. Benson, supra*, 52 Cal.3d at p. 779.)

Finally, the trial court's determination as to the voluntariness of a statement for both the federal and state constitutional guaranties of due process of law, which is a resolution of a mixed question of fact and law that is nevertheless predominately legal, are reviewed independently as well. (*Ibid.*; *People v. Mickey, supra*, 54 Cal.3d at p. 649.)

D. Appellant's Attacks On The Admissibility Of His March 27, 1987 Statement To Police All Fail

Appellant offers several reasons why the trial court should have excluded his March 27, 1987 statement from evidence. None has any basis.

1. Appellant Validly Wavied His *Miranda* Rights On March 27 And The Contrary View Is Forfeited

Appellant claims that his March 27, 1987 statement to police was erroneously admitted into evidence because he didn't validly waive his *Miranda* rights before giving that statement. (I AOB 84, 86.) He asserts that "any purported waiver" on that date was "involuntary." (I AOB 86.)

It is well settled that before police may interrogate a criminal suspect who is in their custody the defendant must give the officers a knowing and voluntary waiver of his or her *Miranda* rights. (*People v. Whitson* (1998) 17 Cal.4th 229, 247.) The prosecution has the burden of showing the validity of the defendant's waiver of his or her constitutional rights by a preponderance of the evidence. (*Colorado v. Connelly, supra*, 479 U.S. at pp. 168-169; *People v. Markham* (1989) 49 Cal.3d 63, 71.)

It is equally well settled, however, that appellants may not make arguments for the first time on appeal (see generally Evid. Code, § 353), and that is what appellant is doing here. He did not challenge the validity of his March 27 *Miranda* waiver below on any ground. (See pp. 120-121, *ante*.) The standard rule requiring a timely and specific objection at trial to preserve the issue for appeal applies to *Miranda* issues. (*People v. Holt* (1997) 15 Cal.4th 619, 666; *People v. Milner* (1988) 45 Cal.3d 227, 236.)

In any event, the record shows that at 6:07 p.m. on March 27, Officer Robertson read appellant his *Miranda* rights, and that appellant expressly waived those rights, both orally and in writing. (1 RT 54-57, 94-95, 146-147, 164, 175.) As the trial court found, police gave appellant an "adequate warning" of his "constitutional rights" and appellant gave "a voluntary and knowing waiver thereof that was freely and intelligently made." (9 RT 1928.)[15/]

---

15. Feeling obliged to defend this judgment on all available grounds, herein the People have addressed the merits of many of appellant's waived claims. This Court has no obligation to address the merits of waived claims, however, and should instead reject assignments of error on procedural "failure to object" grounds identified by the People throughout this case, thereby upholding California's timely and specific contemporaneous objection rule (Evid. Code, § 353), and its corollary principle that a defendant may not assign error for the first time on appeal (*People v. Green* (1980) 27 Cal.3d 1, 27-34; *People v. Milner, supra*, 45 Cal.3d at p. 236). For purposes of federal habeas corpus review (which is only available for persons in custody in violation of the Constitution or laws or treaties of the United States (28 U.S.C. § 2254, subd. (a)), a failure to properly object to or raise a federal constitutional issue at the state trial ordinarily constitutes a procedural default, foreclosing collateral review of the forfeited claim. (*Wainwright v. Sykes* (1977) 433 U.S. 72, 86-87 [97 S.Ct. 2497, 53 L.Ed.2d 594].) However, when a state appellate court reaches the merits of an issue despite the lack of a sufficient objection at trial without also or alternatively "plainly stating" that it is invoking the waiver doctrine, its failure to vindicate state procedure justifies federal review on the merits. (*Harris v. Reed* (1989) 489 U.S. 255, 262-264, fn. 10 [109 S.Ct. 1038, 103 L.Ed.2d 308].) Since the federal procedural default rule protects the state's interest in the finality of its judgments, a federal court does no offense to state procedure by refusing to enforce a state procedural rule ignored by the state

2. Appellant Did Not Unequivocally Request Counsel On March 27

Appellant claims that trial court erred in not excluding his March 27, 1987 statement to police from evidence because during the statement he unequivocally requested the assistance of counsel and the police ignored that request. (I AOB 74-81.) Appellant is wrong.

As the United States Supreme Court explained in *Davis v. United States* (1994) 512 U.S. 452 [114 S.Ct. 2350, 129 L.Ed.2d 362], if a criminal suspect "effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him. But if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." (512 U.S. at p. 458; citations and internal quotation and edit marks omitted.) However, any request for counsel must be *unambiguous*. (*Id.* at p. 459.) As *Davis* explained further, "a statement either is such an assertion of the right to counsel or it is not. Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, [the law] does not require that the officers stop questioning the suspect." (*Id.* at 459; citations and internal quotation marks omitted.) Any reference to counsel "that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." (*Ibid.*; original emphasis.)

---

court. In such a case, the federal court simply accepts the state court's subordination of the state's interest in finality.

Here, appellant did not unequivocally invoke his right to counsel. Well into the four-hour interview, Detective Newton asked appellant a series of questions about whether he would submit to a polygraph examination. (People's Exh. 5D at p. 72.) Appellant responded, "Then I think it would behoove me to consult a lawyer." (*Ibid.*) To clarify whether appellant's request was related only to the possible polygraph, Newton specifically asked, "Okay. Before submitting to a polygraph examination?" (*Ibid.*) Appellant answered, "Uhm, yeah, before submitting to any questions I wouldn't want to answer." (*Ibid.*) Context thus shows that appellant meant he wanted counsel "before submitting" *to any polygraph questions*. This is further demonstrated by the fact that immediately thereafter, appellant continued to focus on the issue of his taking a polygraph exam: He expressed concern about the reliability of a polygraph machine and commented that he had no experience in that area. (*Id.* at pp. 72-73.) Detective Newton sought further clarification and stated "maybe I'm not hearing you right. But before you gonna be completely truthful here, you're going to wait and talk to an attorney, is that correct?" (*Id.* at p. 73.) In response appellant again voiced concern that he was unfamiliar with polygraphs, commenting, "I think it best that if I wanted to face, I think it'd be best if I consult a lawyer." (*Ibid.*) Newton then asked appellant a few questions about his knowledge of how a polygraph examination worked. (*Id.* at pp. 73-74.) Appellant stated that he didn't really know. (*Ibid.*) "That's right. I don't know, that's why I'd like to talk to someone who does." (*Id.* at p. 74.)

Then, after a 14-minute break, Officer Robertson asked appellant if he felt "like continuing to talk to us?" (People's Exh. 5D at p. 74.) Appellant replied, "Sure." (*Ibid.*) Robertson, to resolve any ambiguity, asked, "When we last left this tape, we were talking about polygraph and you mentioned talking to a lawyer. Do you want a lawyer now? (*Ibid.*) Appellant said, "No, I'm all right." (People 's Exh. 5D at p. 74) Robertson reiterated, "You're sure?"

(*Ibid.*) Appellant replied yeah." (*Ibid.*)

This question of whether appellant unequivocally invoked his right to counsel is a factual one reviewed for substantial evidence. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 131.) Substantial evidence supports the trial court's finding that appellant did not unequivocally request counsel during the March 27, 1987 interrogation, and therefore the police did not violate his right to counsel by questioning him without one present to assist him. (9 RT 1928.)

3. Appellant Voluntarily Gave His Statement On March 27 And His Contrary Claims Are Forfeited

Appellant next claims that he gave his March 27, 1987 statement to the police involuntarily, and he offers several grounds in support. (I AOB 86-90.) As noted earlier, "an involuntary confession or admission is inadmissible." (*People v. Mickey*, *supra*, 54 Cal.3d at p. 647.) However, a statement is involuntary only "if it is the product of coercion or, more generally, 'overreaching.'" (*Ibid.*)

We submit first that appellant's claims in this regard are forfeited. While prior to the suppression hearing he offered the view that one of the issues before the trial court had "to do with the straight voluntariness under the conditions [appellant] was placed" (1 RT 48), thereafter appellant never offered a single *specific* argument that his March 27 statement was the product of police coercion, leniency, or other overreaching, and thus was involuntary (2 RT 285-337).

Appellant's claims also fail on the merits. For example, he complains that "the duration and conditions" of his confinement "at the police station were coercive." (I AOB 86.) He argues that when he was arrested, the police took him to the police station without shirt and shoes, held him at the police station for six hours before interrogating him, questioned him "for many hours," and

shackled him to the floor with an ankle bolt. (I AOB 86.) The record, however, offers appellant no support.

While appellant was wearing only pants when arrested (1 RT 79), Officer Robertson could not recall if officers provided appellant with coveralls at the police station (1 RT 87). It is clear that before the interview and until it ended police provided appellant with cigarettes, water, soft drinks, candy, pizza, and permitted him to use the restroom. (1 RT 54-55, 144-145, 164-165, 175.) And, it was not until the "latter part of the interview" that police put the ankle shackle on appellant, and did so because they were going in and out of the interview room and wanted to maintain security. (1 RT 89-90.) The facts therefore show that appellant was hardly treated coercively.

Appellant next complains that the police "deceived and lied" to him; arrested him on narcotics offenses as a "ruse" to interrogate him for the murder; and "falsely and repeatedly" told him that "'five' Department of Justice fingerprint analysts had determined his fingerprints matched those found in Ms. Olsson's house.'" (I AOB 87.)

The record shows that the police properly arrested appellant on two arrest warrants for narcotic violations. (1 RT 53-54.) This was no ruse. The police did not need a "ruse" to interrogate appellant for murder. As Officer Robertson testified, he had probable cause to arrest appellant for murder because two days earlier, the police had matched appellant's fingerprint to the fingerprint on the bloody Buck knife found near the murder scene. (1 RT 80-82.) That the officers told appellant that "five" analysts had made such a match when in reality only one had hardly rises to a level of deception such as to produce an untrue statement. Indeed, appellant continued to deny complicity in the crime despite the officer's assertion that his fingerprints were found in the house.

Appellant next complains that "the police used threats to try to get him to talk." (I AOB 88.) Appellant asserts that at the beginning of the March 27

interview, the police questioned him "about checks found in his car belonging to someone else that had Vicky's name on them." (I AOB 88, citing People's Exh. 5D at p. 2.) Appellant continues his claim with the assertion that this police inquiry about the checks in his car, "initiated the threat, made overt on March 30, that Vicky would go to jail if [appellant] did not talk to the police." (I AOB 88.) However appellant's argument is supported only by his testimony, which means that on appeal the argument essentially has no evidentiary support. Appellant ignores the fact that the trial court, in denying the suppression motion, implicitly rejected his testimony that the police had threatened him on March 30th that his wife would go to jail if he did not give a statement.

Finally, appellant complains that after he told the police that he wanted a lawyer during the March 27 interview "the police tried yet another ploy to keep him talking" by bringing "Officer Trudeau into the interview room." (I AOB 88.) Appellant claims Trudeau "relied on" his "past relationship" with appellant (i.e., the March 7 arrest where Trudeau "cajoled him into talking by telling him nothing that he said would be used against him") "to catch" appellant "off guard and to put him at ease so that he would incriminate himself." (I AOB 88-89.) This argument is procedurally barred not only because appellant did not make it below (see pp. 120-121, *ante*), but because at the suppression hearing he presented no evidence of any "past relationship" with Trudeau. Where "testimony was not before the trial court at the time of the suppression hearing," "it is irrelevant to our inquiry now," because "in reviewing the trial court's suppression ruling, we consider only the evidence that was presented to the trial court at the time it ruled." (*In re Arturo D.* (2002) 27 Cal.4th 60, 77, fn. 18, citation omitted.)

A review of the March 27, 1987 interview establishes that the police did not use any of the traditional methods of intimidation which result in involuntary statements or confessions. Police made no promises to appellant, and neither

Officers Robertson, Newton or Trudeau yelled at appellant, displayed a weapon, or threatened him in any other way. Appellant never indicated that he felt frightened or threatened or appeared as such. Additionally, the officers were neither overly aggressive nor confrontational with appellant. Appellant never appeared not to understand what he and the officers were talking about *and he never incriminated himself.* The opinions that he gave about the crime that the prosecution later used at trial show a defendant in control and trying to put the police off his trail; those statements don't show a "beaten-down" man speaking against his will.

E. Appellant's Attacks On The Admissibility Of His First March 30, 1987 Statement To Law Enforcement All Fail

Appellant offers several reasons why the trial court should have excluded his first March 27, 1987 statement from evidence. None has any basis.

1. Appellant Validly Waived His *Miranda* Rights On March 30 And The Contrary View Is Forfeited

Appellant claims that his first March 30, 1987 statement to police was erroneously admitted into evidence because he didn't validly waive his *Miranda* rights before giving that statement. (I AOB 84.) Because appellant did not make this argument at trial (see pp. 120-121, *ante*) he cannot make it now (*People v. Holt*, *supra*, 15 Cal.4th at p. 666; *People v. Milner*, *supra*, 45 Cal.3d at p. 236).

In any event, the record shows, as the trial court found, that prior to the first March 30 statement the police adequately advised appellant of his *Miranda* rights and that he voluntarily and knowingly waived those rights. (1 RT 74-76, 123, 125, 127; People's Exhs. 6A, 6B at p. 2; 9 RT 1928.)

2. Appellant Did Not Invoke His Right To Remain Silent

Appellant claims that the police violated his *Miranda* rights during the first March 30, 1987 statement because the officers interrogated him even though he invoked his right to remain silent. (I AOB 81-83.) In support, appellant points to his silence after the police asked him if what his wife had told them about his "Doubting Thomas" statement to her "was true." (I AOB 82, citing 1 RT 70, 130.) Appellant claims that instead of honoring his silence, the officers "cajoled and induced" him to talk. (I AOB 82.) Not so.

As with the invocation of the right to counsel, law enforcement officials must stop questioning a suspect who invokes his or her right to silence. "'If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.'" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238, quoting *Miranda v. Arizona*, *supra*, 384 U.S. 436, 473-474.)

The question of whether appellant invoked his right to silence is a factual one reviewed for substantial evidence. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 131; *People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1238.) Here, substantial evidence supports the trial court's finding that appellant did not invoke his right to remain silent during the first March 30, 1987 interrogation, and therefore the police did not violate his rights by continuing to question him. (9 RT 1928-1929.) After appellant remained silent when the officers told then that they knew what he had told his wife about "Doubting Thomas's" commission of the killing of Olsson, Newton acknowledged appellant's fear and explained that if appellant's story were true, he might qualify for the Witness Protection Program. Appellant hesitated momentarily, and then asked about the Witness Protection Program and what promises the police could make to him and his family. (1 RT 70-72, 104, 122, 125, 130-131, 195-196, 199, 200-201, 203, 208-209.) Appellant's silence was a pause to think and to

strategize about his next statement, and was not an invocation of his right to remain silent. Appellant knew his rights, and knew he didn't have to talk if he didn't want to.

Appellant relies upon *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475, *United States v. Hernandez* (5th Cir. 1978) 574 F.2d 1362, 1368, fn. 9, and *Watson v. State* (Tex. Crim. 1988) 762 S.W.2d 591, 598, for the proposition that the "most obvious manner" to assert the right to remain silent "is by remaining silent." (I AOB 82.) However, those three cases are distinguishable.

In *Wallace*, there existed no evidence that defendant expressly waived her rights and she remained silent for perhaps as many as 10 minutes before giving an incriminating statement. (*United States v. Wallace*, *supra*, 848 F.2d at p. 1475.)

In *Hernandez,* the police read defendant his *Miranda* rights three to four times and each time he refused to speak. The first occurred when the officers arrested the defendant at midnight. Five hours later, after appellant had been confined in a police wagon for five hours, "where he was effectively held incommunicado without any possible access to an attorney," the police took him to the police station. There the police read him his rights again, and questioned him two to three more times. Each time defendant refused to speak. Finally, within 45 minutes after arriving at the police station, in a room with more than three police officers present, the police elicited incriminating statements from defendant. The *Hernandez* court held, "Such police conduct is tantamount to coercive pressure applied to the accused to force him to reconsider his invocation of his right to silence." (*United States v. Hernandez*, *supra*, 574 F.2d at pp. 1365, 1368-1369.)

In *Watson v. State*, *supra*, 762 S.W.2d 591, the police interrogated defendant on multiple occasions. The first time, after being read his *Miranda*

warnings, defendant did not answer any question about the burglary for 30 to 40 minutes, and was returned to his cell. (*Id.* at pp. 597-598.) At the second interrogation, defendant refused to answer for 20 minutes and was returned to his cell. An officer told the prosecutor that defendant "didn't want to talk." (*Id.* at p. 598.) At the third interrogation, defendant remained silent for 15 to 20 minutes and then made a statement that did not implicate himself. After his co-defendant confessed and implicated Watson, the police interrogated him for a fourth time, at which time he made incriminating statements. The *Watson* court held:

> We conclude that [defendant's] silence, his refusal to answer any questions during the first and second interrogations and part of the third interrogation, his conduct demonstrating he didn't want to talk and did not want to cooperate with the police was sufficient to indicate his desire to remain silent and to exercise his right to "cut off questioning" particularly given the *Miranda* card warnings that were read to him. The record shows that the police understood [defendant] "didn't want to talk." There was no reasonable basis for inferring that [defendant] had changed his mind.

(*Watson v. State*, *supra*, 762 S.W.2d at p. 599.)

By contrast, in this case appellant was not peppered with questions on multiple occasions nor did he remain silent on multiple occasions. He remained silent for a very short period while thinking of the best way to ask the officers what Witness Protection Program promises they could make him and his family. The trial court ruled correctly in refusing to find that appellant invoked his right to remain silent. (9 RT 1928.)

3. Appellant Voluntarily Gave His First Statement On March 30

Appellant next claims that he gave his first March 30, 1987 statement involuntarily, and he offers several reasons in support, including police promises of leniency, threats, psychological ploys, and the "use" of his wife to

induce him to talk. (I AOB 83, 90-101.) His claims fail.

Appellant complains first that police, "from the beginning" on March 27, 1987, "engineered" Mrs. Tully's involvement in this case to compel him to incriminate himself. (I AOB 91.) Appellant argues that the officer used his March 27 meeting with his wife Vicky "as leverage for her cooperation, and it was Vicky's report of what [appellant] said during this conversation that ultimately led to [appellant's] March 30th statements to law enforcement." (I AOB 89.)

The record offers no support for this claim. That the police did not arrest Mrs. Tully on her confession to check fraud on March 27 was in compliance with policy. (1 RT 86, 143-144, 151-152.) And it was Mrs. Tully, not the police, who persisted that she be allowed to visit and talk to appellant. On March 27 she asked the police several times if she could talk to appellant before he was transported to jail. (1 RT 62-63, 96.) Contrary to appellant's suggestion, the police did not order her to return to the police station to talk to appellant. She had left the station and returned on her own. (1 RT 95-97, 101-102, 112.) It was also Mrs. Tully who called the police on March 29 and requested to talk to Officer Robertson or Detective Newton. (1 RT 64-65.) The next day, she, on her own volition, went to the police station and told the police that appellant had told her that he was present at the house when "Doubting Thomas" murdered Olsson, and that they were afraid of Thomas. (1 RT 65, 69, 194.) In response to her expressed fears, the police told Mrs. Tully about the Witness Protection Program, where her family would be given a new identity, a new home, and new jobs, if they qualified for the program. (1 RT 65-69, 99, 118, 194.) It is obvious that the police were not "leveraging" for Mrs. Tully's cooperation, but vice versa. And Mrs. Tully was not "used" by the police. She refused the police's request to make a taped statement and again refused to help the police by wearing a body wire to tape her conversation with appellant at the

Santa Rita jail. (1 RT 66, 68.) It is inconceivable how the police, by permitting Mrs. Tully to speak to appellant, committed an act tantamount to "those psychological ploys which, under the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable." (*People v. Ray* (1996) 13 Cal.4th 313, 340, 341.)

Appellant also argues that the police lied to Mrs. Tully to obtain incriminating statements from him. (I AOB 93.) Pointing to the police interview of Mrs. Tully on March 30, 1987, appellant asserts that the police told her "that 'it would be easier' on [appellant] if he admitted to some involvement in the crime," and "would not 'lie' to her about that." (I AOB 93, citing People's Exh. 8B at p. 10.) The People respond that not only does appellant fail to cite to a place in the record that shows that Mrs. Tully conveyed this statement to appellant, but the police did not lie to her. Mrs. Tully asked them: "If Richard is telling the truth that he isn't the one, that at least did this, would it be any easier on Richard?" (*Ibid.*) Newton's affirmative answer ("Yea") was true. If appellant was telling the truth that "Doubting Thomas" committed the murder while appellant was simply present at the scene, things would have been easier for him than for Thomas.

Appellant asserts that he gave his first set of March 30 statements to police involuntarily in response to the police threats that Mrs. Tully "was going to go to jail, either on check fraud charges or as an accessory to murder and that their children would be taken away from her." (I AOB 90-91.) Appellant ignores that the only evidence in support of this assertion is his own testimony (1 RT 220-221, 225-227), and that the trial court implicitly rejected it in denying the suppression motion. This credibility determination was for the trial court alone, and it leaves appellant's claim without factual support.[16]

---

16. Appellant vehemently argues in this Court that the trial court could not have reasonably accepted any testimony offered by Officers Robertson and

Appellant lastly asserts that the police induced his March 30 statement through a promise of leniency. According to appellant, the police used the Witness Protection Program as an offer to get him to incriminate himself. (I AOB 95-97.) Appellant states he talked only because he wanted to make sure "he and his family would be protected" and the authorities led him to believe such witness protection "would be arranged if he talked." (I AOB 97.) The law, of course, provides that if a defendant is given to understand that he or she might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution, or court, in consideration of making the statement, even a truthful one, such motivation may render the statement involuntary and inadmissible. (*People v. Cahill* (1994) 22 Cal.App. 4th 296, 309-17.)

Here, the record shows that when the officers explained the Witness Protection Program to Mrs. Tully they made clear to her that appellant's statement about Doubting Thomas having committed the murder had to be true, and that it would be the District Attorney's Office, not the police, who would determine whether she and her family qualified for the program. (1 RT 66-67, 99, 118, 120-121.) Similarly, when police explained the Witness Protection Program to appellant, they made clear to him that he had to be giving them a true statement, and that the District Attorney would ultimately determine whether he qualified for protection. (1 RT 70-72, 128, 130-131, 201-204.) More specifically, Newton told appellant that the police would have to be able "to corroborate" the information appellant gave them before he could qualify

---

Newton because their testimony suffered from numerous inconsistencies and was therefore unreliable. (I AOB 92-93.) On appeal a court can reject the testimony of a witness the trier of fact believed only if the witness gave "inherently improbable" testimony, or testified to events which the truth thereof was "physically impossible." (*People v. Barnes* (1986) 42 Cal.3d 284, 306.) None of appellant's criticisms of the testimony of Robertson and Newton meets either of these two *Barnes* prongs.

for a protection program. (1 RT 201.) Appellant confirmed that as a "correct" understanding. (1 RT 128-129.) Appellant therefore could not have reasonably believed that the police were promising him participation in the Witness Protection Program for himself and his family if he made a statement. Indeed when appellant spoke with prosecutor Fraser in his second March 30, 1987 interview, appellant said he wanted "to make sure that myself and my family are both protected." (People's Exh. 9C at p. 2.) Fraser replied, "I can't make you any promises. I can't promise you about anything." (*Ibid.*)

Appellant cites no case, and the People have found none, which holds that the police make an improper inducement to a witness when they tell him or her that they will try to get the witness into a protection program if the witness tells them the truth and the witness otherwise qualifies for protection. This was the essence of the trial court's ruling. (9 RT 1929.)

Finally, regarding appellant's second set of inculpatory statements on March 30, 1987, those he gave prosecutor Fraser and investigator Brock, in this Court appellant does not detail any trial court error in the admission of those statements. He baldly suggests only that those statements were "involuntary" (I AOB 83, 90, 101), but since he made no such argument at trial, he cannot make it now (see pp. 120-121, *ante*; *People v. Holt*, *supra*, 15 Cal.4th at p. 666; *People v. Milner*, *supra*, 45 Cal.3d at p. 236). Moreover, because, as we have demonstrated, the police committed no constitutional violations in the elicitation of appellant's March 27 and first March 30, 1987 statement, appellant's trial argument, that the second March 30 needed to be suppressed as fruit of the poisonous tree, necessarily fails.

F. Any Error Was Harmless

When involuntary or *Miranda*-violative statements are erroneously admitted into evidence, no reversal is required if the prosecution can show the error

harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18, 23-24; *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [111 S.Ct. 1246, 113 L.Ed.2d 302]; *People v. Johnson* (1993) 6 Cal.4th 1, 32-33.) That is certainly the case here, with respect to the murder verdict and burglary-murder special circumstance, if this Court finds that the trial court erred in admitting one or more of appellant's March 27 and March 30, 1987 statements.

Simply put, the fingerprint evidence on the murder weapon overwhelmingly established that appellant burglarized victim Olsson's home, and stabbed her to death.

IV.

THE TRIAL COURT DID NOT ERR BY DISMISSING CERTAIN PROSPECTIVE JURORS FOR CAUSE

Appellant contends that the trial court erred by excusing five prospective jurors for cause: M.D., E.H., M.K., B.D., and T.L. (I AOB 103-168.) Appellant claims that as a result of this trial court error, the following rights were violated: His "rights to a fair and impartial jury, due process and to a fair and reliable penalty determination under the Sixth, Eighth and Fourteenth Amendments and article I of the California Constitution resulting in a miscarriage of justice." (I AOB 103, 168.) Appellant wants a reversal of the guilt and death judgments as a remedy. (I AOB 103, 167-168.) He is not entitled to it. No error occurred.

A. Standard Of Review

The decisions of this Court and the United States Supreme Court establish that a prospective juror "'may be challenged for cause based upon his or her views regarding capital punishment only if those views would "'prevent or substantially impair'" the performance of the juror's duties as defined by the court's instructions and the juror's oath.'" (*People v. Heard* (2002) 31 Cal.4th 946, 958; quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; *People v. Crittenden*, *supra*, 9 Cal.4th 83, 121; *People v. Mincey* (1992) 2 Cal.4th 408, 456.) "A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. In addition, on appeal, we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous." (*People v. Cunningham* (2001) 25 Cal.4th 926,

975, citations and internal quotation marks omitted.)

> "'The real question is '"'"whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror.*"'" (*People v. Ochoa* (2001) 26 Cal.4th 398, 431, quoting *People v. Bradford* (1997) 15 Cal.4th 1229, 1318, quoting in turn *People v. Hill* (1992) 3 Cal.4th 959, 1003.) Because the qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty (*Morgan v. Illinois* (1992) 504 U.S. 719, 726-728 [112 S.Ct. 2222, 119 L.Ed.2d 492]), it is equally true that the 'real question' is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror." (*People v. Cash* (2002) 28 Cal.4th 703, 719-720; see also *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005 ["A prospective juror who would *invariably vote either for or against the death penalty* because of one or more circumstances likely to be present in the case being tried, *without regard to the strength of aggravating and mitigating circumstances,* is therefore *subject to challenge for cause,* whether or not the circumstance that would be determinative for that juror has been alleged in the charging document" (italics added)].)

(*People v. Heard*, *supra*, 31 Cal.4th at pp. 958-959.)

B. The Trial Court Properly Dismissed M.D.

In his written questionnaire, prospective juror M.D. indicated that, philosophically, he was moderately in favor of the death penalty. (45 CT 13523.) He also indicated that he would not want to make a choice, until he had to, on the question of whether he would vote for a death penalty law if that issue were on an election ballot. (45 CT 13524.)

During M.D.'s voir dire, the trial court presented a hypothetical setting forth the following: the jury had already decided beyond a reasonable doubt that appellant, "either alone or with somebody else, . . . burglarized the house of a woman by the name of Shirley Olsson"; the jury had already determined that Olsson had been intentionally killed by way of multiple stab wounds, and the jury had perhaps decided that appellant assaulted Olsson with an intent to

commit rape. (4 RT 784.) M.D. stated that if he were on that jury, he could follow the court's instructions, have an open mind at the start of the penalty phase of the trial, and seriously consider both sentencing choices, death and life in prison without possibility of parole, depending on the evidence presented. (4 RT 785, 787.)

M.D. explained his questionnaire answer regarding his stand on the death penalty as "ambivalent" and "not too sure about the death penalty." (4 RT 788.) He stated that if his jury reached the penalty stage, there existed "a possibility" that his "discomfort would be so great" that it would impact on whether he could vote to send the defendant to the gas chamber. (4 RT 789.) He expressed that he did not "agree with prison," but acknowledged "it has to be done." (4 RT 789.) He noted that when he attended U.C. Berkeley he had definite negative feelings towards the death penalty, but recognized that those feelings had "softened." (4 RT 789.)

M.D. stated that he believed that under certain circumstances he could vote to impose the death penalty, but continued, "I don't know that they, you know, when we say that a crime may have occurred with special circumstance, those may not be since I don't know what the special circumstances are." (4 RT 790.) Defense counsel explained that the special circumstance in this case was not multiple murder, serial murder, a child molestation case where the child was killed, or where appellant "blew an airplane out of the air." (4 RT 790.) Defense counsel stated the charged special circumstance was "what the judge described to you, a burglary, they were strangers, it went awry, it went sour and the woman was stabbed to death. That is basically the outline of the case itself." (4 RT 790.) M.D. concluded, "if the evidence as presented would present no more than that, I would be—I would be very hard pressed to decide on the death penalty." (4 RT 790-791.)

The prosecutor reiterated that the special circumstance in this case was

murder in the course of a burglary. The prosecutor asked M.D. if that was the type of extraordinary or special circumstance case where he "would be open to imposing the death penalty." (4 RT 791.) M.D. responded, "I would have to say since the other option is life in prison without the possibility of parole, I would have to say no, it does not." (4 RT 791.) The prosecutor asked M.D. if he would "always go for the life without possibility of parole in this type of case." (4 RT 792.) M.D. answered, "Based only on the information I've gotten today, Yes. I don't know what other information might sway my mind, but based on what you told me today and what I've heard up to this point, I would have to say I would be inclined not to." (4 RT 792.) Attempting to elicit a more definitive answer, the prosecutor asked M.D. whether, in view of his past history of being against the death penalty, which had "softened," and his statement that he would tend not to impose the death penalty except in extraordinary cases, the prosecutor "could stand up here and ask you for the death penalty and [have] a shot?" (4 RT 793.) M.D. answered "No, based on what I know up to now." (4 RT 793.) He added that he did not know all of the evidence involved in this case, and that perhaps "something may come up which would sway [him]," but he did not know what that could be. (4 RT 793.) M.D. then repeated that "based on what I know now, I'd have to say no, that I can't [impose the death penalty.]" (4 RT 793.) The prosecutor, still probing for a more definite answer, asked if "a person breaking into a home, and in the course of a burglary gone awry, as defense counsel says, a single person is killed," would that render the death penalty "a viable penalty here for you?" (4 RT 793.) M.D. stated, "No, so long as the other option is available, life without possibility of parole." (4 RT 793.) The prosecutor then challenged M.D. for cause (4 RT 793), and the trial court granted that request, ruling:

> I have been listening carefully to the prospective juror's responses. I've been observing his demeanor as he answered the questions. I also have in mind his answers to the questionnaire. It is my conclusion that

> the prospective juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions of [*sic*] the oath. And accordingly, the challenge will be allowed.

(4 RT 794.)

Appellant challenges this ruling by arguing that M.D. did not entertain any religious, moral, or philosophical views or beliefs against the death penalty, and therefore those non-existent views could not have prevented or substantially impaired his ability to follow the law or his oath. Appellant also argues that M.D. never indicated that he would be unwilling to weigh the aggravating and mitigating factors based on the evidence presented. Appellant further argues that the court asked M.D. case specific questions that "did not comport with *Witt*." (I AOB 135-136.) Appellant's arguments are without merit. The trial court's ruling excusing M.D. is fairly supported by the record.

First, M.D. stated that in college, he had strong views against the death penalty. While his college views had "softened" to "ambivalent views" (4 RT 788-789), he still could not say he would vote for a death penalty law if such an issue were placed on the California ballot. He further stated that it was possible that his discomfort about the death penalty would be so great, that it would impact on whether he could vote to impose a death sentence against appellant. (4 RT 789.)

Second, M.D. expressly stated that he could not vote to impose the death penalty in the hypothetical case where the jury had found that appellant had murdered one victim by multiple stabbings, during the course of a burglary, so long as the penalty of life without possibility of parole was an option. Although, M.D. stated that he could be swayed by "something," he did not know what that might be. It is apparent that he could not imagine an aggravating circumstance that would overcome his anti-death penalty bias. Even the fact that appellant might have sexually assaulted and stabbed his victim 25 times to death was not enough. M.D.'s anti-death penalty bias was

essentially insurmountable in this case. In other words, it is evident that M.D.'s views on the death penalty would prevent or substantially impair his duty to return a verdict of death in the case before him.

Appellant next argues that the trial court improperly questioned M.D. on facts specific to the case. In *People v. Pinholster, supra*, 1 Cal.4th 865, 917-918, this Court stated:

> Defendant objects that a fact-based voir dire is impermissible under *Witt, supra,* 469 U.S. 412. As we have already noted, we have commented in the past that questions directed to jurors' attitudes towards the particular facts of the case are not relevant to the death-qualification process, so that a trial court that refused to permit such questions did not err. (*People v. Clark*[] [(1990)] 50 Cal.3d [583,] 597.) We have also said, however, that "a court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases." (*People v. Fields*[] [(1983)] 35 Cal.3d [329,] 357-358.) It was this language upon which the trial court in this case relied in permitting certain questions regarding the prospective jurors' attitudes toward the facts of the case. Here, the questions provided a basis for deciding something about the juror's views in the abstract; not only was each of these two jurors asked his attitude toward a case phrased in terms of the facts of this case, but the answer to these questions led to the ultimate and crucial question whether the juror could vote for the death penalty in any burglary-murder case.

In *Pinholster*, the defendant also challenged the hypothetical questions asked of the jurors.

> Defendant complains that in her hypothetical questions, the prosecutor imputed specific intent to kill to defendant, and introduced as facts that defendant had no mental defect or diminished capacity, and that defendant had stabbed both victims. He quotes such questions as: "If you were to learn, or have a fact situation, this is purely a hypothetical, where two people set out to commit a burglary, and while they are inside a residence committing a burglary—by the way no one is at home so they do break into a residence—while they are inside the home, the owner of the residence and a friend return to the home, and burglars kill them to avoid detection or avoid the police being called. [¶] Can you envision imposing the death penalty on either one of the burglars in that particular fact situation?"

(1 Cal.4th at p. 914.)

This Court stated:

> Having examined the record, we think that for the most part, the prosecutor's questions were aimed at exploring the juror's views regarding legal doctrines and the death penalty in the abstract. The question quoted above, and others like it, seem to us to be directed primarily at determining the jurors' attitudes toward the felony-murder special circumstance. To the extent that the court allowed questions laden with too many examples of facts to be proved at trial, we find no reasonable possibility that any error in permitting these questions prejudiced defendant at the penalty phase of trial, nor do we see any reasonable probability that such questions prejudiced defendant at the guilt phase of trial.

(*Id.* at p. 915, citation omitted.)

Similarly, in this case, the voir dire questions focused on examining M.D.'s views on the applicable legal doctrines and the death penalty in the abstract. The trial court initially allowed questions that were case specific to the extent that Olsson was stabbed 25 times to death during the course of a burglary, and that there may have been an assault with intent to commit rape. M.D. stated he could not vote for the death penalty if those were the facts of the case. After further questioning, M.D. stated that he could not impose the death penalty in a burglary-murder case where one person was killed during a burglary "gone awry." (4 RT 790-791.) As in *Pinholster*, the questions regarding the facts in the case led to the crucial question of whether M.D. could vote for the death penalty in *any* burglary-murder case, and his answers clearly established that he could not. This Court has "noted that the Legislature had determined that burglary murder was a crime that qualified one for the death penalty, and that if a juror categorically could not vote for the death penalty in a burglary-murder case, then he or she could not follow the law. (*Pinholster*, at p. 917; see also *People v. Cash*[,] [*supra*,] 28 Cal.4th [at pp.] 718-723 []" (*People v. Navarette* (2003) 30 Cal.4th 458, 489.) Accordingly, the trial court did not err in the hypothetical questions it asked M.D. and, as will be shown, other prospective

jurors.

Appellant next claims that the "trial court used different standards in ruling on the prosecution's challenge to [M.D.] than it did in ruling on the defense challenge to [D.dR.], who was allowed to sit as an alternate juror." (I AOB 160-167.) The record shows otherwise. During voir dire, D.dR. initially stated, "I think [I] would tend to strive hard to wait and not form an opinion until I heard the evidence either way. I tend to be honest. I probably tend to go more towards capital punishment, but I'm not close-minded on that, on my decision." (8 RT 1560.) D.dR. indicated that he was "probably 60/40" in favor of the death penalty, but had not excluded or eliminated either penalty choices from his mind, and that there existed the realistic possibility that he could return either verdict. (8 RT 1560-1562.) D.dR. stated that "no matter what my prejudices are, either way, I tend to follow with what the law is as given to me. I feel it's extremely important to do, even though I may not—I will go on my general beliefs. I feel strongly to follow the law and what the instructions are. I try to overcome the prejudices." (8 RT 1562.)

Defense counsel asked D.dR. about his written questionnaire statement that the death penalty was appropriate in certain circumstances. D.dR. stated that he was "not really sure" what kind of circumstances would warrant the death penalty. (8 RT 1563-1564.) Defense counsel also asked D.dR. about his written answers in response to the "psychological, alcoholism, and drug questions," where D.dR. indicated that people are responsible for their own actions. (8 RT 1564.) Defense counsel expressed "fear" that D.dR. believed that a person who intentionally kills another human being should forfeit his own life. (8 RT 1567.) D.dR. responded that that was his belief in some circumstances, but he was not sure what those circumstances were. (8 RT 1567.) D.dR. stated that although he felt strongly that people are responsible for their own actions, he was open-minded enough to listen to evidence that

could change his mind. (8 RT 1568.) Defense counsel asked D.dR whether, if he found appellant guilty of burglary, and found that appellant intentionally killed a woman and very possibly assaulted her with an intent to rape, there existed "a realistic likelihood that you can return both verdicts as opposed to you always returning one." (8 RT 1571.) D.dR. stated that he worried about being placed in that situation, since he felt strongly about capital punishment. (8 RT 1571.)

During the prosecutor's voir dire, D.dR. stated that given the hypothetical situation, he "guessed" the "scales would weigh extremely heavy" for him to vote to execute appellant. (8 RT 1572.) The prosecutor then gave examples of the types of aggravating and mitigating evidence that might be presented in the penalty phase. (8 RT 1573.) D.dR. believed that at the end of the guilt phase, he would lean towards, but would not have decided on the death penalty, and would be open to listening to all of the aggravating and mitigating evidence at the penalty phase. (8 RT 1575.) D.dR. stated that he could vote for the death penalty, but would "feel very sad." (8 RT 1575-1576.)

Defense counsel asked whether, because of D.dR's strong feelings that people are responsible for their own actions, it would be difficult for him to give credence to a psychologist or psychiatrist. D.dR. agreed that it would be difficult. (8 RT 1578.)

The trial court, near the end of voir dire, again asked D.dR. if, as a juror, he would "seriously consider the kind of evidence that might typically be presented by a defendant in a case like this before you made up your mind as to punishment?" (8 RT 1580.) D.dR. stated that he believed he would seriously consider the evidence. (8 RT 1580.) The court rejected appellant's for-cause challenge to D.dR., as follows:

> With regard to the—for purposes of the record, with regard to the challenge that has been offered, I have carefully listened to the prospective juror's responses. I've observed his demeanor as he

> answered the questions. I do have in mind the answers to the questionnaire. It is my conclusion, based on the totality of the record, that the prospective juror's views would not prevent or substantially impair the performance of his duties as a juror in accordance with the instructions and oath. And accordingly, the challenge will be denied.

(8 RT 1581.)

The record shows here that D.dR., throughout the entire voir dire, held strong to his personal beliefs in favor of the death penalty, and that people should be accountable for their acts. However, at the same time, he continued to assert that he was open to listening to mitigation evidence, and would seriously consider that evidence during the penalty phase of the trial before determining punishment. D.dR.'s remarks indicate that he would be able to put aside his personal views and deliberate fairly under the death penalty law, and those remarks provide substantial support for the trial court's decision that D.dR.'s views would not prevent or substantially impair his duties as a juror.

Appellant specifically complains that when the court questioned M.D., it did not not give examples and ask about potential aggravating and mitigating factors, as it did for D.dR. However, unlike D.dR., M.D.'s final answer was that he could not impose the death penalty in a burglary-murder case where the defendant broke into a home, the burglary went "awry," and one person was killed. The trial court obviously interpreted this belief on M.D.'s part to mean that he could not impose the death penalty in such a case regardless of the aggravating circumstances. Accordingly, M.D.'s answers did not warrant the court explaining things and questioning him in further detail as to whether he could seriously consider the aggravating and mitigating evidence presented during the penalty phase. In sum, the record does not support appellant's claim that the court did not apply the same standard to M.D. and D.dR. in determining whether their views would prevent or substantially impair their performance of duties as jurors as defined by the court's instructions and their oaths.

C. The Trial Court Properly Dismissed E.H.

In her questionnaire, prospective juror E.H. indicated that she felt "the death penalty in some cases is necessary." (13 CT 3384.) Her philosophical opinion regarding the death penalty was neutral. (13 CT 3385.) She also indicated that she would have to conduct research to decide whether California should have a death penalty law if she were asked to vote on the issue in an election. (13 CT 3386.)

At voir dire, the trial court presented a hypothetical where the jury had determined beyond a reasonable doubt that appellant, alone or with somebody else, burglarized a house that belonged to victim Olsson, and that in the course of the burglary she was intentionally killed by multiple stab wounds. And the hypothetical further provided that the jury might have also found that Olsson was assaulted with the intent to commit rape. (6 RT 1285-1286.) E.H. stated that if she were one of the jurors, she would be able to proceed to the penalty phase, and follow the court's instructions and be open to the possibility of imposing either the death penalty or life in prison without possibility of parole. (6 RT 1288-1289.)

During defense counsel's questioning of E.H., she stated that she would vote for the death penalty law in California if it were on the ballot. She explained that "some crimes are pretty bad, where a death penalty would wouldn't [*sic*] bother me." (6 RT 1290.) Defense counsel then asked whether, where appellant "broke into a house to commit a burglary, which incidentally is either to commit a theft or another felony, and killed the lady who lived there, stabbed her to death 25 times," (and that there may have been an assault with an intent to commit rape), that this comprised a "serious enough" crime for E.H. to consider imposition of the death penalty. E.H. answered, "Based on that outline, I wouldn't think so." (6 RT 1291.) She added that a death crime would be "like you said, a mass murderer, that." (6 RT 1292.) E.H. indicated

that the hypothetical given her was not the type of serious crime that fell into that category. (6 RT 1292.) At this point, the prosecutor challenged E.H. for cause. Defense counsel submitted the issue. (6 RT 1292.) The court asked again, "this is not the type of case in which you feel that the death penalty might be an appropriate penalty, is that right?" (6 RT 1292-1293.) E.H. answered, "Right." (6 RT 1293.) The court stated:

> All right. Based on having listened to the prospective juror's responses and having observed her demeanor as she answered the questions, also having in mind the answers to the written questionnaire, it is my conclusion that the prospective juror's views are such that they would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and oath, and according to, the challenge will be allowed.

(6 RT 1293.)

Substantial evidence supports the conclusion that E.H.'s views about capital punishment would prevent or substantially impair the performance of her duties as a juror in accordance with her oath and the court's instructions. E.H.'s statements were very straightforward. She believed that the death penalty should only be imposed for crimes like mass murder. (6 RT 1292.) This view precluded her from following the court's instructions and the law that burglary-murder, such as the case before her, was a death-eligible crime. In other words, she could not impose the death penalty in this case. Her statements validate the trial court's decision to remove her for cause.

D. The Trial Court Properly Dismissed M.K.

In her questionnaire, prospective juror M.K. indicated that she believed in the death penalty and, philosophically, was moderately in favor of it. (49 CT 14968.) She also indicated that she would vote for a death penalty law in California if the issue were placed on a ballot. (49 CT 14970.)

At voir dire, the trial court explained the guilt and penalty phases of the trial.

(3 RT 507-508.) In addressing the penalty phase, the court again presented the hypothetical where the jury had found appellant guilty of first degree murder and the special circumstance true. In other words, the hypothetical was that the jury had decided beyond a reasonable doubt that appellant, either alone or with another, had burglarized the house of victim Olsson, and that she was intentionally killed by as many as 25 stab wounds. The jury may have also decided that Olsson was assaulted with an intent to commit rape, the hypothetical posited. (3 RT 509.) The court asked M.K., with respect to the type of offense described, if she would proceed to the penalty phase with an open mind as to both sentencing choices. (3 RT 510.) M.K. responded that she "guess[ed] [she] would try," and that she "guess[ed]" that she would lean towards the death penalty, but had not eliminated either sentencing choice. (3 RT 511.) M.K. repeated that she would try and make every effort to be open to the penalty phase evidence. (3 RT 512-513.)

During defense counsel's voir dire, M.K. reiterated that she had not eliminated either sentence option, but would lean towards the death penalty. (3 RT 513.) M.K. explained that it would depend on the facts of the case as to whether she could remain open to imposing life without possibility of parole. (3 RT 513.) She later stated that she would be able to consider the mitigating circumstances in making a penalty decision. (3 RT 516.)

During the prosecutor's voir dire, M.K. eventually revealed that she would rather not have to make a decision where the death penalty was involved. (3 RT 518.) Although she felt that the death penalty, in the abstract, was appropriate under certain circumstances, she thought it would not "be an easy thing to do" after "get[ting] to know" appellant for six weeks. (3 RT 518.) The prosecutor asked M.K. if she could, realistically, impose the death penalty. M.K. said she had not asked herself that question. She acknowledged that philosophically believing in the death penalty was different than actually

sentencing a person one had met to death. (3 RT 520.)

The prosecutor walked M.K. through the penalty phase where she would hear the aggravating and mitigating evidence. He asked her whether, if she were the foreperson of the jury, she could sign the death verdict form that would result in appellant's execution. (3 RT 521-522.) M.K. flatly answered, "No." (3 RT 522.) The prosecutor immediately challenged M.K. for cause. (3 RT 522.) Defense counsel submitted the issue. (3 RT 522.)

The trial court then read M.K. the relevant jury instructions that, "To return a judgment of death, you personally would have to be persuaded that the evidence in aggravati[on] is so substantial in comparison with the evidence in mitigation that it warrants death instead of life without parole." (3 RT 522-523.) The court asked M.K. if, as a member of the jury, she could impose the death penalty. (3 RT 523.) M.K. replied, "I don't think I could." (3 RT 523.) M.K. again explained that although she believed in the death penalty, she could not actually vote to send a person, whom she had been in court with for six weeks, to death. She confirmed that even if she found the aggravating evidence so substantial in comparison with the evidence in mitigation that it warranted death instead of life without parole, she could not impose the death penalty as instructed by the court. (3 RT 522-523.) Both the prosecutor and defense counsel submitted the matter. (3 RT 523-524.) The court found:

> At this time, then, having listened to the prospective juror's response and having observed her demeanor as she answered the questions, and also having earlier reviewed the written questionnaire, it is my conclusion, although the prospective juror has given arguably inconsistent or equivocal answers at some point, it's my conclusion that the prospective juror's views would prevent or substantially impair the performance of her duty as a juror and in accordance with her instructions and oath, the challenge will be allowed.

(3 RT 524.)

M.K.'s statements amply support the court's determination to remove her for cause. To repeat, she stated that it would not "be an easy thing to do" to

vote for the death penalty in this case. (3 RT 518.) And this Court has "held it permissible to excuse a juror who indicated he would have a 'hard time' voting for the death penalty or would find the decision 'very difficult.' (*People v. Pinholster, supra*, 1 Cal.4th at pp. 916-917.)" (*People v. Roldan* (2005) 35 Cal.4th 646, 697.) Moreover, M.K. ultimately expressed that she would not be able to impose the death penalty in this case, regardless of the aggravating evidence. Thus, her statements substantially support the court's determination that her personal views on the death penalty would prevent her from performing her duties as a juror as defined by the trial court's instructions and the juror's oath.

E. The Trial Court Properly Dismissed B.D.

In her questionnaire, prospective juror B.D. expressed the belief that the death penalty was "appropriate in certain cases—although it is heartbreaking." Her philosophical opinion was one that was moderately in favor of the death penalty. She indicated that she did not have any religious, moral feelings, or philosophical principles that would affect her ability to vote for the death penalty as a verdict in this case. (45 CT 13713-13714.) She indicated that she would vote for a death penalty law if it were on a ballot in an election, stating that she felt the death penalty was appropriate in some cases. (45 CT 13715.)

During voir dire, after presenting the standard hypothetical concerning the jury's guilt phase findings, the court explained to B.D. that not until the jury reached such a verdict, and proceeded to the penalty phase of the trial, would the jury hear the evidence concerning aggravating or mitigating circumstances and determine the punishment. (3 RT 635-636.) B.D. indicated that, if she were a juror in this case, she could have an open mind when she entered the penalty phase and would seriously consider the options of death and life in prison without possibility of parole. (3 RT 636-637.) The court further

explained that the process of weighing the aggravating and mitigating circumstances was not a scientific or mechanical process, but a subjective process where B.D. "personally, would have to be persuaded the evidence in aggravation is so substantial in comparison with the evidence in mitigation that it warrants death instead of life without parole." (3 RT 637.) B.D. commented, "At this point, it would be very difficult for me to [] have to decide if someone is—it would be terribly difficult." (3 RT 638.) She expressed that she could vote for the death penalty, but would have "some anxiety about it." (3 RT 638.) She gave more thought to whether she could actually impose the death penalty, and estimated that "maybe [she had] 20 percent" doubt that she could. (3 RT 639.) During defense counsel's voir dire, B.D. explained that she thought that the crime in the hypothetical situation was a "bad enough" crime to deserve the death penalty, but that she did not "want to be the one to make that decision." (3 RT 640.)

The prosecutor asked B.D. whether, if she was the foreperson of the jury, she could sign the death penalty verdict that would be the "first step" towards appellant's execution. (3 RT 641-642.) B.D. replied, "I don't think so." (3 RT 642.) The prosecutor explained that they needed a "degree of precision" in her answer to determine if she could serve as a juror. To that, B.D.'s answers progressed from "Well, I have serious doubts about my ability to do what you're saying," to "Well, the more I'm sitting here, the more I'm realizing that I don't—I don't think I could. . . I couldn't sign the paper, and if I can't sign the paper, how can I you know, vote, . . ." to " I don't think so." (3 RT 643-644.)

B.D. indicated that she was troubled over whether she could live with herself if she actually voted to impose the death penalty. She explained that her views on the death penalty had changed over the years, from being totally opposed to it, to believing in it. She wondered that, in years to come, if her

views about the death penalty again changed, she would regret having voted for the death penalty in this case. (3 RT 646.) She stated, "I have to be honest, I don't think I could do it. I don't think I could make that decision." (3 RT 646.) She continued, "the more I sit here, the more it frightens me and disturbs me to think of making that decision." (3 RT 647.) B.D. indicated that she did not think she could make the decision to impose the death penalty, and did not think she could live with her decision. (3 RT 648.)

Defense counsel asked B.D. if she could ever return a death verdict. (3 RT 649.) B.D. indicated a "strong element of doubt." (3 RT 649.) Defense counsel asked one last question, "Is the death verdict a verdict you couldn't return in this case." (3 RT 650.) B.D. responded with a flat, "No." (3 RT 650.) She shook her head and again said, "No." (3RT 650.) The prosecutor confirmed that "the question was asked to her is this—could she return a death verdict in this case, and her answer was 'no.'" (3 RT 650.) The court agreed with that description. (3 RT 650.) After the prosecutor then challenged B.D. for cause and defense counsel submitted the matter, the court ruled:

> All right. All right. I have listened very carefully to the prospective juror's responses. I want you to know we appreciate your candor in the thought process that you engaged with us. I carefully listened to the prospective juror's responses and have been observing her demeanor as she answered the questions. I also have in mind the answers to the written questionnaire, surely, it's inconsistent or equivocal answers, but it is my conclusion that the prospective juror's views are such that she would not—that it would prevent or substantially impair the performance of her duty as a juror in accordance with her instructions and oath. Accordingly, the challenge is allowed.

(3 RT 650-651.)

As the trial court indicated, B.D. was very candid in her thought processes, which evolved from believing that this case theoretically warranted the death penalty, to the realization that she could not morally impose the death penalty and live with her decision. Surely, her answers were equivocal, but the trial

court's resolution is binding (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 975), and B.D.'s answers were equivocal only to the extent that she was first dealing with the question in the abstract, and was later placed in the situation where she might actually be faced with having to decide whether to vote to sentence a person to death. B.D. gave the trial court substantial reason to excuse her for cause.

F. The Trial Court Properly Dismissed T.L.

In his questionnaire prospective juror T.L. wrote that the death penalty was "not really a big problem for me." (30 CT 8585.) His philosophical opinion regarding the death penalty was neutral. (30 CT 8586.) He further indicated that he was not sure how he would vote if the death penalty law was put on an election ballot. (30 CT 8587.)

During voir dire, the trial court provided T.L. with the hypothetical where he was on a jury and that jury found that appellant, "acting either alone or with somebody else, . . . burglarized the residence of a woman by the name of Shirley Olsson, that she [was] killed in the course of that burglary, that the killing was intentional, that she died by virtue of multiple stab wounds," and the jury "might also have decided that [Olsson] was assaulted with the intent to commit rape." (8 RT 1660-1661.) The court asked T.L. whether, if he were a juror in this case, he could proceed to the penalty phase with an open mind and consider "both sentencing choices," after hearing all the evidence presented in both phases of the case. T.L. answered that he could keep an open mind and would consider both sentencing choices. (8 RT 1662-1663.) The trial court explained that weighing the aggravating and mitigating circumstances was not a mechanical process, but a very subjective and personal one, where the jury would be asked to make a determination on the totality of the circumstances. (8 RT 1663-1664.) T.L. indicated that he would be able to follow the court's

instructions and be open to the possibility of imposing either penalty in this case, depending upon all the evidence presented. (8 RT 1664.) The court asked T.L. if there was "some question" in his mind about that, to which he answered "No." The court asked "Do you understand what you're being asked," to which he replied affirmatively. Soon after that, the court asked T.L. if he could vote to impose the death penalty if he felt that was the appropriate penalty. T.L. stated that that was a "hard question to answer," and the court again asked him if, he felt the death penalty was the appropriate penalty after hearing all the evidence, could he "vote to impose it or could [he] not?" (8 RT 1665.) Appellant answered "No." (8 RT 1665.) To clarify any ambiguity, the court asked, "You could not?" (8 RT 1665.) T.L. shook his head in the negative. (8 RT 1665.) Neither the prosecutor nor defense counsel had any questions for T.L., and the prosecutor challenged him for cause. Defense counsel submitted the matter without any questions or argument to the court, and the court, without reservation, excused T.L., ruling:

> All right, having listened to the prospective juror's responses and having observed his demeanor as he answered the questions, also having in mind his answers to the written questionnaire, it's my conclusion that the prospective juror's views would prevent or substantially impair the performance of his duty as a juror, in accordance with his instructions of [*sic*] the oath, and accordingly will be allowed.

(8 RT 1665-1666.)

T.L.'s foregoing answers to the court during voir dire provide the substantial evidence justifying the trial court's decision to excuse him for cause. It matters not that T.L. may have given conflicting answers or equivocated, as "a degree of equivocation on the juror's part which, taken into account with the juror's hesitancy, vocal inflection, and demeanor, can justify a trial court's conclusion regarding the juror's mental state that the juror's views would '"prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."' [Citation.] Such decisions are

committed to the discretion of the trial court, which is able to observe the juror's demeanor firsthand. That [the juror] was somewhat equivocal and might have been rehabilitated with further voir dire does not require a different result. 'There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity.' [Citation.] 'Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror.' [Citation.]" (*People v. Roldan*, *supra*, 35 Cal.4th at pp. 697-698.)

In conclusion, the record substantially supports the trial court's ruling, with respect to all five of the prospective jurors that it excused for cause who are at issue, that those jurors were substantially impaired from performing their duties as a juror. Appellant's contrary contention fails.

V.

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENSE'S MOTION TO EXCLUDE ALL WITNESSES FROM THE COURTROOM DURING THE GUILT PHASE

Evidence Code section 777, subdivision (a), provides that a trial court "may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses." The exclusion of witnesses from the courtroom is a matter within the trial court's discretion that is not disturbed on appeal absent an abuse of discretion. (*People v. Valdez* (1986) 177 Cal.App.3d 680, 687.)

At the time of appellant's trial, section 1102.6 read in pertinent part as follows:

> (a) The victim shall be entitled to be present and seated at the trial. If the court finds that the presence of the victim would pose a substantial risk of influencing or affecting the content of any testimony, the court shall exclude the victim from the trial entirely or in part so as to effect the purposes of this section.
>
> . . . . . .
>
> (e) As used in this section, "victim" means (1) the alleged victim of the offense and one member of the victim's immediate family and (2) in the event that the victim is unable to attend the trial, up to two members of the victim's immediate family who are actual or potential witnesses.

As with Evidence Code section 777, the standard of review for a trial court's ruling on a motion to permit the presence of a victim under former section 1102.6 is the abuse-of-discretion standard. (*People v. Griffin* (2004) 33 Cal.4th 536, 573-574.)

Here, just prior to the prosecutor's opening statement at the guilt phase, the following exchange took place:

> [Defense Counsel]: Well, just one point, your Honor. The district attorney's about to make an opening statement. At this point, I would like to make a witness exclusion motion.

THE COURT: All right.

[Defense Counsel]: I do so move.

THE COURT: There has been a request that anybody contemplated to be a witness in this proceeding, I will now direct to wait outside, and they shall not be present here until such time they are called forward for their testimony, and this will be a continuing order which will be placed through the course of these proceedings.

[THE PROSECUTOR]: Your Honor, with regard to the motion, the broadness of what the court is indicated, I have a question concerning that because we are in two phases, and I have family members of the victim, her sister and her son here in the courtroom, who are not going to be witnesses during the guilt phase of this trial, but certainly are going to be witnesses in the penalty phase if we get there.

And I would submit that the motion excluding witnesses should not encompass those two individuals because of the fact, number one, that they are not going to testify in the guilt phase, and if we—that was the type of situation, then, you get into a situation that family members of decedent's could never come into the court during the course of the trial because they're always potential witnesses in the penalty phase.

THE COURT: Does your request relate to the guilt phase?

[Defense Counsel]: Well, your Honor, no. My request extends to the entire trial. As long as the circumstances of the crime under 190.3 are circumstances in aggravation, I understand the District Attorney's position and potential problem, but on the other hand, circumstances of the crime, the potential aggravating evidence, and if we have a penalty phase and my motion applies also to both phases of the trial.

THE COURT: It would be my intention, [Defense Counsel], based on his representation as to who these individuals are, these are family members; is that correct?

[THE PROSECUTOR]: Yes, your Honor.

THE COURT: It would be my intention to issue this order for purposes of the guilt phase of these proceedings. If there is any particular—if there's any particular portion of testimony that is to occur in this phase of the proceedings, or any particular witness that you want to address with regard to the presence of these individuals in the courtroom, I will certainly hear you at that time on that and consider a request, and/or at least consider any request to exclude these individuals for the purpose of that testimony. We can also discuss other measures,

but it would not be my intention to issue an omnibus order to it excluding everybody from the guilt phase of the proceedings.

[Defense Counsel]: Well, it's difficult to anticipate sometimes what the testimony will be and often the damage is done after the testimony is—

THE COURT: If you contemplate with a particular witness, even a possibility, then we will interrupt the proceedings and you can make your representation. I'll hear Mr. [Prosecutor], and I'll make a decision, but in terms of an omnibus order excluding family members for the duration of the trial, at this point, I would not be inclined to issue such an order.

[Defense Counsel]: I don't wish to be exacerbate, but the circumstances of the crime, each and every detail of it are facts that the jury could consider as aggravating evidence in any, in any penalty phase in this case, and I don't know how it's possible to separate, you know, at one point what fact of the crime is going to be unduly prejudicial or not.

THE COURT: Mr. [Prosecutor], would it be your contemplation, if there is a penalty phase and if these witnesses are called, that they would be testifying about the circumstances of the crime?

[THE PROSECUTOR]: No, your Honor.

THE COURT: But that's why I say I react with a cautionary, because I don't know what the testimony is going to be either, sir, and if you know who the witnesses are potentially, and you know generally what they're contemplated testimony is, but if we get to a witness or get into an area with a witness where you wish to request that a particular individual be excluded for that portion of the guilt phase, or the testimony of that portion of the testimony or the testimony of that witness, I will hear you on that point.

All I'm saying is, in a general matter, I'm not going to issue an omnibus order of that type at this time.

All right. Anything further now we need to take up?

(10 RT 1937-1940.)

Appellant contends that the trial court abused its discretion under former section 1102.6, and Evidence Code section 777, in permitting victim Olsson's sister, Jan Dietrich, and Olsson's son, Elbert Walters III ("Trip"), to be present

throughout the guilt phase. (I AOB 169-178.) Appellant also contends that the trial court abused its discretion under former section 1102.6, and Evidence Code section 777, in permitting victim Olsson's father, Clifford Sandberg, and her daughter, Sandra Walters, to remain in the courtroom during the guilt phase after they testified. (I AOB 169-178.) Appellant contends that the trial court's ruling constituted an abuse of discretion resulting in a miscarriage of justice, because it was arbitrary, essentially permitted four, instead of two victim family members to be present during the guilt phase, and created a substantial risk of influencing or affecting the content of all four family members' penalty phase testimony. (I AOB 169-178.) Appellant claims that the court's ruling deprived him of his rights to due process under the Fourteenth Amendment, his rights to a fair trial and to confront witnesses under the Sixth and Fourteenth Amendments, his rights to a fair and reliable penalty determination under the Eighth and Fourteenth Amendments, and his parallel rights under article I of the California Constitution. (I AOB 171, 182-183.) Appellant lastly contends that this Court should conclude that the trial court's error mandates a presumption of prejudice and reversal of both the guilt and penalty judgments because the absence of prejudice is not manifestly clear from the record and because the prosecution cannot prove the absence of prejudice. (I AOB 179-181.)[17/]

The above-quoted witness-exclusion ruling of the trial court did not constitute an abuse of discretion. A trial court abuses its discretion, of course,

---

17. We will construe appellant's general witness-exclusion motion below as an invocation of section 1102.6 and Evidence Code section 777. We construe his references to the Sixth, Eighth and Fourteenth Amendments not as argument that these constitutional provisions provided a theory of exclusion that he did not present to the trial court, but that the trial court's alleged exclusion error, insofar as it was wrong under the law actually presented to the trial court, had the additional legal consequence of violating the state and federal Constitutions. (*People v. Avila, supra*, 38 Cal.4th 491, 527, fn. 22; *People v. Partida, supra*, 37 Cal.4th 428, 437-438.)

only when it rules arbitrarily, capriciously, or whimsically; i.e., only when it rules beyond the bounds of reason, all the circumstances before the court considered, resulting in a miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

That didn't occur here. There was nothing arbitrary or capricious in the trial court's ruling permitting Olsson's sister and son to remain in court during the entire guilt phase. In making its ruling the court listened to both parties and attempted to accommodate the interests of all. And it did so reasonably. The purpose of a witness-exclusion order is to prevent tailored testimony and aid in the detection of less-than-candid testimony. (*Geders v. United States* (1976) 425 U.S. 80, 87 [96 S.Ct. 1330, 47 L.Ed.2d 592]; *People v. Valdez, supra*, 177 Cal.App.3d at p. 687.) Here, the prosecutor told the court that Jan Dietrich and Trip Walters would not be testifying at the guilt phase and would not testify at the penalty phase on the circumstances of the crime that would be the focus of the guilt phase. (10 RT 1939.) There was thus no risk of "tailored" or less-than-candid testimony. Furthermore, it seems very unlikely that Dietrich and Trip learned anything from sitting through the guilt phase that they did not already know. No abuse of discretion appears.

As for appellant's contention that the trial court abused its discretion in permitting Sandberg and Sandra Walters to remain in the courtroom after their guilt phase testimony, the record discloses that this complaint is trivial. As the prosecutor eventually put on the record without objection or correction, after Sandberg testified he attended "a couple" of court sessions, and Sandra Walters stayed in the courtroom after she testified only for the conclusion of the prosecutor's rebuttal case. (16 RT 3282.)

If appellant thought this posed a problem, he should have made it clear at the time. As the trial court told defense counsel at the time of its witness-exclusion ruling, it would interrupt the trial proceedings at any time to discuss

and consider any specific requests by counsel for exclusion of a witness from the courtroom, no matter the testimony and no matter the witness. (10 RT 1938-1940.) The court even offered to work with defense counsel "segment by segment, session by session. . . ." (10 RT 1941.) Beginning with defense counsel's first request, the court directed the prosecutor to divulge who and what the testimony of the first prosecution's witness would be, in order that defense counsel could determine whether he wanted to request the exclusion of any potential witness. (10 RT 1941-1943.) The prosecutor complied and counsel made no objection. (10 RT 1943.) Indeed counsel indicated satisfaction with this procedure. (10 RT 1943.)

For his part appellant now complains about the trial court's willingness to entertain a defense request to exclude a particular witness for a particular portion of testimony. (I AOB 178.) Appellant claims that this improperly required him "to anticipate the testimony of the prosecution witnesses in order to prevent a non-excluded witness from hearing anything prejudicial." (I AOB 178.) This Court should reject appellant's attempt to suggest that his very experienced capital counsel had such limited knowledge of the facts of the case that they could not have reasonably anticipated what each prosecution witness was going to testify to, and thus could not have taken up the trial court's offer to work together on possible witness exclusion.

Appellant also claims that the trial court's witness-exclusion ruling amounted to an abuse of discretion because the presence of Olsson's family members at the guilt phase created a substantial risk of influencing or affecting the content of their penalty phase testimony. Again, we disagree. The guilt phase was about establishing appellant's guilt. The family members were going to testify at the penalty phase only as to how Olsson's death impacted their lives. Any claim that the penalty phase testimony of the members of the victim's family was shaped or crafted by hearing guilt phase testimony is based

on pure speculation. We repeat that it is very unlikely any evidence was introduced at the guilt phase which the family member witnesses were not aware of before.

People v. Bradford, *supra*, 15 Cal.4th 1229, and *People v. Griffin*, *supra*, (2004) 33 Cal.4th 536, are two cases that discuss former section 1102.6 and address what constitutes an abuse of discretion in the witness-exclusion context. (I AOB 173-174.)

In *Griffin*, before commencement of opening statements at the penalty phase retrial, defendant moved to exclude witnesses from the courtroom when they were not testifying. The court granted the motion. (33 Cal.4th at p. 570.) The prosecutor moved to allow the victim's mother and sister, who were potential witnesses, to remain present pursuant to former section 1102.6. (33 Cal.4th at pp. 570-571.) Defendant objected on the grounds that the jury would be able to see their reactions during trial. The court took the motion under submission and, pending the ruling, it excluded any witness not testifying from the courtroom. (*Id.* at p. 571.) Meanwhile, the victim's mother and sister both testified in the prosecutor's penalty phase case. (*Ibid.*)

The next day, the prosecutor argued that the victim's mother and sister were entitled to be present at the remaining portion of the trial, acknowledging that both might be recalled in rebuttal. Defense counsel countered that their presence "could pose a substantial risk of influencing or affecting the content of any testimony." (*Id.* at pp. 571-572.) Counsel expressed concern that these key witnesses' rebuttal testimony could be influenced by their listening to other testimony, and that the victim's mother and sister's reaction to various evidence could impact the jury. The trial court granted the prosecutor's motion but directed him to "caution" his witnesses about "any emotional outbreak." (33 Cal.4th at pp. 570-571.)

The prosecutor completed his penalty case and the defense presented its

case. (*Id.* at pp. 572-573.) The prosecutor followed with rebuttal, which included testimony by the victim's mother and sister. (*Id.* at p. 573.) On appeal, appellant contended that the trial court erred by allowing the victim's mother and sister to attend part of the trial. (*Id.* at p. 573.)

This Court found no abuse if discretion:

> Nothing before the trial court at the time it made its ruling suggested that Nordin's or Wilson's presence posed a substantial risk that either woman would craft or shape her own testimony, or cause any other witness to do so, as a result of her presence. In arguing against the motion on this point, defense counsel asserted only that such a risk existed, but an assertion on this sort is insufficient to support a claim that the trial court abused its discretion (see *People v. Bradford*[,] [*supra*,] 15 Cal.4th [at p.] 1232 []). Further, although we review the trial court's ruling on the basis of the record of the proceedings before it at the time the ruling was made, we note that subsequent events do not suggest that either Nordin or Wilson tailored her testimony on rebuttal to conform with what she had learned from being present at trial, but instead show that each woman simply testified to matters she was likely to know without regard to what was disclosed at trial. In addition, subsequent events do not support any inference that either Nordin nor Wilson, by her presence, caused any other witness to give testimony different from what the witness otherwise would have given, inasmuch as even defense counsel characterized each woman as "very composed" and "very restrained."

(*Id.* at p. 574.)

In *People v. Bradford*, *supra*, 15 Cal.4th 1229, defendant requested to exclude three witnesses, who "clearly were within the statutory definition of victims" under section 1102.6, from the courtroom during counsel's opening statements. The trial court denied the motion. (15 Cal.4th at p. 1321.) On appeal, defendant contended that the trial court erred in failing to exclude the witnesses during the hearing to determine whether they should be excluded during counsel's opening statements, and when counsel actually delivered their opening statements. (15 Cal.4th at p. 1321.) The *Bradford* court found that the court did not err because the individuals were "essentially excluded from the

hearing" because the hearing on the motion to exclude was conducted "outside the hearing" of these individuals so they were "unaware of the substance of the hearing." (*Ibid.*) The *Bradford* court also held that "[d]efendant's mere assertion that the victims *could or would be* influenced by the opening statements was insufficient to establish that the victims' presence posed 'a substantial risk of influencing or affecting the content of any testimony.'" (*Id.* p. 1322, original emphasis.) The court further found that defendant had not shown prejudice. The court pointed out that "[n]othing prevented defendant from inquiring during his cross-examination at trial whether [the victim's brother] had so tailored his testimony." This Court also pointed out that the victim's mother's testimony was corroborated by other witnesses at trial who were not present during opening statement. (*Id.* at p. 1322.)

Appellant claims that *Bradford* and *Griffin* are distinguishable and not instructive here. (I AOB 173.) Appellant argues that in *Griffin*, at the retrial, neither witness testified as to "victim impact" evidence; instead their testimony focused on the defendant. (I AOB 173.) Appellant also notes that the two witnesses, when testifying on rebuttal, were "very composed" and "restrained." (I AOB 173-174.) The significance of *Griffin*, however, is not the type of testimony the witnesses gave on rebuttal, but the factors that showed the reasonableness of the court's ruling, including this Court's teaching that a defendant's "mere assertion that there is a substantial risk of influencing or affecting the content of any testimony" is insufficient to show an abuse of discretion. (33 Cal.4th at p. 574.) Furthermore, as in *Griffin*, appellant points to no place in the record to show that Olsson's family members displayed any inappropriate emotions before the jury.

Appellant also argues that "[b]ecause *Bradford* addressed a claim of error arising from the presence of victim-witnesses only during opening statements, rather than during the entire trial . . . it does not control the issues raised here."

(I AOB 173.) But *Bradford* is yet another example where a defendant's "mere assertion that the victims could or would be influenced . . . was insufficient to establish that the victim's presence posed 'a substantial risk of influencing or affecting the content of any testimony.'" (15 Cal.4th at p. 1322.) In addition, the facts in *Bradford* are similar to the facts here in that Olsson's father and daughter were not in the courtroom to hear any witnesses prior to their own guilt phase testimony. Therefore, their subsequent testimony during the guilt phase could not have been influenced by what they were not privy to hear. Moreover, as stated before, Olsson's family members' testimony during the penalty phase focused on how the victim's death affected their lives. Their testimony would not have been influenced by testimony given during the guilt phase which focused on the circumstances of how the crime was committed.

Appellant complains that the trial court did not mention either Evidence Code section 777 or former section 1102.6 in making its ruling, did not indicate that it had considered whether the presence of Olsson's family "would pose a substantial risk of influencing or affecting the content of any testimony" as required by former section 1102.6, and did not expressly address such factors as "the seriousness of the case," the "relationship between the witnesses," and "the nature, relevance, and importance of the evidence. . . ." (I AOB 174.) Appellant asserts that:

> The court made no reference to [appellant's] rights whatsoever. Indeed, it provided no rationale for its order, stating only that it "was not going to issue an omnibus order at this time."

(I AOB 174.)

Appellant ignores that a trial court need not expressly cite to a specific code section or to particular factors, or expressly state that it is weighing the risks. "All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities." (See *People v. Williams*, *supra*, 16 Cal.4th 153, 213.) The record shows that here the trial court eventually ruled that two of

Olsson's family members would not be encompassed in its general order to exclude all witness from the courtroom because those witnesses were not testifying during the guilt phase, and because the prosecutor "contemplated" that their testimony at the penalty phase would not be about the circumstances of the case. Furthermore, the court offered to work with defense counsel "session by session" to help him determine if any testimony by the upcoming prosecution witnesses would give defense counsel reason to make a specific request to exclude those two family members or any other particular witnesses during any particular testimony. This shows that the court knew it had to factor in whether the presence of the victim's family in the courtroom would pose a substantial risk of influencing or affecting the content of any testimony. Thus, the record clearly supports an inference that the trial court was well aware of its obligation pursuant to Evidence Code section 777 and former section 1102.6 and performed the requisite analysis.

Finally, appellant complains that the prosecutor misled the court. Appellant points to where the court asked the prosecutor if Olsson's family members "would be testifying about the circumstances of the crime" at the penalty phase of the trial, and the prosecutor answered "no." (I AOB 177.) Appellant argues:

> If the prosecution's representation was truthful, then it precluded the prosecutor from calling any family witnesses at the penalty phase because victim impact testimony is only admissible at the penalty phase under section 190.3(a), which allows the jury to consider "the circumstances of the crime" in determining the proper sentence. (*People v. Stanley* (1995) 10 Cal.4th 764, 832.) If the prosecutor's representation was untruthful, then he misled the defense and the trial court. Either way, the prosecutor's statements were misleading and did not provide a reasonable basis for the court's ruling.

(I AOB 177-178.)

Appellant's argument fails because clearly all parties understood that the prosecutor's reference to "circumstances of the crime" in the witness-exclusion discussion did not include victim impact evidence. In context, when the court

asked about the "circumstances" of the crime it was asking whether family members Dietrich and Trip would be testifying about the circumstances of the *commission* of the crime, facts relevant to the guilt phase of the proceeding. If so, the court would have excluded these penalty phase witnesses from the courtroom, so that their testimony could not be affected by the guilt phase witnesses' testimony relating to the commission of the crime. By answering "no," the prosecutor indicated that these penalty phase witnesses would not testify about the facts of the crime, but would give "victim impact" testimony instead. Neither the prosecutor nor the court interpreted the phrase "circumstances of the crime" in the broadest sense as used in section 190.3, but in a more limited sense as it would relate to evidence admissible at the guilt phase of a trial.

In sum, the trial court did not abuse its discretion by refusing to exclude members of the victim's family from the guilt phase of the trial. The best appellant's contrary arguments do is evince a reasonable disagreement with the trial court. And where, as here, the question on review is whether the lower court abused its discretion, appellate counsel's showing of error is insufficient if he or she merely presents facts which afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge. (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.)

VI.

SUFFICIENT EVIDENCE SUPPORTS THE GUILT PHASE JUDGMENT

Appellant contends that he is due a reversal of the entire guilt judgment because his convictions for first-degree murder and assault with intent to rape, along with the affirmative finding on the burglary-murder special circumstance, are not supported by sufficient evidence. (I AOB 184-201.) The People disagree.

The standard of review governing allegations of insufficient evidence is well known. The due process clause of the Fourteenth Amendment requires the prosecution to prove every element of a crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 313-324 [99 S.Ct. 2781, 61 L.Ed.2d 560].) In evaluating a claim of insufficient evidence, the reviewing court examines the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence, i.e., evidence that is reasonable, credible and of solid value, that would support a rational trier of fact in finding the essential elements beyond a reasonable doubt. (*People v. Lewis* (2001) 25 Cal.4th 610, 643.) In doing so, the court presumes in support of the judgment the existence of every fact that the trier of fact could have reasonably deduced from the evidence. (*People v. Towler* (1982) 31 Cal.3d 105, 117-118; *People v. Johnson*, *supra*, 26 Cal.3d 557, 576.) If the evidence permitted a reasonable trier of fact to find that the accused was guilty, the opinion of the appellate court that the circumstances of the case may also be reconciled with innocence will not warrant a reversal. (*People v. Towler*, *supra*, 31 Cal.3d at p. 118.) The reviewing court may not reverse a conviction based on insufficient evidence unless it clearly appears "that upon no hypothesis whatsoever is there sufficient evidence to support it." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

A. Sufficient Evidence Supports The First Degree Murder Conviction On A Premeditation And Deliberation Theory

Appellant claims that if the jury returned the first degree murder conviction on the premeditation-and-deliberation theory provided it, the conviction is supported by nothing other than "scant" and "minimal" evidence. (I AOB 187-193.) Appellant's claim is unpersuasive.

Appellant cites *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, as summarizing the types of evidence appellate courts have considered in weighing the sufficiency of a first degree murder conviction based on premeditation and deliberation. *Anderson* discusses planning-activity evidence, motive evidence, and manner-of-killing evidence. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) However, "*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *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." (*People v. Pride* (1992) 3 Cal. 4th 195, 247.) Thus, while it is true that premeditation and deliberation must arise from "careful thought and weighing of considerations" (*People v. Anderson*, *supra*, 70 Cal.2d at p. 27), it is also true that "'[t]he process of premeditation and deliberation does not require any extended period of time. "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. . . ." [Citation.]'" (*People v. Bolin*, *supra*, 18 Cal.4th at p. 332, quoting *People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

Under the foregoing legal principles, there existed sufficient evidence to support a jury finding that appellant premeditated and deliberated his murder of Olsson. First, there was strong evidence of planning. The evidence shows

that appellant waited until the early morning to commit his crime, at about 1:00 to 2:00 a.m., when Olsson was alone and presumably sleeping and no witnesses awake in the neighborhood to see or hear anything. The evidence also shows that appellant contemplated and attempted different ways to enter the house. He cut, bent, removed, and eventually discarded the bathroom window screen next to Olsson's master bedroom. (10 RT 2033, 2037-2038; 11 RT 2098-2099, 2103, 2106-2108, 2114-2115, 2160-2161, 2187-2188; 12 RT 2301-2302; 14 RT 2833.) Although there existed no evidence that he actually entered through that window, the evidence overwhelmingly established that he forced his way inside through the front door: The police found the chain mount and chain, along with two screws and a piece of wood, forcefully pulled out of the front door frame. The chain was hanging on the slide that was still bolted onto the front door. (10 RT 2052, 2077; 11 RT 2122-2128, 2151-2152; 12 RT 2255; 14 RT 2843, 2846, 2862-2864.) Further, there existed evidence that Olsson would cautiously answer the door at night by leaving the chain latched to the door and only partially opening the door to see who might be on the other side. (14 RT 2789.) The bruises on Olsson's head were also consistent with her head having come in contact with the edge of a forcibly-opened door. (13 RT 2666, 2711.) And the bruised lines on Olsson's lips and left ankle were consistent with having been hit with the edge of a forcibly-opened door. (11 RT 2175-2176.)

We also know that appellant brought his Buck knife with him to Olsson's house. Not only did his erstwhile stepfather Chandler tell authorities that he was with appellant in September 1985 when appellant bought a hunting license and the Buck knife (13 2524-2526; 14 RT 2855), but appellant's finger and palm prints were found on the knife after the crime. (12 RT 2406, 2408-2413, 2449-2453).

> [T]he fact that the defendant brought his loaded gun [to the location] and shortly thereafter used it to kill an unarmed victim reasonably

suggests that defendant considered the possibility of murder in advance. (*People v. Miranda* (1987) 44 Cal.3d 57, 87; accord, *People v. Williams* (1995) 40 Cal.App.4th 446, 455.)

> As to planning, the jury could infer that defendant carried the fatal knife into the victim's home in his pocket, which makes it "reasonable to infer that he considered the possibility of homicide from the outset."

(*People v. Steele* (2002) 27 Cal.4th 1230, 1250, citation omitted.)

Further planning was demonstrated by the fact that, as appellant told police, he had a pair of gloves in his car and went there to obtain them because, in his words, "after I saw what happened, I didn't want my fingerprints in the house." (People's Exh. 6C at p. 21.)

As for motive evidence, the record reflects a plausible motive. The evidence shows that for about a year appellant lived with Chandler, in a house only two houses away from where Olsson lived. (13 RT 2503, 2534.) Chandler testified that appellant moved out of his house about four weeks prior to Olsson's death. (13 RT 2507-2508.) Appellant told police that he lived with Chandler from November 1984 to November 1985. (People's Exh. 6C at p. 27.) In either case, after appellant moved out, he continued to visit Chandler to pick up his mail and phone messages. (13 RT 2508-2510, 2511-2513, 2516-2520.) A reasonable inference from this is that Olsson knew appellant from the neighborhood and that she recognized him when he broke into her house and attacked her. Accordingly, he killed her to avoid identification and arrest. (*People v. Mayfield, supra*, 14 Cal.4th 668, 769.) Consistent with this theory is appellant's statement to police that after "Doubting Thomas" committed the crime appellant put on gloves and tried to wipe off any fingerprints he might have left to avoid identification. (People's Exh. 6C at p. 21.) (See also *People v. Sanchez* (1995) 12 Cal.4th 1, 31-35 [reviewing court will sustain conviction where there is strong motive in conjunction with evidence of planning]; *People v. Miranda, supra*, 44 Cal.3d at p. 87 ["the law does not require that a first

degree murderer have a 'rational' motive for killing."].)

Third, the manner of killing demonstrates willful premeditation and deliberation on appellant's part. The evidence shows that appellant drove his Buck knife into victim Olsson's head and body 28 times, with enough force to break and cut her ribs, puncture her lungs multiple times, and break the ridge and bone around her eye. (13 RT 2657-2683.) The amount of force used to stab Olsson broke the tip of the knife and left chips in it. (13 RT 2618-2619.)

Appellant, relying upon *People v. Haskett* (1982) 30 Cal.3d 841, 850, argues that the many stab wounds randomly inflicted "'does not in itself establish premeditation and deliberation'" and may instead infer a "frenzied, unplanned attack." (I AOB 191-192.) However, in this case, Criminalist Binkley testified that the blood smears on the bed sheet indicate that appellant stabbed Olsson, paused to wipe his bloody knife on the sheet, continued to stab Olsson, and then wiped his knife again on the sheet (13 RT 2608-2611), all of which establishes that appellant had time to reflect and think about what he was doing.

Appellant, nevertheless, argues that "there was no evidence that any interval of time elapsed between the wipes or that they occurred before, as opposed to after, the killing." (I AOB 191.) He therefore claims that, "If it occurred after the killing, it could not establish the required mental states of malice *aforethought,* intent to kill or *pre*meditation." (I AOB 191, original emphasis.) However, as just set forth, criminalist Binkley stated that Olsson's killer paused to wipe the bloody blade before restabbing her. In addition, Dr. Van Meter testified that every stab wound caused hemorrhaging, which indicated that Olsson's heart was still pumping and that she was still alive when stabbed 28 times. Dr. Van Meter further testified that none of the stab wounds would have resulted in instant death, and that even with no medical attention Olsson could have survived for over an hour. (13 RT 2674-2677, 2683.) Appellant's

argument that the stab wounds may have "occurred after the killing" is rebutted by the evidence.

Furthermore, the evidence strongly suggests that appellant also strangled Olsson. Dr. Van Meter found hemorrhaging in the muscles of the neck and overlying the structures of the larynx, causing the "voice box" to collapse and obstruct the breathing. She also observed fractures of the superior horns of the thyroid cartilage and the hyoid bone under the tongue. She opined that these injuries were the result of "blunt force" or "compression type" injuries like strangulation. (13 RT 2679-2682.) (See *People v. Steele*, *supra*, 27 Cal.4th 1230 [where defendant stabbed the victim about eight times in the chest and strangled her, and previously killed another woman in a similar manner, the court held that the evidence "supports the inference of a calculated design to ensure death, rather than an unconsidered 'explosion' of violence."].) Thus, appellant's stabbing of Olson in the head, neck and back 28 times, and also strangling her, strongly infers that he deliberately planned to kill her.

Therefore, under the circumstances and based upon the totality of the evidence from trial, there is more than sufficient evidence to sustain a finding of deliberate and premeditated murder. (*People v. Brito* (1991) 232 Cal.App.3d 316, 323-324.)

Pointing to various excerpts of the prosecutor's closing argument, appellant claims that the prosecutor erroneously argued that "the factual basis for the separate elements of malice aforethought, premeditation, and deliberation was identical." (AOB 189.) To support his claim, appellant argues that the prosecutor "improperly argued that 'thinking about it' was sufficient to prove premeditation, deliberation and malice aforethought beyond a reasonable doubt." (AOB 190.) Reviewing the excerpts in context with the prosecutor's argument pertaining to malice aforethought, premeditation, and deliberation, we find no error. The prosecutor, in pertinent part, stated:

The court is going to instruct you on another form of murder because there is two ways of getting to first degree murder. One is the way that I've already told you where you have a killing, whether it's intentional, unintentional, accidental, it occurs during the course of a burglary.

And the defendant had the specific intent to commit the crime of burglary, and that's basically what we hear.

There's another form called willful, deliberate, premeditated killing with the express malice aforethought.

The road or two roads result in the same thing and that is the culprit is guilty of first degree murder. But whereas one where you go in there with the intent to commit the crime of burglary and killing occurs which automatically makes it murder in the first degree, the other one deals with situations that even the facts in this case can create a first degree murder. To begin with you need to have malice aforethought. And malice aforethought comes in a form called express malice.

Now, what express malice basically means is you show an intent to unlawfully kill a human being. I mean you manifest it. You make it very clear that your whole purpose is to kill a human being. And again we get back to how do [you] know what's going on inside somebody's head, the things they do, the circumstances surrounding the act, the instruments they use and the methods they use to achieve it, and if a person has malice, express malice, that's all that's required for a murder.

When we talk about malice aforethought, it doesn't require any ill will or hatred. See this is one of those words that the law gives a different meaning to. All it requires basically is that the person, when we talk about aforethought has nothing to do with deliberation but merely has to do with the idea that this mental state, "I plan to kill," intentionally existed before the act occurs, doesn't entail deliberation.

Now, this other form of first degree murder, as I indicated, you've got a willful killing, willful means intentional, an intentional killing. Deliberate, you think about it. Now, it's not like on Columbo where you sit down and you write up a list of pros and cons on why I should kill. It can be that way, but it's not that complex. What it basically means is that the person thought about it. Thought about life versus death. And makes a decision to kill.

This process also requires premeditation. And premeditation means that you think about it before you commit the act. The length of time is not a standard because a cold, calculated judgment and decision to kill can occur in a very short period of time. Basically, when we talk about

premeditation, we talk about thinking of it beforehand.

You've also got to have that express malice aforethought. And express malice is basically repetitious of the first requirement, because when we talk about express malice, we're talking about an intent to unlawfully kill a human being. You've made this decision that you intend to unlawfully kill. It's a willful killing. You've deliberated and you've thought about it.

It's not an act of sudden heat of passion. This killing wasn't a sudden act of heat of passion. And this woman didn't have a chance. And the evidence has been very clear that he thought about it. But, you know, you don't have to go through this mental gymnastics. While you can, you don't have to because you can get there by the other road of a killing that occurred during the course of a burglary. And by that killing that occurs during the course of a burglary automatically makes it first degree murder.

(15 RT 3080-3083.)

The record shows that appellant is wrong in claiming that the prosecutor simply argued that "'thinking about it' was sufficient to prove premeditation, deliberation and malice aforethought beyond a reasonable doubt" (I AOB 190), which is surely why defense counsel made no "misstatement of law" objection. No reasonable juror would have understood the argument as appellant does. The prosecutor clearly explained that "express malice aforethought" required a manifest intention to unlawfully kill before the act of killing occurred, "deliberation" meant that there was consideration of life versus death, and "premeditation" meant that the deliberation occurred before the act of killing. The prosecutor's argument was proper and consistent with the instructions the trial court eventually read to the jury. (16 RT 3240-3244; see CALJIC Nos. 8.10, 8.11, 8.20.)

B. Sufficient Evidence Supports The First Degree Murder Conviction On A Felony Murder Theory And Also Supports The Burglary-Murder Special Circumstance And The Count 2 Assault With Intent To Commit Rape Conviction

As the trial court instructed the jury, to find appellant guilty of first degree murder on a felony murder theory the jury needed to find, among other elements, that appellant entered Olsson's home with "the specific intent to steal, take and carry away the personal property of another of any value and with the further specific intent to deprive the owner permanently of such property or with the specific intent to commit rape." (16 RT 3239.) To find the burglary murder special circumstance true the jury needed to find, inter alia, that appellant committed the murder "while engaged in the commission or attempted commission of a burglary." (16 RT 3245.)

Appellant claims that if the jury returned its first degree murder conviction on the felony murder theory provided it (16 RT 3239), insufficient evidence supports it because the evidence did not establish that he had an intent to steal or to commit rape when he entered the victim's house. Appellant claims that the absence of those intents dooms the burglary-murder special circumstance and assault with intent to commit rape conviction as well. (I AOB 184, 186-187, 193-201.) Appellant is wrong again.

Viewing the evidence in the light most favorable to the judgment reflects substantial evidence that appellant entered Olsson's home with a specific intent to steal or to commit rape. With respect to the former, appellant told the police that he went to Olsson's home with "Doubting Thomas" so that Thomas could get drugs from Olsson. (People's Exh. 6C at pp. 3-4, 19-20.) The jury could have reasonably rejected the "Doubting Thomas" part of that statement, but believed from it that appellant used and wanted drugs. In turn the jury could have reasonably inferred that appellant broke into that home in the early morning with an intent to steal money to support his drug habit. After all,

appellant took Olsson's purse and discarded it after taking the $3.95 she had in there. (11 RT 2090-2093, 2207; 12 RT 2313, 2339-2340; 14 RT 2257-2259, 2822-2823, 2918.) The evidence supports the jury's conclusion that appellant had the intent to steal upon entering and didn't simply form it after entry.

As for the evidence of appellant's intent to commit rape, the evidence shows that he told police that he had intercourse with Olsson. (People's Exh. 6C at pp. 7-8, 18.) The jury could have reasonably believed, given all the other evidence that sex had occurred (e.g., that Olsson was found naked with her bed clothes underneath her and on the floor), that appellant did have sex with Olsson, but rejected his ridiculous recitation of a consensual encounter with her. It is simply inconceivable Olsson would have done what appellant described. The jury could have reasonably believed that appellant didn't simply garner an intent for sex after entry, but had that intent before he entered, which is why he targeted the home of a single woman in his neighborhood and entered in the early morning hours with a knife, knowing that she would be alone and vulnerable.

In light of the above, substantial evidence supports the first degree murder conviction on a felony-murder theory, the burglary-murder special circumstance, and the assault with intent to commit rape conviction.

Appellant argues that "the physical evidence shows that a rape did not occur." He specifically points to the fact that, "The coroner found no evidence of trauma to the genital area, or any other sign of sexual assault or attempted sexual assault." (I AOB 195, citing RT 2689.) Appellant ignores his own statement to police that he had sex with Olsson, however, and ignores that Dr. Van Meter further testified that the absence of finding visible injury or trauma to Olsson's genitalia did not mean that she was not forced to submit to an act of intercourse. (13 RT 2687-2688.)

Appellant further points out that the magistrate at the preliminary hearing

held that the evidence was insufficient to charge rape or attempted rape as a separate offense, but that the evidence was sufficient for the prosecutor to charge assault with intent to commit rape. (I AOB 195.) He claims that at trial, "the prosecution submitted no evidence beyond that presented at the preliminary hearing to support its highly inflammatory, but circumstantial accusation of rape." (I AOB 194.) The record shows otherwise. Again, at trial the prosecutor introduced appellant's tape recorded statement to the police that he entered Olsson's home and had intercourse with her (People's Exh. 6C at p. 8), which was corroborated by evidence that Olsson's pajamas had been removed and that her mutilated naked body was positioned on the bed so that her pelvic area was raised on top of the rolled up bedding and pajamas. (10 RT 2045-2046; 11 RT 2190; 12 RT 2237.)

Lastly, appellant's reliance upon *People v. Johnson*, *supra*, 6 Cal.4th 1, *People v. Craig* (1957) 49 Cal.2d 313, *People v. Anderson*, *supra*, 70 Cal.2d 15, and *People v. Granados* (1957) 49 Cal.2d 490, is misplaced. (I AOB 197-199.) In these cases, this Court held that there existed insufficient evidence that the respective defendants had intended to rape, attempt to rape, or commit a lewd and lascivious act, and thus there existed insufficient evidence to support a finding of felony murder. However, in these cases this Court noted the absence of evidence that defendants had shown any sexual interest in or engaged in any sexual activity with their victims. That is not this case, especially in light of appellant's statement that he was interested in having sex with Olsson, "made out with her," and had intercourse with her.

Appellant also argues: "Significantly, the jury was instructed that it was 'not required to agree as to which particular crime the defendant intended to commit' at the time of his entry into the victim's house." (I AOB 193-194.) He claims that as a result, "the likelihood of juror confusion on this issue was great." (I AOB 194, fn. 56.) However, this Court has held that "if the jury

finds a felonious entry was made, they are not required to agree on particular felonies intended." (*People v. Failla* (1966) 64 Cal.2d 560, 567-569.) And the prosecutor, in his very first statement and throughout closing argument, asserted that appellant forcibly entered Olsson's house with intent to commit both rape and theft. (15 RT 3024.) The jury was not confused, given that argument and the instructions.

Appellant additionally complains that the final information did not specify the theory of first-degree murder (i.e., whether it was premeditated or felony-murder), did not separately charge him with felony murder, and did not specify the nature of the intended felony for the burglary-murder special circumstance allegation. (I AOB 185.) Appellant's complaint is without basis

In this case, the information, in relevant part, charged appellant with first-degree murder, a special circumstance allegation that the murder was committed during the commission of a burglary, and also assault with intent to commit rape. (I AOB 185 citing CT 1539-1541.) The prosecution is not required to specify the theory of murder in the accusatory pleading. Adequate notice is provided at the preliminary hearing or the indictment proceedings. (*People v. Diaz* (1992) 3 Cal.4th 495, 557; *People v. Silva* (2001) 25 Cal.4th 345, 367-368.) In addition, it is not error for the prosecution to not charge the underlying special circumstance felony as a separate offense; the People may charge the special circumstance felony in the murder count. (*People v. Morris* (1988) 46 Cal.3d 1, 18; *People v. Mickey, supra*, 54 Cal.3d 612, 677, fn. 12.) Moreover, appellant cites no case law to support his claim that the intended felony of the burglary-murder special circumstance be charged in the information. The prosecutor specifically began and argued throughout his closing statement that appellant forcibly entered victim Olsson's house with intent to commit rape and theft. (15 RT 3024.) This gave appellant sufficient notification of what he had to defend against.

Appellant also complains that "under the merger doctrine, an assault charge is insufficient to support a burglary-murder charge or a burglary-murder special circumstance." (I AOB 185.) Relying upon *People v. Ireland* (1969) 70 Cal.2d 522, 539-541), he reasons, "Since the crime of assault is a lesser included offense of murder, all murders would become felony-murders if assault were considered as the predicate felony." However, as stated above, the prosecutor did not rely on "assault" to support the burglary murder special circumstance, but argued that appellant committed burglary with intent to commit rape and theft. Therefore, appellant's claim is unwarranted.

Appellant's argument 6 is without merit in all respects.

VII.

THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF APPELLANT'S UNEMPLOYMENT

During the prosecution's case-in-chief, appellant's mother's ex-boyfriend testified and described his relationship with appellant as "almost like father and son." (13 RT 2503.) Chandler testified that he lived two houses away from where victim Olsson lived. (13 RT 2503-2504.) He stated that appellant lived with him from the winter of 1985 to the beginning of July 1986, and moved out about four weeks before Olsson was murdered. (13 RT 2503, 2507-2508.) After he moved, appellant stopped by infrequently, Chandler continued. (13 RT 2511.) Appellant, however, kept a key to the house; and continued to leave his clothes, receive mail, and receive phone calls there. (13 RT 2508-2512.) Many of the calls were from the union hall about jobs for appellant. (13 RT 2510, 2512-2513, 2516-2517.) There were also other phone calls for appellant, including one urgent call and another from his mother. (13 RT 2519-2520.) Appellant had a key to Chandler's house until Chandler changed the locks on his doors in March 1987. (13 RT 2520-2521.) The direct examination, in relevant part, continued:

Q. For the six months before the murder of your neighbor the defendant had a hard time keeping a job, didn't he?

A. Did he what?

Q. Had a hard time keeping a job?

[Defense Counsel]: I'm going to object to this—

A. Yes.

[Defense Counsel]: —it's irrelevant.

[THE PROSECUTOR]: Motive.

[Defense Counsel]: Well, I want an offer of proof outside the presence.

THE COURT: All right. Approach.

(Whereupon, the Court and counsel conferred.)

THE COURT: All right. Now for the record, the objection to the last question will be overruled. That question was answered. That answer will remain in.

And, Mr. [Prosecutor], you may proceed with other questions.

[THE PROSECUTOR]: That six-month's period before he moved out of your home, that is, let's say, 1986, when he was living at your home, from the first to when he moved out three weeks, four weeks earlier in the first part of July, there would be days when the defendant would be gone from your home for a number of days, and then when he came back he'd sleep all day, correct?

A. I don't remember him coming back to sleep there or stay there, not to sleep.

Q. I'm sorry?

A. I don't remember him coming back just sleeping there, no, uh-uh.

Q. Well, weren't there days when he would just do nothing but sleep all day and into the night, into the next day?

A. I don't know how long he would be sleeping. He would be sleeping when I would get up and go to work.

(13 RT 2522-2523.)

On cross-examination, Chandler testified that appellant had moved in right after appellant was discharged from the Marine Corps and lived there for less than a year. (13 RT 2533.) On re-direct examination, Chandler stated that appellant had moved into his house in the winter of 1985 and stayed "on and off" for about one year. (13 RT 2534.) At the end of Chandler's testimony, and outside the presence of the jury, the court summarized the bench conference for the record:

I simply want to memorialize for the record the subject matter of the last bench conference, which occurred at approximately 11:45. It was with respect to the witness Chandler, and, with regard to that, there had been a question asked by [the prosecutor] generally relating to the subject matter of [appellant's] employment situation prior to the killing. That was objected to. We—there was an approach to the bench on that issue. There was discussion relating to the relevance of that question,

also with regard to the relevance of [appellant's] appearance during the period that was being discussed before the killing and also with regard to the issue of possible drug use or involvement with drugs.

At the end of that discussion the Court indicated that the Court would, and the record reflects that, the Court did overrule the objection relative to [appellant's] work history and the period of time being discussed before the killing. Finding there to be relevance to that line of inquiry also I permitted the prosecutor, and indicated that I would ask specific questions relative to [appellant's] appearance during that period.

And I think, if you agree with the accuracy of that recollection, we'll take our recess and return at 1:45.

[THE PROSECUTOR]: Your Honor, there is one thing I would like to have on the record, and that is with regard to Exhibit 55, the telephone bill statement and its envelope, where the witness had written a note.

And the note reads:

"Rich,

"You have a telegram at Western Union. They called this morning.

"The Public Defender in Martinez wants you to contact him immediately.

"Also, your mom called and wants you to call her at 9:00 p.m. our time."

The witness got out the fact that most of the calls that I get are for jobs, and I think that that creates a false light with regard to [appellant].

Also, the entirety of this statement, that I know we'll get into it a little bit later, but just for purposes of getting the Court's thinking and counseling with regard to this, the witness was saying that he wasn't staying there, but, yet, given what is being reflected in the note, making a specific reference to this morning, indicates that—two things. Number one, he's getting phone calls not just from employers, but from his attorney; and secondly, that his appearances were expected more regularly than this witness would seem to indicate in his testimony this morning.

(13 RT 2536-2538.)

Appellant contends that the trial court erred in overruling his "relevancy" objection to the evidence of his alleged unemployment status a short time prior

to Olsson's murder. (I AOB 202-208.) Citing *People v. Wilson* (1992) 3 Cal.4th 926, 939, and *People v. Edelbacher* (1989) 47 Cal.3d 983, 1024, for support, appellant urges that the fact of a defendant's poverty "generally is inadmissible to establish motive to commit robbery or theft. . . . This Court has found that the probative value of this evidence is outweighed by the risk of prejudice." (I AOB 202.) Appellant claims that the trial court's abuse of discretion in admitting the unemployment evidence prejudiced him because without it the prosecutor could not have proved burglary felony murder or the burglary-murder special circumstance. (I AOB 205-206.) Appellant claims the error requires reversal of the death judgment too because the prosecutor prejudicially used it to help obtain the death verdict. (I AOB 206-207.) Appellant lastly claims that the admission of the unemployment evidence violated his rights to due process, equal protection, and to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution, as well as his Eighth Amendment right to a reliable penalty determination (and his parallel rights under article I of the California Constitution). (I AOB 206-207.)[18/]

Appellant's assignment of error fails because no abuse of trial court discretion appears. *People v. Wilson*, *supra*, 3 Cal.4th at page 939, and *People v. Edelbacher*, *supra*, 47 Cal.3d at page 1024, state that it is unfair to make poverty *alone* a ground for suspicion or evidence to establish a motive to

---

18. Appellant objected at trial to the unemployment evidence on relevancy grounds only. (13 RT 2522.) Thus, to the extent appellant is invoking the alleged federal and state constitutional violations as additional legal consequences of the relevancy error, that is permissible. (*People v. Avila*. *supra*, 38 Cal.4th 491, 527, fn. 22; *People v. Partida*, *supra*, 37 Cal.4th 428, 437-438.) If appellant is alleging the state and federal constitutional as providing a theory of inadmissibility in addition to relevancy, those arguments are forfeited (*ibid.*), as is his claim (I AOB 205) that the trial court should have excluded the unemployment evidence under the Evidence Code section 1101 prohibition against improper character evidence. (*People v. Thomas*, *supra*, 2 Cal.4th 489, 519-520.)

commit poverty robbery or theft. That did not occur here. The prosecutor did not *only* present the evidence that appellant "had a hard time keeping a job" in the six-month period before the murder in attempt to establish a motive for burglary or theft. As the prosecutor noted, there also existed the evidence of appellant's statement to police regarding drugs. As the prosecutor properly argued in summation:

> Now, why would he go into her home, aside to do that and to steal, whether he thought there might be drugs or just to take the few dollars that she had in her purse, thinking that maybe there would be more?
>
> Now, John Chandler did tell us a few things about [appellant], he couldn't keep a job for six months before he moved out of the house in July, couldn't keep a job. He's living with John Chandler.
>
> What else do you know about [appellant]? Well, [appellant] tells you, himself, he's using drugs. He's using drugs. Well, where do you get money for that if you can't keep a job? How do you support that? I mean we're not talking about keeping a roof over your head.

(15 RT 3049.)

That the trial court did not abuse its discretion in admitting the evidence of appellant's employment status prior to the killing is shown by the fact that the evidence was relevant on issues other than appellant's motive for theft. The evidence was probative on the issue of appellant's living status. Chandler testified that even after appellant supposedly "moved out," he continued to receive phone calls at Chandler's house, many of which were from the union about jobs prospects. That helped refute Chandler's additional testimony that appellant actually stopped living with him four weeks before the murder occurred, and rarely visited. In addition, the evidence refuted appellant's out-of-court statement to police that he moved out of Chandler's house eight months before the murder occurred and had not stayed overnight there in over four weeks. (13 RT 2511; People's Exh. 6C at pp 22-23, 27.) Appellant's alleged unemployment status helped establish that he had a reason to continue living at Chandler's house, presumably rent free, and was in fact continuing to

receive job related and other phone calls at the house when Olsson was murdered. This in turn helped establish that appellant was living in the immediate vicinity when the murder, burglary, and assault with intent to commit rape took place.

Appellant's contention that the evidence that he "had a hard time keeping a job" was irrelevant and more prejudicial than probative fails. And because the evidence was admissible on multiple grounds refutes appellant's claim that the admission of the evidence rose to the level of a federal constitutional violation.

VIII.

APPELLANT'S CLAIMS OF INDIVIDUAL AND CUMULATIVE PROSECUTORIAL MISCONDUCT AND TRIAL COURT ERROR AT THE GUILT PHASE REGARDING THE INTRODUCTION OF EVIDENCE ARE MERITLESS

Appellant contends that the prosecutor engaged in misconduct at the guilt phase by repeatedly disregarding the court's orders limiting the scope of the admissible victim impact evidence, in an attempt to arouse sympathy for victim Olsson and hatred against appellant. (I AOB 208-241.) Appellant also faults the trial court for permitting the introduction of any victim impact evidence in the first place and permitting the prosecutor "to flaunt its rulings and to introduce impermissible evidence." (I AOB 208, 232-250.) Appellant contends that each set of errors by itself violated various of his state and federal constitutional rights and requires reversal of his convictions and the special circumstance findings. (See e.g., I AOB 209, 217, 230-232, 234, 246, 250.) He also claims that even if reversal is not required when the misconduct and evidentiary errors are viewed separately, reversal is certainly required when the misconduct is viewed cumulatively with the trial court error. (I AOB 251.) Appellant believes that the introduction of the victim impact evidence and the prosecutorial misconduct regarding it was so prejudicial that it rendered his trial fundamentally unfair and thus violated his rights to a fair trial under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as article I of the California Constitution. (I AOB 217, 251.) Appellant's assertions are baseless.

The law in this area is well settled. A prosecutor has a duty to not only seek convictions, but justice as well. While prosecutors may strike hard blows at the defense, they must strike fair blows, not foul ones. (*Berger v. United States* (1935) 295 U.S. 78, 88 [55 S.Ct. 629, 79 L.Ed.2d 1314.) "Society wins not

only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." (*Brady v. Maryland* (1963) 373 U.S. 83, 87 [83 S.Ct. 1194, 10 L.Ed.2d 215].)

Prosecutors commit state-law misconduct when they engage in a pattern of deceptive or reprehensible methods of attempting to persuade the court or jury. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) Prosecutors commit misconduct which violates the Constitution when they engage in conduct so egregious that it infects the trial with such unfairness as to make the defendant's convictions a denial of due process. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [94 S.Ct. 1868, 40 L.Ed. 431]; *People v. Padilla* (1995) 11 Cal.4th 891, 939.)

Few principles of appellate review are more well established than the one which declares that, except in extraordinary circumstances, allegations of prosecutorial misconduct are cognizable on appeal only if at the time of trial the appellant made a timely and specific objection to the prosecutor's alleged misconduct and requested an admonition regarding it. (*People v. Frye*, *supra*, 18 Cal.4th at 894, 969-970; *People v. Montiel* (1993) 5 Cal.4th 877, 914-915.) There is no exception to the waiver rule for capital cases. (*People v. Clair* (1992) 2 Cal.4th 629, 662.) Nor is there any "close case" exception to the waiver rule. (*People v. Cain* (1995) 10 Cal.4th 1, 48.)

It is also well settled that only relevant evidence is admissible at trial (Evid. Code, § 350), and that relevant evidence is defined as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" (Evid. Code, § 210). Questions concerning the admission of evidence at trial are left to the sound discretion of the trial court and are reversed on appeal only on a showing of abuse of discretion. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118; *People v. Ochoa*, *supra*, 26 Cal.4th 398, 437-438.) It is also beyond question that it is the duty of the trial

court "to control all proceedings during the trial, and to limit the introduction of evidence and argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044.) Appellants may challenge trial court evidentiary rulings only if they interposed a timely objection at trial that set forth the same specific grounds for the objection that they wish to raise on appeal. (*People v. Hart* (1999) 20 Cal.4th 546, 615.)

(1) Appellant argues first that the prosecutor committed misconduct during voir dire "by focusing a potential juror on an irrelevant and inflammatory factor, an obligation to the victim's family, and then, after defense objection, repeating the same misconduct." (I AOB 219.) Appellant asserts:

> While questioning juror Jaminson W[.], the prosecutor stated: "[i]t's not fair to the family members of the woman who was murdered if people can't impose either of the two penalties." The defense objected. The trial court did nothing other than to tell counsel: "I would simply ask you at this time to note our conversation for the record. If the situation arises again, you may react appropriately and I'll react as I feel appropriate." ([5] RT 939-940.) [] When the prosecutor made the same comment to another prospective juror, the defense objected. The court finally admonished the prosecutor not to refer to Ms. Olsson's family again during questioning.

(I AOB 219.) Appellant claims that Jamison W. not only heard the comment, but ultimately sat on his jury. (I AOB 219, fn. 63.)

Preliminarily, appellant misreads the record. Neither appellant's citation to the record, nor the record of Jamison W.'s voir dire, indicate that the prosecutor told Jamison W. that "[i]t's not fair to the family members of the woman who was murdered if people can't impose either of the two penalties." (See 5 RT 928-933, 935-938.) The prosecutor did make the statement at issue to potential juror Judith B., who was questioned on voir dire just prior to Jamison W. In any event, appellant did not contemporaneously object in the trial court to the prosecutor's remark. Instead, he waited until the court had completed voir dire

of two potential jurors before raising any objection. The failure to assert a *timely* objection forfeits the claim of prosecutorial misconduct for appeal. (*People v. Frye, supra*, 18 Cal.4th at pp. 969-970; *People v. Montiel, supra*, 5 Cal.4th 877, 914-915.) And appellant's claim that the trial court somehow erred by making a "cryptic" ruling to his objection is trivial. (I AOB 234 ["I think we could spend a fair amount of time whether it's an appropriate subject of voir dire. I would simply ask you at this time to note our conversation for the record. If the situation arises again, you may react appropriately and I'll react as I feel appropriate." (5 RT 940.)].) The trial court's statement is fairly read as an implicit ruling that the prosecutor did not commit prejudicial misconduct.

Indeed no misconduct occurred here. As the prosecutor pointed out, he made clear to the juror that he was talking about the penalty phase of the trial where the impact of the victim's death on her family was an appropriate issue. The court likewise stated "I don't think anybody in this room would dispute the legitimate issue of any family member." (5 RT 940.) The prosecutor's remark was proper. Furthermore, appellant could not have suffered prejudice because Judith B. did not serve as a juror. (8 CT 1926.) Although appellant also asserts that "the prosecutor made the same comment to another prospective juror," appellant does not divulge the other prospective juror's name and does not give a citation to the record. (I AOB 219.) Therefore, we cannot respond to that claim and this Court should summarily reject it.

(2) Appellant argues that the prosecutor committed misconduct during opening statement by improperly telling the jury that at the time of her death, victim Olsson and her sister were planning to take a trip to Topeka, Kansas to celebrate their father's 85th birthday; and "about Ms. Olsson's commendable, but irrelevant, life history." (I AOB 210-212, 220.)

"The purpose of the opening statement is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and

effect, and the use of matters which are admissible in evidence, and which are subsequently in fact received in evidence, may aid this purpose." (*People v. Wash*, *supra*, 6 Cal.4th 215, 257, citations and internal quotation marks omitted.) Remarks made in opening statement do not constitute misconduct unless the evidence referred to by the prosecutor was so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1213; *People v. Wrest* (1992) 3 Cal.4th 1088, 1108.) That is not the case with respect to the comments to which appellant currently complains:

> Ladies and Gentlemen of the jury and alternates, the evidence will show that this past weekend marked the 6th anniversary of a family gathering. That family gathering had its origins earlier than obviously when it was planned for.
>
> As a matter of fact, on July 17, 1986, that was the 58th birthday of Shirley Olsson. And at that time or around that time, Shirley Olsson and her sister, Jan, had made arrangements and were talking and planning to basically meet with their father in Topeka, Kansas. That meeting was to take place on Saturday, July 26th of 1986. And they were there to celebrate their father's 85th birthday.
>
> Well, there was a family gathering, but it wasn't in Topeka. It was in Livermore. And that family gathering was not to celebrate, but to mourn. Because the evidence will show that the day before Shirley Olsson was to leave to go to Topeka, Kansas, in the early morning, a Friday, July 25, 1986, this defendant (pointing) forced his way into her home, and after a very brief struggle where he was able to quickly gain control of her with a knife like this (indicating), a Buck 110, he forced her into her bedroom, where he sexually assaulted her, and then he viciously, viciously murdered Sandy Olsson.

(I AOB 210-211, citing 10 RT 1954-1955.)

The prosecutor continued:

> Sandy Olsson was a nurse. Started here nursing in the army in 1950 during the Korean war, served in Japan, who treated the soldiers coming back from Korea. Then at that point in time, her career moved on. She got married, had two children, stopped nursing for a period of time while her children were in school, raising them. And then returned to

nursing.

Along the way in 1977, '78, she was divorced from her husband after a marriage of some 25 plus years. By then, her children were adults.

The evidence will then continue to show that returning to the work place or the work force as a nurse, she moved from a couple of hospitals here in the Bay Area, even going over to Hawaii, and eventually in 1982 getting a staff position out at the Veteran's Administration Hospital in Livermore. There, she worked as a general nurse, and she even specialized in a particular field of nursing. She was the ostomy nurse, and what that basically means is the patients they treated out there at the Veteran's Hospital, a number of them had colostomies, or open wounds, and she became a specialist and received special training and how to take care of those patients and what those patients needed to know to take care of themselves and handling the colostomy bags and the like.

The evidence will show that she's a very, very dependable nurse. One that would always be at work. Sickness would not get in her way. I mean, her life at that point in time, with the children out of the home, was the job and she was dedicated to it.

(10 RT 1955-1956.)

The prosecutor later added:

So, there's Sandy, who enjoyed her garden and would maintain the yard. I mean that was her hobby. I mean the things that she would do basically is that. When she was home, she'd be tired at the end of the day. If she weren't working on the weekends, basically there would be gardening, always reading, always reading, and sunbathing. This was before we really became aware of the dangers of skin cancer, but she enjoyed sitting in the sun.

(10 RT 1959.)

The prosecutor did not commit misconduct here. As he explained to the trial court on appellant's objection to his remarks, the statements at issue referenced the evidence that he expected to introduce to prove his case. He stated that the "type of person that Shirley Olsson was is extremely probative" to prove that the killing was intentional, premeditated, deliberate, and committed by a stranger. (10 RT 1983.) The prosecutor further explained that

there existed little physical evidence to show that Olsson resisted her killer, which inferred that she might have known the killer. To rebut that inference, the prosecutor explained that he would seek to introduce Olsson' s background and her responsibilities at work to show that she was not docile, and would not have normally easily submitted to a perpetrator, but submitted to appellant without resistance because she was under complete control and at knife point. In short, the prosecutor stated that his evidence was aimed at showing that Olsson was not killed by a "spurned lover" or by somebody she knew, but by appellant.

The prosecutor next explained that he had referenced evidence he intended to introduce to try to prove that Olsson's life was focused on her job, which left little time or energy for anything else. The prosecutor believed that relevant and necessary to rebut anticipated defense testimony that Olsson, at night, sold stolen drugs and had sex with men she did not know. The prosecutor next explained that Olsson's job and the planned family reunion was evidence he planned to introduce to explain the conduct of one of Olsson's co-worker's when Olsson did not report for work on the morning she was found dead, as well as a neighbor's conduct when Olsson did not drop off her house keys before she left on her trip. Both persons knew that Olsson would not have gone anywhere on the morning in question except to work, when her plan was to leave the next day to visit her father to celebrate his 85th birthday. (10 RT 1984-1986.) None of the evidence which the prosecutor referred to in the challenged statements was "so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted." (*People v. Davenport, supra*, 11 Cal.4th at 1213.) That the trial court accepted the prosecutor's explanations and overruled the defense objection to the challenged remarks not only further demonstrates no prosecutorial misconduct, but was a reasonable ruling in and of itself, contrary to appellant's claim. (I AOB 235-237.)

(3) Appellant next contends that prosecutor committed misconduct by eliciting numerous instances of improper "victim impact" testimony from Olsson' s co-worker Barbara Green. (I AOB 212-215, 222-226.) All of appellant's allegations fail.

Appellant claims that the prosecutor, "in violation" of an order of the trial court, "emphasized" that Olsson was killed on the weekend of her father's birthday by "encouraging" Green to testify that Olson had planned to visit her father for his birthday. (I AOB 211, 224.) Appellant asserts that the trial court had ruled that only the fact that "a trip was contemplated" was admissible evidence. (I AOB 223) The record shows otherwise, however. Again, the prosecutor, in his opening statement, remarked that Olsson and her sister were planning to meet their father in Kansas to celebrate his 85th birthday. (10 RT 1954.) After a lengthy discussion on defense counsel's objection, the court overruled the objection as it related to Green's proposed testimony. (10 RT 2003.) The court stated, "In terms of whether there was . . . a trip contemplated for July 26th, again, I'm going to overrule that objection." (10 RT 2003.) Therefore, taken in context with the events that preceded the court's ruling, it is clear that the court's ruling referencing the "trip" encompassed the purpose of the trip as the prosecutor had referred to in his opening statement.

The relevant dialogue between the prosecutor and Green was as follows:

Q. Now, when was the last time you saw her?

A. The day before she was killed.

Q. Do you recall what that day was?

A. That was a Thursday.

Q. When you saw her on Thursday did she have a large bruise in the area of her forehead, on the right or left side?

A. No, she did not.

Q. With regard to her plans in the—for the rest of the week, when you saw her on Thursday did you know what the plans were for the rest

of the week?

A. I knew that she was preparing to take a flight to go back and see her father. It was her father's birthday, and she was going back for that. And I had known that she was coming in one more day and then she would be flying on Saturday. That's what I had—we had talked about.

Q. So, basically, you knew that she would be coming in on Friday and then on Saturday she was on a plane to go visit her father—

A. Yes.

(10 RT 2025.)

No misconduct occurred here. The prosecutor's inquiry into when Green last saw Olsson and if Green knew Olsson's schedule for the remainder of the week was appropriate to help try to prove why Green went to Olsson's house after Olsson failed to arrive at work. Green would have found it significant that Olsson did not report for work on her last day before vacation, not believing Olsson would have changed her plans at the last minute without notice in view of the important vacation she had coordinated with her sister and father.

(4) The foregoing rationale shows the meritlessness of appellant's claim of prosecutorial misconduct and trial court error in the testimony of Olsson's co-worker Maxine Gatten, who testified that Olsson was "very reliable," "very dependable," very punctual, and that she was always at work at about 7:00 a.m. when her shift began at 7:30 a.m. (10 RT 2012, 2014, 2017.) Not only did appellant not object to this testimony on either evidentiary or prosecutorial misconduct grounds, rendering each claim waived (*People v. Hart*, *supra*, 20 Cal.4th at p. 615; *People v. Montiel*, *supra*, 5 Cal.4th at p. 914), but no misconduct or trial court evidentiary error occurred. The evidence that Olsson was reliable and punctual was probative on the issue of Green's conduct when Olsson did not show up for work on July 26, 1986. Put differently, Olsson's failure to show for work gave Green reason to be concerned and made it reasonable for Green to think Olsson was in trouble, and reasonable for Green to drive to Olsson's house to see if she needed help. The evidence also helped

explain Green's role in the investigation. (*People v. Farnam* (2002) 28 Cal.4th 107, 155.)[19]

(5) With respect to Green's concern for Olsson when Olsson did not show up for work on July 26, 1986, appellant assigns misconduct to the prosecutor for asking Green about that concern, prompting Green to reply, in part, "the night before Sandy was killed I did not sleep all night long. I did not have any—anything that said it was Sandy, but for some reason I did not sleep." (I AOB 212, citing 10 RT 2026.)

Appellant's failure to object leaves this claim forfeited on appeal, either as a claim of prosecutorial misconduct (*People v. Montiel*, *supra*, 5 Cal.4th at p. 914) or trial court error (*People v. Hart*, *supra*, 20 Cal4th at p. 615). In any event, it is simply inconceivable that the prosecutor was attempting to violate the scope of admissible victim impact evidence in an intent to arouse sympathy for victim Olsson and hatred against appellant by asking Green if at some point she became concerned over Olsson not arriving for work. (10 RT 2025.) Green's answer was, "Not until the Friday of—that I knew that something had happened to Sandy. No, I not—I was—the night before Sandy was killed I did

---

19. Appellant also claims that the prosecutor improperly elicited testimony from Gatten to the effect Olsson "was an ostomy nurse, whose duties included moving throughout the hospital facilities to treat her patients" and that " 'she spent a lot of her own time really doing it, too.' " (I AOB 212, citing 10 RT 2010.) At trial defense counsel specifically objected to this evidence under Evidence Code section 352"; the trial court overruled the objection. (10 RT 2010.)

No misconduct or trial court error occurred. Gatten's testimony was necessary to try and establish that Olsson was a hard worker, responsible, committed to her nursing job, and was physically exhausted by the end of the work day because she cared for patients throughout the entire hospital and the adjacent nursing home. This evidence corroborated testimony by others that Olsson worked hard as a nurse and spent her evenings quietly reading and watching television, which was contrary to the dishonest and promiscuous lifestyle that the prosecution had reason to believe (through appellant's statement to police), that the defense might attempt to lead the jury to believe.

not sleep all night long. I don't know why I did not sleep all night long. I did not have any—anything that said it was Sandy, but for some reason I did not sleep. I remember laying in my bed, and at 12 o 'clock I saw the clock, and 1[] o'clock, when I woke up, I evidently slept for about an hour there. At 4:00 o'clock I could not sleep any longer, and I was in the house, and because I had a family and made noise I decided to go to work. I was at work at 4:00 o'clock that morning." (10 RT 2025-2026.) It is equally inconceivable that this answer could have had any effect on the guilt verdict.

(6) Again with respect to Green's concern for Olsson when Olsson did not show up for work on July 26, 1986, appellant assigns misconduct to the prosecutor for asking Green about the "basis of that concern" and assigns error to the trial court for overruling the defense objection to this question and some of the others that followed it (I AOB 212-213, citing 10 RT 1027-2028), one of which led to this answer, "Sandy and I had made a pact that if anything was wrong with the other one of us that we would hold each other until death. And I was trying to reach Sandy in case there was something like that'" (I AOB 213, 224-225, citing 10 RT 2031, 224-225).

Appellant's failure to object to this testimony on prosecutorial misconduct grounds and request an admonition waives that challenge to the testimony. (*People v. Montiel*, *supra*, 5 Cal.4th at p. 914.) Nor did the trial court err in admitting it if one unreasonably reads defense counsel's general objections below as a preservation of the claim. The evidence was relevant on the issue of why Green left the hospital for Olsson's home when Olsson did not show up for work. In short, it was appropriate background evidence to explain Green's conduct and role in the investigation of Olsson's death. (See *People v. Farnam, supra*, 28 Cal.4th at p. 55.)

(7) Appellant also asserts that the prosecutor, "without advance notice that he was entering a questionable area, asked how Green felt when Ms. Olsson did

not show up for work." (I AOB 224.) Specifically, the trial court had requested the prosecutor to give the court advance warning when he would be attempting to elicit testimony which he had remarked upon during his opening statement, such as Olsson's background, her responsibility as a nurse, her planned trip to visit her father, and about Olsson's personality. How Green reacted to Olsson not showing up for work did not fall into any of these categories. Thus, advance notice was not required and no misconduct occurred.

(8) Appellant also claims that the "trial court improperly overruled the defense objection to Green's testimony that she had flashbacks of discovering the body at least twice a month." (I AOB 214-215, 225, 243-244, citing 10 RT 2082; see also 10 RT 2079-2080.) No trial court abuse of discretion is established, however. The prosecution explained that he elicited this on redirect examination to counter a defense challenge on cross-examination. (10 RT 2080.) Defense counsel, in detail, challenged Green's memory of what she did and how the events unfolded the day she discovered Ms. Olsson's body. (10 RT 2060-2078.) Therefore, the trial court ruled reasonably in permitting Green to testify that her recollection of that day was vivid because she relived that day twice a month.

(9) Appellant claims that the prosecutor improperly asked Green if Olsson "ever used profanity or 'swear words' in her normal conversation?" (I AOB 225, citing 10 RT 2060.) We fail to see how this question can amount to prosecutorial misconduct, as the prosecutor was trying to show that Olsson was not the type of person appellant portrayed her as in his statements to police. In any event, however, appellant acknowledges that the court sustained his relevance objection and that Green never answered the question. (I AOB 225.) Accordingly, prejudice from any misconduct could not have possibly accrued to appellant.

(10) Appellant claims that the prosecutor improperly asked Green what she

"felt" when she touched Olsson's body, eliciting Green's answer, "Death. There's nothing as cold as death." (I AOB 213, citing RT 10 RT 2048.) Appellant also argues that the prosecutor improperly "kept asking Green where she touched the body, prompting Green's answer that she stroked Olsson's body in the "only area that wasn't damaged or had some wounds on it." (I AOB 213, citing 10 RT 2049.) Appellant further objects to Green's description of the bedroom where Olsson's body was found, as Green stated the room was "very cold," although it "had been very hot outside." (I AOB 213, citing 10 RT 213.)

Because appellant made no objections to the foregoing on prosecutorial misconduct or trial court evidentiary grounds, he cannot make such arguments here. (*People v. Montiel, supra*, 5 Cal.4th at p. 914; *People v. Hart, supra*, 20 Cal4th at p. 615.)

The claims of error are also meritless. The prosecutor properly asked Green, "When you touched her what did you feel?" (10 RT 2048.) Contrary to appellant's suggestion that the prosecutor was attempting to elicit an emotional answer, it appears that the prosecutor was attempting to elicit a clinical response. Green, a registered nurse, had felt Olsson's body and determined that her body was cold and that she was dead. Similarly, the prosecutor properly asked Green, "What part of her body did you touch?" and "How far down did you touch her?" (10 RT 2048-2049.) This question was relevant to Green's diagnosis that Olsson was dead. Moreover, Green's statement that the room was cold and that it was hot outside, was not responsive to the prosecutor's question of "What did you then do?" (10 RT 2049.) Therefore, the prosecutor did not intentionally solicit, and could not have anticipated Green's response. (*People v. Valdez* (2004) 32 Cal.4th 73, 125.) He did not commit misconduct.

Further, Green's comments that she felt Olsson was cold and dead, that she

touched the only areas of Olsson's body that was not wounded, and that the room was cold and outside was hot, could not have been prejudicial under any circumstances. Dr. Sharon Van Meter, the pathologist who performed the autopsy of Olsson, testified at length, including a description of the 28 stab wounds and strangulation that Olsson suffered while she was still alive. Green's brief and innocuous remarks added nothing to the doctor's description.

(11) Appellant claims that the prosecutor improperly asked Green about her "emotional condition" when she called 911, eliciting her response that she was "very distraught," "very upset," her "heart was racing," she "could not hardly stand," and she was "crying." (I AOB 213, citing 10 RT 2053-2054.) Appellant further claims that the prosecutor improperly asked if Green returned to work, which prompted her answer, "No. I could not return to work. I went home, and I laid on my own couch, and all I could think if I could just stop my heart from racing. I knew it was going to just burst." (I AOB 214, citing 10 RT 2059.)

Once again, appellant's failure to object has waived any issue for appeal. (*People v. Montiel*, *supra*, 5 Cal.4th at p. 914; *People v. Hart*, *supra*, 20 Cal4th at p. 615.) The claim of prosecutorial misconduct is also meritless. The prosecutor's questions about Green's emotional condition and her answers were relevant to her credibility. (Evid. Code, § 210.) Her emotional stability was critical as to whether she was able to assess the surrounding situation and recall the events accurately.

Additionally, the prosecutor's questions and Green's remarks were harmless. As stated above, the jury heard at length the pathologist's testimony about the severity of Olsson's injuries and saw several pictures of Olsson's nude body riddled with multiple stab wounds. Ms. Green's added remarks that she was "upset" and her "heart was racing" could not have told the jury something it did not already know.

(12) Appellant next contends that the prosecutor committed misconduct by eliciting improper "victim impact" evidence from Olsson's father Clifford Sandberg. (I AOB 211, 222, 226-227.)

Appellant claims that the prosecutor improperly elicited testimony from Sandberg over a defense relevancy objection, again complaining about a reference that Olsson and her sister were planning a trip to attend Sandberg's 85th birthday celebration. (I AOB 211, citing 14 RT 2791-2792 .)

No misconduct or trial court error occurred. Mr. Sandberg was 91 years old when he testified. Because of his age, his testimony, as to when he last saw and when he would next see his daughter and the reasons for those visits, was relevant to test his ability to recollect events during the time period surrounding Olsson's murder. On cross-examination, defense counsel asked Mr. Sandberg for the date of his birth. He answered July 29, 1901. (14 RT 2792.) Mr. Sandberg's testimony also was relevant to show the type of lifestyle Olsson led, i.e., that she spent her vacations to visit family and to celebrate important milestones in their lives. This was contrary to the wild life of drinking, sex, and selling drugs that was the lifestyle appellant gave to Olsson in his statements to police.

(13) Appellant continues to argue that the prosecutor "continued to elicit irrelevant victim impact testimony during his questioning of Ms. Olsson's father." Appellant claims that over an erroneously overruled defense objection Sandberg was allowed to testify that he regularly spent the winter months with his daughter, including a description of going into her room if he noticed her light on in the middle of the night and observing that she had fallen asleep reading in bed, still in her pajamas and robe. (I AOB 215, 244, citing 2757-2762, 2786-2788.)

The prosecutor's questions and Sandberg's answers did not constitute prosecutorial misconduct and trial court error if those claims are preserved for

review. Again, evidence of Olsson's day-to-day living habits and what she wore to bed was highly probative to rebut appellant's statements that Olsson sold drugs, led an immodest and wanton life, and easily gave her body to unfamiliar men. Likewise, evidence that Olsson always wore flannel pajamas to sleep was also very probative to show that her attacker had forced her to take off her clothes so he could sexually assault her.

(14) Appellant claims that the prosecutor improperly elicited testimony from Olsson's father that "on at least one occasion, someone came to his daughter's door in the evening and asked for help for his sick wife[,] [and] Ms. Olsson went to help her neighbor." Appellant argues that the court "found this testimony inadmissible. . . . However, the jury already had heard it and no admonishment was given to the jury to disregard it." (I AOB 215, 226-227, citing 14 RT 2789.) Appellant asserts that "[t]his testimony was highly prejudicial not only because it portrayed Ms. Olsson as a caring neighbor, but because it provided the prosecutor with 'evidence' to support his argument that Ms. Olsson opened the door for Mr. Tully." (I AOB 227.) The evidence at issue is this:

> [THE PROSECUTOR]: The front door to the house, how is the front door locked?
>
> A. It had a chain on it.
>
> Q. When was the chain used?
>
> A. Well, when she came in the evening, after 4:00 o'clock, she'd shut the door and put the chain on, and I know that because many times I'd check it when I went to bed and the chain was always on.
>
> Q. In the evening, do you recall ever having someone come over to the house and her opening the door when the chain was on the door?
>
> A. Yes. I know of a special case about 8:30 or 9:00 o'clock one night, there was a real loud pounding and rapid pounding on the door, and she went to the door, and I came out of my room and followed right behind her, and she opened the door and with the chain on and peeked around and heard a man's voice saying, "My wife is awfully sick and

she's fallen on the floor." So Shirley said I'll—

[Defense Counsel]: I think the question has been answered, your Honor, and I'm going to object to narrative.

THE COURT: All right. The answer up to this point may remain. Next question.

[THE PROSECUTOR]: Thank you.

Q. Did she go and help the neighbor?

A. Yes—

[Defense Counsel]: Excuse me, sir, I'm going to object to this as irrelevant and I am—

THE COURT: I'll sustain.

(14 RT 2788-2789.)

Appellant's only objection to the answer he calls prosecutorial misconduct and trial court error was on "narrative" grounds. The issues are therefore forfeited. Appellants may not change their theories on appeal. (*People v. Thomas*, *supra*, 2 Cal.4th 489, 519-520.)

In any event, no error occurred in the elicitation and admission of the evidence. The prosecutor was attempting to show that Olsson habitually chain locked her front door and opened the door part way with the chain still fastened to check who was at the door. This was probative to show that Olsson had opened the door part way for appellant, and that he forced the door open, ripping the chain mount out of the door frame. This was also probative to show that Olsson was a responsible neighbor and to refute appellant's statements to police that she was irresponsible and sold stolen drugs and had sex with unfamiliar men. Further, Sandberg's partial answer, "Yes—", to the question of whether Olsson went to help her neighbor, could not have prejudiced appellant in any way, shape or form.

(15) Appellant next contends that the prosecutor committed misconduct by eliciting improper "victim impact" evidence from Olsson's daughter, Sandra

Walters. (I AOB 222, 227-229.) Once again appellant protests the prosecutor eliciting evidence that Olsson had planned a trip to visit her father on the weekend of her murder. (AOB 211, citing 14 RT 2822.) The dialogue proceeded as follows:

> Q. Now, I believe you indicated to us that your mother was planning to go somewhere on the 25th; is that correct?
>
> A. To my grandfather's house.
>
> Q. When you returned to your mother's home after the police were finished, did you observe these items on the desk in the bedroom?
>
> A. Yes.
>
> Q. And could you tell us what they are, please.
>
> THE COURT: Which exhibit now?
>
> [THE PROSECUTOR]: This is exhibit 21G.
>
> THE WITNESS: The clothes that she was going to pack to go to my grandfather's house.

(AOB 211, citing 2822.)

Any claims of trial court error or prosecutorial misconduct are forfeited. (*People v. Montiel, supra*, 5 Cal.4th at p. 914; *People v. Hart, supra*, 20 Cal4th at p. 615.) No misconduct or error occurred here. Walters's testimony regarding her mother's planned trip was relevant to explain the physical evidence found in Olsson's bedroom.

(16) Appellant claims that the prosecutor improperly elicited testimony from Walters that she had recently seen her mother to celebrate her mother's birthday, that during their visits they would shop and walk the dog together, and about her mother's social life and their last contacts with each other. (I AOB 215-216, 227-228, citing 14 RT 2806, 2820.)

Any issues of prosecutorial misconduct or trial court error are waived due to appellant's failure to object. (*People v. Montiel, supra*, 5 Cal.4th at p. 914; *People v. Hart, supra*, 20 Cal.4th at p. 615.) And, no misconduct or trial court

error occurred. Again, the prosecution could think that the defense might be that Olsson was selling drugs she had stolen from the hospital to appellant's friend, had consented to having sex with appellant whom she had never seen before, and that appellant's friend stabbed Olsson to death. Therefore, Walters's testimony about her mother's habits and her daily routine were probative to show that Olsson led a very private and conservative lifestyle.

(17) Appellant's allegation that the prosecutor committed misconduct during closing argument by alleging that appellant's statements to police "not only deprived Ms. Olsson of her life, but also of her good reputation" (I AOB 216, 229-230) is addressed elsewhere.

(18) Finally, appellant claims that the trial court erred "by admitting into evidence a photograph of Ms. Olsson in her nursing uniform," even though the defense agreed to stipulate to her identity. (I AOB 246.) Appellant complains that in limine, the trial court had ruled that "if this photograph needs to be used with a particular witness, I'll permit that it simply won't be shown to the jury, and then we'll just establish the exhibit number when we get back outside." (I AOB 246, citing 10 RT 1934.) After several witnesses were shown the photograph, the prosecutor offered the photograph into evidence. (15 RT 2995) The court acknowledged that it may have previously ruled that the photograph would not be admitted into evidence, "but having now heard the testimony relative to the attire [worn by Ms. Olsson], I'm going to permit that picture to be received at this time." (15 RT 2998.)

Courts should be cautious in the guilt phase of a capital murder case about admitting photographs of murder victims while alive, given the risk that the photograph will merely generate sympathy for the victims. (*People v. Harris* (2005) 37 Cal.4th 310, 331.) However, the possibility that a photograph of a murder victim while alive will generate sympathy does not compel its exclusion if it is otherwise relevant. (*Ibid.*) In this case, the photograph was shown to

Olsson's neighbor Mr. Freeman, her co-worker Ms. Gatten, her father Mr. Sandberg, and her daughter Ms. Walters. The photograph "was relevant to establish these witnesses' ability to identify the victim as the person about whom they were testifying." (*People v. Osband* (1996) 13 Cal.4th 622, 677.) Additionally, the witness's ability to identify a photograph of Olsson enhanced their credibility before the jury and helped support that they had no doubt about whom they were testifying. Moreover, the picture was "not a photograph particularly calculated to elicit sympathy." (*People v. Thompson* (1988) 45 Cal.3d 86, 115.) The picture did not show Olsson with her sick patients or in some type of manner that would be an attempt to arouse the sympathy of the jury. It was merely a picture of her in her work uniform when she was alive. "[T]he photograph did not unduly prejudice the defendant in any way." (*People v. Thompson*, *supra*, 45 Cal.3d at p. 115.)

Appellant's multiple claims in argument 8 of prejudicial prosecutorial misconduct and trial court error all fail.

IX.

NO PREJUDICIAL PROSECUTORIAL MISCONDUCT DURING ARGUMENT IS DEMONSTRATED

Appellant contends that the prosecutor committed several acts of misconduct during the guilt phase argument. As we shall explain, no basis for reversal appears.

Appellant first complains that the prosecutor rhetorically asked during closing argument, "Did you ever get the feeling [defense counsel] believed his client was telling the truth?" Appellant argues that the question was "reprehensible," and that by posing it the prosecutor "impugned the integrity of defense counsel" and diverted the jury's attention to a matter that would "'not help the jury determine whether, under the evidence presented, defendant committed the crime charged.'" Although the rhetorical question was met with immediate objection by defense counsel and admonition from the trial court to disregard it, appellant insists the event "is not harmless under either the state standard set forth in *People v. Watson* . . . or the federal standard set forth in *Chapman v. California* . . . ." (I AOB 253-255.) Appellant can advance this claim only by ignoring essential context, a deficiency that we now take the opportunity to correct.

After discussing the beyond-a-reasonable-doubt standard of proof and explaining how that standard had been met in this case, the prosecutor turned to defense counsel's assertions made earlier in argument:

> The defense attorney says, you know, it's not enough. This evidence here is not enough. Well, saying it doesn't make it so, but you know, if you say something loud enough and repeat it long enough, well, then, it takes on a life of its own that someone might believe that's what you got. It's not enough. It's not enough.
>
> Did you try and follow any line of reasoning that he was giving you here this morning? I mean when he talked about his own client's statement to the police and to Charles Fraser, from my office, he jumped around. I mean, on the one hand, this thing that was broken open by the

defendant when he went and opened the door in a panic to get his gloves out of the car (indicating), and you jump around as to what's going on, did you ever get the feeling he believed his client was telling the truth?

MR. WAGNER: Objection, your Honor, that's improper. I ask you to admonish the jury. What my client is to do is improper and I ask this court to admonish the jury.

THE COURT: The jury is advised to disregard this comment.

All right, proceed.

MR. BURR: Thank you, your Honor.

With regard to this whole idea of getting up and arguing to you the credibility of his client's statement, did you walk away thinking what he said was true as to whether the defendant said it's true?

Was there anything in this substance in what he had to say and the logical way or illogical way in which it's presented that gave up any sense that you should believe what the defendant said? That there was a logical string to it that you could follow?

(15 RT 3181-3182.)

It is plain from the foregoing that the overall thrust of the prosecutor's remarks remained squarely focused on the evidence of record and the circumstances affecting the credibility of its sources. The incidental reference to defense counsel's "belie[fs]," while unfortunate, was made only in passing, and neither "impl[ied] that defense counsel ha[d] fabricated evidence [n]or otherwise portray[ed] defense counsel as the villain in the case." (*People v. Thompson*, *supra*, 45 Cal.3d 86, 112.) Accordingly, the remark would not have undermined the jury's understanding that the "defendant's conviction should rest on the evidence, not on derelictions of his counsel." (*Ibid.*)

Moreover, the trial court promptly instructed the jury to disregard the remark. This amply ensured that no prejudice resulted. (*People v. Riel* (2000) 22 Cal.4th 1153, 1198; see *Francis v. Franklin* (1985) 471 U.S. 307, 325, fn. 9 [105 S.Ct. 1965, 85 L.Ed.2d 344] ["The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and

faithfully follow instructions"].) Appellant disputes this, insisting the trial court "made matters worse." (I AOB 254.) He believes the jury would still consider the prosecutor's comment to be "a relevant consideration," despite the court's plain and unambiguous directive that it be "ignored." (I AOB 254.) Appellant does not further explain how the jury would reason its way to such an understanding, which is directly contrary to the terms of the admonition and the presumption that the admonition was understood and obeyed.[20/]

Appellant next complains that the prosecutor referred to appellant as "a despicable excuse for a man," a "despicable individual," "garbage," and "a sucker." (I AOB 256, citing 15 RT 3023, 3161, 3173, 3218.) Only the first of these epithets was objected to below, but even as to that remark counsel failed to request an admonition that could have cured any conceivable harm, thereby waiving the claim on appeal. (*People v. Montiel*, *supra*, 5 Cal.4th 877, 914.) At any rate, the characterization of appellant as "despicable," no less than the other epithets used (which were surely waived by failure of objection), were entirely warranted by the evidence establishing appellant's guilt of the charged

---

20. Appellant also alleges that "[t]he prosecutor later argued that defense counsel were essentially trying to trick the jury, by arguing what they knew to be a lie." (I AOB 255 & fn 71, citing 15 RT 3218-3220.) The passage cited by appellant in connection with that allegation, however, reflects neither any argument by the prosecutor that defense counsel had resorted to "lies" or "trickery," nor an objection by defense counsel predicated upon that characterization. For the latter reason, appellant's complaint about the comments appearing at the cited passage has not been preserved for appellate review, *regardless* of whether he seeks to raise it as "an additional claim of misconduct" (which appellant, no doubt mindful of his waiver, explicitly disavows) or as "context" to buttress his assertion that some other event was "prejudicial." Appellant cites no authority suggesting that the requirement of a timely and specific objection applies only for "claims" but not for "context," and he articulates no coherent justification for drawing the spurious distinction he proposes.

crimes.[21] "[T]he the prosecutor 'may "vigorously argue his case," "[using] appropriate epithets warranted by the evidence."'" (*People v. Welch* (1999) 20 Cal.4th 701, 752-753; see also *People v. Farnam, supra*, 28 Cal.4th 107, 168 (["monstrous," "cold-blooded," vicious, a "predator," "horrifying," "more horrifying than your worst nightmare"]); *People v. Pensinger* (1991) 52 Cal.3d 1210, 1251 (["violent," "perverted," "maniac"]).)

Next, appellant contends that the prosecutor committed *Griffin*-error (*Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106]) when arguing as follows:

> Now, a witness gets up there, what's the standard? Well, the demeanor while testifying. You know how they will act. The character of the witness's testimony. Character basically means does the story—is what they say, does it make sense? Is that the way it happens in the everyday world? The extent of the witness's ability to perceive, recollect and communicate. In other words, could they actually see what they claim they saw and be where they were? I mean, the existence or nonexistence of a bias, interest or motive, did they have a reason to say what they're saying?
>
> Previous statement consistent with testimony. Statement inconsistent with any part of his testimony, existence or nonexistence of a fact testified to him. Attitude towards the action, admission of untruthfulness. There are a couple of others that you will be instructed on, but that's basically the application to the case. Those are the things you're supposed to consider with witnesses.
>
> You do the same thing with his taped statements. Now, you just don't take the words—
>
> MR. WAGNER: I'm going to object. This is a comment on

---

21. By contrast, the reference to appellant as a "sucker" was not an epithet at all, but, as a reading of the prosecutor's remarks in full context makes clear, an entirely fair characterization of appellant's own specious theory that he was an unlucky victim of official corruption or incompetence. (See 15 RT 3173-3174 ["You always attack the D.A., you always talk about when the police did such an inept job, that's why they wound up with this sucker over here. Right."].)

defendant's testifying, that's absolutely—I ask for an admonition.

THE COURT: I'm sorry.

MR. WAGNER: It is a comment on the fact that the defendant did not testify, your Honor, we have allusions to testimony, the demeanor while testifying, and I ask the jury—I ask the court to give the jury an admonition. I object.

THE COURT: All right. Well, the jury has been previously advised that this is argument. The arguments of the attorneys are not evidence in this case.

And, Mr. Burr, move forward.

MR. BURR: Thank you.

In evaluating what he says here on these tapes, he used the same standard. What's the demeanor while he's talking to the cops? Does he have an interest, motive, bias to say something? Darn right he does.

The character of his testimony, or in this particular case, the character of his statement is what he states on this tape recording. Does it make sense? Is that the way things happen in the real world when you talk about this statement? It's not credible. The content of what he has to say just is not credible. It's not credible in its content. It is not even credible in its delivery.

(15 RT 3194-3196.)

"*Griffin* prohibited comments that suggest a defendant's silence is 'evidence of *guilt*.'" (*Portuondo v. Agard* (2000) 529 U.S. 61, 69 [120 S.Ct. 119, 146 L.Ed.2d 47], emphasis by the Court, citing *Griffin*, 380 U.S. at 615; see also *United States v. Robinson* (1988) 485 U.S. 25, 32 [108 S.Ct. 864, 99 L.Ed.2d 23] ["'*Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt'"], quoting *Baxter v. Palmigiano* (1976) 425 U.S. 308, 319 [96 S.Ct. 1551, 47 L.Ed.2d 810]), quoted and cited in *Portuondo v. Agard, supra*, 529 U.S. at 69. The prosecutor's comments here did not remotely suggest that the jury draw the inference forbidden by *Griffin*. Rather, by those comments the prosecutor simply urged the jurors to evaluate the credibility of appellant's out-of-court

statements—which had been received into evidence under the hearsay exception for an admission of a party—under the same standards and criteria used to evaluate in-court testimony. This was entirely correct legally, and wholly unobjectionable on any basis. (Evid. Code, § 210 ["'Relevant evidence' means evidence, including evidence relevant to the *credibility* of a witness *or hearsay declarant*, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" (emphasis added)]; *id.*, § 780 [listing considerations bearing on assessing credibility]; *id.*, § 1202 [generally providing that "evidence to attack or support the credibility of [a hearsay] declarant is admissible if it would have been admissible had the declarant been a witness at the hearing"]; cf. *People v. Cuevas* (1995) 12 Cal.4th 252, 266 ["Logically, . . . out-of-court identifications and other out-of-court statements should be measured by the same standard in judging their sufficiency to support a conviction"].)[22/]

Finally, appellant contends that the prosecutor committed misconduct by "misstating the law and evidence and arguing facts not in evidence." (I AOB 261-265.) These claims fail as well.

The misstatement of fact occurred, allegedly, when the prosecutor, while referring to visual aids, recounted the circumstances of appellant's forced entry into the victim's home:

> Sandy Olsson's house, this is where the screen's found, this is where the knife's found, this is where the purse's found. Not only this, more graphically, here's this still hanging in the door (chain latch), screws pulled out of the wall, wall board dust directly underneath where this attaches at the baseboard. And we have the splinters, three splinters that are recovered right there on that rug.

---

22. If appellant believes the credibility of his out-of-court statements was properly subject to assessment under some criteria *other than* those specified in Evidence Code section 780, he does not disclose (and we cannot imagine) what they would be.

You may recall the video over there that showed—well, they didn't focus it very clearly, but we've got the splinters, and they're here in evidence.

The police know there was forced entry, and the police, when they interview him, especially Scott Robertson and Mike Newton, while they're interviewing him, they ask him did you take anything else besides her purse when you left. He says nope. Are you sure you didn't take anything else, didn't take anything else? Well, did you use the bathroom? I mean hint, give him an opportunity. Nope didn't use the bathroom. Well, gee-whiz, you told us how much beer you've been drinking, remember all that beer and the kamikazes, and from the time you pick up Doubting Thomas till the time you leave you didn't use the bathroom once? Nope, nope. He dances away from that screen.

The fact that these screws were not screwed into the wall stub, remember that testimony that Detective Robertson told you, by the man who's built his own home and does a lot of woodwork, looked in, and he can see, examined them, these screws were screwed in the wood around the door frame, through there, went through the wall board but did not go into a stud. It didn't go into a hard piece of wood. It went into a void.

This created the illusion of security. Because it really wasn't security. Something that Sandy Olsson relied on was illusory because this really wasn't going to provide security because all it took was for him to put his shoulder quickly to the door, as soon as she opened it, and this busted loose, without very much effort at all.

See, he didn't know he did this. So it was not only bad luck for Sandy Olsson, that this wasn't secured in the door—in the wall stud, but also turned out to be bad luck for that defendant because when he popped through that door, you can imagine.

Now, you go around to the back, you work on the screen there, you cut the screen, you try and open it. Then you pry it off, and you get it off. Then you realize, you know, to crawl in through that I'm going to make too much noise. This isn't working. And you leave the screen there. And you go around to the front door, you start knocking. You're a neighbor, start knocking. Sandy Olsson, she's a nurse. She gets up. And, you know, this is a good neighborhood, I mean there are no bars on her windows.

MR. WAGNER: Objection, misquotes the record.

THE COURT: Well, the jury will be advised that the arguments of counsel are not evidence in this case.

You may proceed, sir.

MR. BURR: There aren't any bars. There's a decorative thing on the front of the one window to that bedroom that she uses as a den. But I mean, we know what bars look like. If you bar up your home, you bar up every window. And that whole back area that's open to everybody in the world, off the golf course, like the defendant, there are no bars there. She felt secure in that home.

Somebody comes knocking on the door at that hour, she just assumes it's a neighbor that needs help, a neighbor that's fallen down in the garage or something, that needs help, and she's a nurse. And she answers that call. She's not paranoid about her safety in that community, not even a safe paranoid. I mean that door, I mean if you were concerned about that safety, one of the first things you'd do is you'd put a little peephole through that door. But she didn't see fit to do that. In that neighborhood, you answer that door, you can't see who's on the other side. The window that shows out onto the doorway is on the other side of a wall.

And so as soon as she opened the door he pops it, puts his shoulder and put his hundred and 60 pounds to it and pops that door and pops this off and doesn't even know it. Whatever resistance there was, he just assumes it was Sandy Olsson.

(15 RT 3034-3037.)

According to appellant, "[n]o evidence had been presented concerning the safety of the neighborhood, or whether there were bars on Ms. Olsson's windows. There was no evidence that Ms. Olsson felt 'secure' in her home." (AOB 263.)

The record shows that Barbara Green described one of Olsson's windows as having wrought-iron or metal on it for protection. (10 RT 2031, 2062.) Officer Robertson described the windows to Olsson's as being "covered by a grate." (11 RT 2158.) Whether these were true security bars or, as the prosecutor argued, "decorative," was for the jury to decide. At any rate, the prosecutor's main point still stood: Regarding Olsson's sense of safety, it could

fairly be inferred from the fact that her door was equipped with a chain latch ineffectually affixed only by screws installed into hollow wall board, that the victim, as the prosecutor argued, would have felt a false sense of safety—an "illusion of security." As for the safety of the neighborhood more generally, we think it manifest that appellant's jury, sitting in Alameda County and drawn from a pool of Alameda County jurors, would have its own appreciation for the extent of relative safety prevailing within the golf course community that was Olsson's Livermore neighborhood, as "'[j]urors cannot be expected to shed their backgrounds and experiences at the door of the deliberation, room.' (*People v. Fauber* (1992) 2 Cal.4th 792, 839; see also *Price v. Kramer* (9th Cir. 2000) 200 F.3d 1237 [in a civil rights action claiming police brutality, jurors did not commit misconduct during deliberations when they related their own negative experiences with the police].) Rather, 'jurors are expected to bring their individual backgrounds and experiences to bear on the deliberative process.' (*People v. Pride*[,] [*supra*,] (1992) 3 Cal.4th 195, 268.)" (*In re Lucas* (2004) 33 Cal.4th 682, 696.) It is simply inconceivable that the prosecutor's challenged comments had even the remotest effect on the verdict.

Appellant also contends that the prosecutor, by arguing that appellant's "stupid story that he gave the cops and the District Attorney's Office" was merely "an attempt to get [him]self off the hook by smearing the good name and reputation of Sandy Olsson" (15 RT 3218-3219), "improperly referenced evidence that had been excluded regarding the victim's reputation at the hospital." (I AOB 263, citing 14 RT 2773, 2790.) But the evidence previously excluded bore on the victim's "*professional* reputation for honesty and integrity" (14 RT 2773), and thus the prosecutor's reference to the extent to which appellant's incredible account of events—according to which she engaged in consensual sex with him—"smeared" her personally, in no manner contravened that ruling. It is also important to remember that appellant's

statement to law enforcement included the claim that he and "Doubting Thomas" were going to Olsson's home "to pick up some drugs" from her—drugs she obtained from a hospital. (People's Exh. 6C at pp. 3-4, 15, 19-20, 27.) The prosecutor could have reasonably viewed that statement by appellant as an attempt to smear the good name and reputation of Olsson. The prosecution had rebutted appellant's statement at trial as well by presenting the evidence that Olsson never stole drugs from her hospital. (14 RT 2769-2779.)

The prosecutor's alleged "misstatement of law" occurred, according to appellant, when the prosecutor noted that in order to convict appellant of first degree murder, the jurors need not unanimously agree on which of two alternative theories—felony-murder or wilful, deliberate, and premeditated murder—established his guilt of that offense. The challenged remarks are as follows:

> The court will instruct you that in order to convict the defendant of first degree murder, you don't have to unanimously agree as to which of these two theories get you to first degree murder, whether it's the killing as a result or during the course of a burglary or this premeditated deliberate form of murder.
>
> Just like in the burglary where you can be divided as to why he entered, whether it was to steal, whether it was to rob, whether it was to do both. As long as you all agree that he had that intent or one of those intents, he's guilty of burglary.
>
> In this particular case, as long as you all agree that he either had all these things when he killed, or that it occurred during the course of a burglary—
>
> MR. WAGNER: Objection, that misstates the law, your Honor.
>
> THE COURT: Well, I've indicated to the jury and I think they're aware of it, but I'll restate it. At the conclusion of the arguments, I will be instructing you as to the applicable law. Go ahead, sir.
>
> MR. BURR: Just as long as all 12 of you agree that he's guilty of first degree murder, whether it was which of those two theories, you don't have to be unanimous. Six of you could find it occurred during the course of the burglary, three of you could find it occurred as a result

> of this, and the other three of you could believe it's both. As I said, those instructions I felt that I needed to explain because the court is going to give them to you.

(15 RT 3084-3085.)

Appellant contends that the prosecutor's remarks constituted an "attempt[] to confuse and mislead the jury as to their role and the importance of the jury instructions." In amplification of this challenge, he asserts:

> The argument was improper on several grounds. First, [appellant] was never charged with the offense of burglary, and thus the prosecutor's analogy to a burglary verdict was misleading. Second, there was no evidence presented of a robbery, and no robbery charge before the jury. Third, the prosecutor was conflating the elements of premeditated murder with burglary murder, and suggesting the mental state requirements were identical for both types of murder. Fourth, he did not tell them what "all these things" were that could lead them to a finding of premeditated, as opposed to felony, murder.

(I AOB 264.)

Appellant's criticisms are specious. By definition, every analogy entails comparing *different* things; the purpose of the exercise is not posit that the two items compared are identical, but to appreciate some particular respect in which they might be similar. If this be "misleading," then every analogy would be misleading. Sensibly, the law gives jurors more credit than appellant's argument assumes. (*People v. Lewis* (2001) 26 Cal.4th 334, 390.) Thus, no juror would have understood the prosecutor to have suggested that burglary and murder were identical crimes, or even that they shared some common element, much less would the comment have cause the jury to "conflate" any elements of the two theories of first degree murder, which, were those theories not *different*, there would have been no need to discuss the non-unanimity rule at all. Once again, prejudice to appellant is inconceivable.[23/]

---

23. Although appellant professes bewilderment over what the prosecutor was referring to when he spoke of "all these things," it is manifest from reading the record in context, and it would have been unmistakable to

X.

THE JURY FOUND, UNANIMOUSLY AND BEYOND A REASONABLE DOUBT, EACH FACT ESSENTIAL TO APPELLANT'S CONVICTION AND JUDGMENT

Appellant's next guilt-phase contention is that *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] and its progeny (see *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2532, 159 L.Ed.2d 403]; *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621]), required jury findings, made unanimously and beyond a reasonable doubt, regarding (1) the theory upon which he was guilty of first degree murder and (2) the target felony of his burglary for both (a) burglary-murder and (b) the burglary-murder special circumstance. (I AOB 269-287.) Because his jury was not instructed to make these findings, he demands reversal. His claim fails.

Apprendi held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (530 U.S. at p. 490.) But as this Court explained in *People v. Nakahara* (2003) 30 Cal.4th 705, "nothing in *Apprendi* . . . require[s] a unanimous jury verdict as to the particular *theory* justifying a finding of first degree murder. (See also *Ring v. Arizona*[,] [*supra*,] 536 U.S. [at p.] 584, 610 [requiring jury finding beyond reasonable doubt as to *facts* essential to punishment].)" (*People v. Nakahara, supra*, 30 Cal.4th at p. 712, emphasis in original.) In *Schad v. Arizona* (1991) 501 U.S. 630 [111 S.Ct. 2491, 115 L.Ed.2d 555], the Supreme Court of the

---

every juror present in court, that his reference was to a graphical display on which the elements of wilful, deliberate, and premeditated murder had been itemized. If appellant genuinely harbors any doubts in that regard, he is, of course, free to investigate the matter and present his findings in a habeas petition. The record on appeal, however, shows no error whatsoever.

United States itself rejected the claim that jury unanimity as to the theory on which a jury reaches its verdict is constitutionally required. (*Id.* at pp. 630-645; see also *People v. McPeters* (1992) 2 Cal.4th 1148, 1185, citing *Schad.*) Any suggestion that *Apprendi* overruled *Schad* on this point is meritless. (*State v. Tucker* (Ariz. 2003) 68 P.3d 110, 120; see also *Spears v. Mullin* (10th Cir. 2003) 343 F.3d 1215, 1236 n.20; *Mansfield v. State* (Fla. 2005) 911 So.2d 1160, 1179.)

Similarly, there exists no requirement for purposes of establishing either first degree felony (burglary)-murder or the felony (burglary)-murder special circumstance that the jury unanimously agree on the precise nature and identity of the target offense, for neither matter is a fact that increases any penalty. (§ 459 [defining burglary as various forms of entry "with intent to commit grand theft or petit larceny or *any* felony"]; *id.* § 190.2, subd. (a)(17)(G) [defining burglary special-circumstance by reference to the statutory elements of burglary]; *People v. Failla*, *supra*, 64 Cal.2d 560, 569 ["in prosecutions for burglary, as in murder and theft cases, the jurors need not be instructed that to return a verdict of guilty they must all agree on the specific 'theory' of the entry—i.e., what particular felony or felonies the defendant intended at the time—provided they are told they must be unanimous in finding that a felonious entry took place"]; see also *People v. Russo* (2001) 25 Cal.4th 1124, 1133 [post-*Apprendi* decision citing *Failla*]; *People v. Griffin* (2001) 90 Cal.App.4th 741, 750-752; see generally *People v. Davis* (2005) 36 Cal.4th 510, 564.) Whatever else it might be thought *Apprendi* accomplished, it "'did not alter, restructure, or redefine'" the elements of any state-law crime, or require that the states do so themselves. (*State v. Lovelace* (Idaho 2004) 90 P.3d 298, 303.)

XI.

NO INSTRUCTIONAL ERRORS APPEAR

Appellant argues that his guilt phase was "marred by prejudicial instructional errors." (I AOB 288.) The contrary is plain.

A. Consciousness Of Guilt Instructions

Appellant first attacks three standard "consciousness of guilt" instructions—CALJIC Nos. 2.03 (false statements), 2.06 (efforts to suppress evidence), and 2.52 (post-crime flight). As read to appellant's jury, the challenged charges instructed as follows:

> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(16 RT 3231 [CALJIC No. 2.03].)

> If you find the defendant attempted to suppress evidence against himself in any manner, such as by destroying evidence or by concealing evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such evidence is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(16 RT 3231 [CALJIC No. 2.06].)

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt; but, is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

(16 RT 3234-3235 [CALJIC No. 2.52].)

Appellant notes that each instruction concluded by informing the jury that the weight to be accorded the evidence discussed are matters for the jury's

consideration or determination. In appellant's view, these concluding statements "expressly contradict[] the earlier language telling the jury that guilt may not be established solely by the evidence of post-crime 'consciousness of guilt' activity." "If the jury is free to attach whatever weight and significance it chooses to evidence of the defendant's flight, making false statements, and/or concealing evidence," appellant reasons, "then there is a significant likelihood that it will be misled as to its obligations and will base its guilt determination on this evidence alone, even where the other evidence does not establish guilt beyond a reasonable doubt." Appellant thus thinks it "likely the jury will give great weight to this evidence, finding the defendant guilty even though the prosecution has failed to prove guilt beyond a reasonable doubt." (I AOB 290.)

The instructions challenged by appellant have been repeatedly upheld by this Court (see generally *People v. Jurado* (2006) 38 Cal.4th 72, 125), and the novel construction he offers of them is, to put it mildly, strained and unnatural. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." (*Boyde v. California* (1990) 494 U.S. 370, 380-381 [110 S.Ct. 1190, 108 L.Ed.2d 316].) Rather, "a 'commonsense understanding of the instructions in the light of all that has taken place at the trial [is] likely to prevail over technical hairsplitting.'" (*Ibid.*) At any rate, if appellant believed the instructions were actually amenable to the improbable construction he now hypothesizes, he could have asked the trial court to provide appropriate clarification or amplification. Indeed, it was incumbent upon him to make such a request, and his failure to do so below prevents him from presenting his criticisms on appeal. (*People v. Chatman* (2006) 38 Cal.4th 344, 393.)[24/]

---

24. Without providing citation to the record, appellant asserts that all three instructions were given "[o]ver defense objection." (I AOB 289.) The record shows that the parties formally conferred with the trial court over instructions at a conference conducted on August 14, 1992 (15 RT 2988, 3019),

Next, appellant observes that CALJIC Nos. 2.03. 2.06, and 2.52 all instruct that each form of conduct suggestive of consciousness of guilt—lying, suppression, and flight—"is not sufficient in itself to establish guilt." From this, appellant speculates that the jury would have come to believe, by negative implication, that this same evidence, in combination, could be sufficient. (I AOB 290-291.) Assuming solely for the sake of argument that such an understanding on the jury's part would have been erroneous, no instructional occurred here, for no reasonable likelihood exists that the jury would have parsed the instruction so finely as to draw from it the inference appellant describes.[25/] Indeed, so unlikely was that prospect that appellant saw no need

---

following an earlier, apparently unreported, conference (see 15 RT 3017-3019). The trial court announced that the formal conference marked the appropriate occasion to recite and memorialize any relevant objections or requests. (15 RT 3018-3019.) At that time, appellant's counsel stated he would "renew" his "earlier objection to 2.52." (15 RT 3019.) Based on the prosecutor's retort to defense counsel's remark and the trial court's ruling in favor of providing CALJIC No. 2.52, it appears that appellant had earlier questioned only whether there was "sufficient evidence" of flight to warrant that instruction. (15 RT 3019-3020.) We find nothing in the record to support appellant's implied assertion that he objected to CALJIC. No. 2.52 on the same grounds he advances now. Moreover, as far as we can tell, the trial court's announced intention to instruct in accordance with CALJIC Nos. 2.03 and 2.06 (15 RT 3020) provoked no objection whatsoever. (See 15 RT 3020.)

25. Appellant submits that "[b]ecause 'consciousness of guilt *can be* as consistent with innocence as it is with guilt,'" "[i]t . . . follows that *any* consciousness of guilt evidence"—regardless of its number of sources, its extensiveness, and its aggregate persuasiveness—"is not sufficient to prove guilt." (I AOB 291.) It would seem at least arguable, however, that when evidence establishing that the defendant comported himself in a manner suggesting self-awareness of guilt is provided from a multitude of sources and in overwhelming volume, the likelihood of an "innocent" explanation being true could well diminish to the point of near inconceivability. Whether, in that circumstance, the law would still require that the totality of that evidence be regarded as insufficient as a matter of law is a question that, for the reasons noted above, need not be debated or resolved in this proceeding.

below to request that the "ambiguity" he now detects be addressed by a simple clarifying modification of the instruction. That failure forecloses any consideration of his criticisms on appeal. (*People v. Cole* (2004) 33 Cal.4th 1158, 1211.)

Appellant also alleges that the jury charges "violate[d] the prohibition against argumentative pinpoint instructions." (I AOB 292.) He is again wrong. (*People v. Holloway* (2004) 33 Cal.4th 96, 142; *People v. Jackson* (1996) 13 Cal.4th 1164, 1224; see also *People v. Kelly* (1992) 1 Cal.4th 495, 531; *People v. Jurado*, *supra*, 38 Cal.4th at p. 125.)

B. Circumstantial Evidence Instructions

Appellant contends that "a number of instructions relating to circumstantial evidence . . . eroded the presumption of evidence" and "impermissibly lightened the prosecution's burden of proof." (I AOB 295.) He acknowledges "[d]ecisions by this Court rejecting challenges to these instructions" (I AOB 296, citing *People v. Wilson*, *supra*, 3 Cal.4th 926, 942-943; *People v. Mickey*, *supra*, 54 Cal.3d at pp. 669-671; *People v. Jennings* (1991) 53 Cal.3d 334, 386), but insists those decisions "are contrary to principles articulated by the Supreme Court and should be reconsidered and overruled." (I AOB 296, citing *Apprendi* and *Ring*.)

Appellant's jury was instructed in accordance with CALJIC No. 2.01, as follows:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only, one, consistent with the theory that the defendant is guilty of the crime, but two, cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a

reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.

If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(16 RT 3228-3229.)

Focusing exclusively on the last paragraph of this standard instruction (see I AOB 295) and assertedly "similar language" which he leaves the reader to locate somewhere in CALJIC Nos. 2.02, 8.83, and 8.83.1 (see I AOB 296),[26] appellant complains that "the circumstantial instructions, particularly in regard to the special circumstance finding (CALJIC Nos. 8.83 and 8.83[.1]) *did not require any findings beyond a reasonable doubt.*" (I AOB 296, emphasis added.) But this assertion ignores this Court's explicit injunction that the precise phrase he seeks to attack must be "'read in context, not only with the remaining language within each instruction but also together with related instructions, including the reasonable doubt instruction.'" (*People v. Hughes* (2002) 27 Cal.4th 287, 346-347.) When this Court's directive is heeded, the utter frivolousness of appellant's argument becomes apparent (*ibid.*), and nothing said in *Apprendi* or any other case will support any different conclusion.[27]

---

26. The jury was instructed in accordance CALJIC No. 2.02 at 16 RT 3230-3231; CALJIC No. 8.83 at 16 RT 3245-3246; and CALJIC No. 8.83.1 at 16 RT 3246-3247.

27. *Hughes*, which is dispositive, was decided two years after *Apprendi.* More importantly, it was decided three years before appellant filed his opening brief in this case.

C. Voluntary Intoxication Instructions

Appellant acknowledges that the trial court instructed the jury regarding the potential effect of voluntary intoxication on specific intent "as it applied to the murder and assault charges." (I AOB 298; see also I AOB 297, fn.78, quoting CALJIC No. 4.21.) He asserts, however, that the jury was never instructed that "intoxication must be considered when determining whether he had committed the murder during the course of a burglary for purposes of the burglary-murder special circumstance" allegation appended to the murder charge. (I AOB 298.) He believes "the jurors would not have applied the voluntary intoxication instruction referring to Count One and Count Two in considering whether [his] intoxication prevented him from forming the specific intent required to prove the burglary-murder special circumstance." (I AOB 299.) Had the jury not been misinstructed in the manner alleged, appellant further believes "it would have concluded that [he] was intoxicated," and "that finding" alone, he maintains, "would have prevented the jury from finding the specific intent required for premeditated and deliberate murder, a burglary-murder committed with the specific intent to steal or to rape, the burglary-murder special circumstance with a specific intent to steal or rape, and the assault with intent to rape charges," and "would have resulted in not guilty verdicts on these charges." (I AOB 303.) Appellant is mistaken in every respect.

The voluntary intoxication instruction provided by the trial read as follows:

> In the crimes of which the defendant is accused in Counts One and Two of the information and the lesser crime of accessory to a felony, a necessary element is the existence in the mind of the defendant of a certain specific intent and/or mental state. The specific intent and/or mental state required is included in the definitions of the crimes charged and the lesser crime to that charged in Count One contained in these instructions.
>
> If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in determining

whether defendant had such specific intent or mental state.

If from all the evidence you have a reasonable doubt whether the defendant formed such specific intent or mental states, you must find that he did not have such specific intent or mental states.

(16 RT 3251.)

Appellant's suggestion that the jury would not have considered whether intoxication prevented appellant from forming the specific intent required to establish the burglary-murder special circumstances rests on the assumption that the jury understood the court's reference to "the crimes charged" to *exclude* the special circumstance allegation. We think this exceedingly unlikely. The special circumstance, of course, had no factual or legal meaning independent of the murder. Moreover, with its first mention of "intoxication," the court referred not to any particular count, but to a period of time: "the time of the alleged crime." This surely embraced conduct and events relating to the special circumstance allegation; after all, the special circumstance allegation itself identified the period "while the defendant was engaged in the commission or attempted commission of a burglary" as the period during which the "murder was committed." (16 RT 3244.) Accordingly, the jury having been instructed on the elements of (including the mens rea requirements for) not only murder, but burglary as well (16 RT 3239), and having been further instructed to determine whether "the defendant was intoxicated at the time of the alleged crime" and "consider that fact in determining whether the defendant had such specific intent or mental state" (16 RT 3251), it would not have failed to consider the effect of appellant's asserted intoxication when resolving the special circumstance allegation. (See *People v. Mickey*, *supra*, 54 Cal.3d at pp. 676-677.) But even if one were to indulge the assumption that the jury's consideration of the intoxication evidence was somehow limited to the murder charge independent of the special circumstance, and to the assault with intent to commit rape count, we know with complete certainty that appellant's

intoxication evidence did *not* "prevent[] the jury from finding the specific intent for" either of *those* offenses. (16 RT 302-303.) Appellant does not describe the circumstances under which his jurors, who found the intoxication evidence did not negate the intent elements for murder and assault, would have concluded that this same evidence somehow did negate the mental element for burglary. Thus, any lack of precision in the intoxication instruction was inconsequential to the jury's deliberations and verdict.

Finally, under a separate subheading (I AOB 301), appellant contends that because the intoxication instruction directed that the jury "should," rather than "shall or must," consider intoxication, it "did not require the jury to consider intoxication" as to *any* charge. By appellant's reading of the instruction, it left the jury "free to disregard intoxication and its effect. . . , even though it was supported by the evidence." (I AOB 301.) Appellant's construction is untenable, especially in light of the sentence immediately following the phrase in the court's instruction. That sentence instructed the jury as follows: "If from *all the evidence* you have a reasonable doubt whether the defendant formed such specific intent or mental states, you must find that he did not have such specific intent or mental states." (16 RT 3251, emphasis added; see also 16 RT 3237 [directing that guilt can only be determined "after the entire comparison and consideration of all the evidence".) Accordingly, appellant's jury was properly instructed. (*People v. Reza* (1981) 121 Cal.App.3d 129, 132-133.)

XII.

NO CUMULATIVE PREJUDICE IS DEMONSTRATED

None of the errors alleged by appellant, alone or in combination, provide any basis for relief.

XIII.

THE TRIAL COURT COMMITTED NO PREJUDICIAL CONSTITUTIONAL OR STATUTORY ERROR IN ADMITTING THE PROSECUTION'S PENAL CODE SECTION 190.3, FACTOR (B) EVIDENCE IN AGGRAVATION; MANY OF APPELLANT'S CONTRARY ARGUMENTS ARE FORFEITED

As outlined earlier, at the penalty phase the prosecution presented evidence that on January 7, 1988, at around 5:45 p.m., in the maximum security housing unit at the Santa Rita jail, appellant engaged in a fist fight with another inmate, Derek Mendoca, during meal time. (16 RT 3412-3414.) The prosecution also presented evidence that on September 26, 1991, at around 4:00 p.m., during meal time, appellant and another inmate, Robert McKinney, engaged in a "wrestling hold" with each other. (16 RT 3418-3419.) "They continued holding on and, like trying to grasp each other, and eventually . . . they separated, tried to throw a couple of punches at each other, and then ended up back in the grasp in wrestling kind of situation." (16 RT 3419.)

The trial court instructed the jury, under section 190.3, factor (b), and CALJIC No. 8.85, that it could consider the following, in its penalty determination, if applicable:

> The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(18 RT 3873.)

The trial court further instructed the jury:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal activity: the two incidents involving batteries on Robert McKinney and Derek Mendonca [*sic*] in the Alameda County jail, which involved the express or implied use of force or violence. Before a jury may consider any of such criminal activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did

in fact commit such criminal activity. A juror may not consider any evidence of any other criminal activity as an aggravating circumstance.

(18 RT 3875.)

The trial court instructed the jury to presume appellant innocent of committing misdemeanor batteries on McKinney and Mendoca, unless the jury determined that the prosecution had proved appellant guilty beyond a reasonable doubt. (18 RT 3875-3876.) The court instructed the jury on the elements of misdemeanor battery as follows:

> Every person who willfully and unlawfully uses any force or violence upon the person of another, is guilty of misdemeanor battery, a violation of Penal Code section 242.
>
> The use of force and violence is not unlawful when done in lawful self-defense. The burden is on the People to prove that the use of force and violence was not in lawful self-defense. If you have a reasonable doubt that such use was unlawful, you must not consider that evidence for any purpose.
>
> As used in the foregoing instruction, the words "force" and "violence" are synonymous and mean any unlawful application of physical force against the person of another, even though it causes no pain or bodily harm or leaves no mark and even though only the feelings of such person are injured by the act. The slightest unlawful touching, if done in an insolent, rude, or an angry manner, is sufficient.
>
> It is not necessary that the touching be done in actual anger or with actual malice; it is sufficient if it was unwarranted and unjustifiable.
>
> The touching essential to a battery may be a touching of the person, of the person's clothing, or of something attached to or closely connected with the person.
>
> No provocative act which does not amount to a threat or attempt to inflict physical injury, and no words, no matter how offensive or exasperating, are sufficient to justify a battery.

(18 RT 3876-3877.)

Appellant's argues that the evidence of his alleged batteries on McKinney and Mendoca should never have gone before the jury. (II AOB 317-322.) He contends that under *People v. Phillips* (1985) 41 Cal.3d 29, 72, fn. 25, the

prosecution is only allowed to present section 190.3, factor (b) evidence when each of the elements of the alleged other crime is supported by substantial evidence, and that the trial court erred in denying his pretrial *Phillips* motion to exclude the two alleged batteries at issue here. (II AOB 316.) Appellant also argues that this state law violation and other reasons show that the admission of the evidence violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and article I of the California Constitution. (II AOB 316-322.) "Use of such minimal acts to condemn a man to death violates all notions of a fair trial, due process, fundamental fairness, equal protection, and the 'heightened reliability' required in capital cases." (II AOB 316.) Appellant asserts that reversal of the death judgment is required because the erroneous admission of the evidence does not qualify as harmless under either the state law or federal constitutional test for prejudice. (II AOB 320-321.)

Appellant is not entitled to the remedy he requests. His arguments in support of his assignment of error are either meritless or forfeited. In all events, any error was harmless.

A. No State Law Violation Occurred

Although factor (b) permits the prosecution to introduce evidence "of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence," a prerequisite to admission is that the conduct amount to a violation of a criminal statute. (*People v. Phillips*, *supra*, 41 Cal.3d at p. 72; *People v. Walker* (1988) 47 Cal.3d 605, 637, 639.) In *Phillips*, this Court suggested that

> in many cases it may be advisable for the trial court to conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element of the other criminal

> activity. This determination, which can be routinely made based on the pretrial notice by the prosecution of the evidence it intends to introduce in aggravation (§ 190.3), should be made out of the hearing and presence of the jury. (Evid. Code, § 402.)

(*People v. Phillips, supra*, 41 Cal.3d at p. 72, fn. 25.)

At any such preliminary inquiry the prosecution need not prove the unadjudicated criminal conduct beyond a reasonable doubt; evidence that would allow a rational trier of fact to make a determination beyond a reasonable doubt as to such criminal activity is sufficient. (*People v. Ochoa*, *supra*, 19 Cal.4th 353, 449.) Here, pretrial, on appellant's request, the court held a *Phillips* hearing on appellant's alleged jailhouse batteries. (2 RT 241.) The parties adduced the following evidence:

On January 7, 1988, at approximately 5:25 p.m., Alameda County Deputy Sheriff Robert Pinkerton was on duty at the Santa Rita County jail supervising inmates who were eating dinner. (2 RT 246.) As he did so, his attention was directed to two inmates, appellant and Derek Mendoca, who were "involved in a fistfight, standing up, throwing punches at each other." (2 RT 247.) Pinkerton testified that he could not recall if any of the punches landed. (2 RT 248.) He could recall that he immediately separated the men. (2 RT 247.) Mendoca had no physical injuries while appellant had a cut lip that required treatment. (2 RT 249.)

Alameda County Deputy Sheriff Michael Perkins testified that on September 26, 1991, at around 4:00 p.m. in the afternoon, while on duty at the Santa Rita County jail, he heard a commotion and then saw appellant and another inmate, Robert McKinney, "clutched in a wrestling match." (2 RT 258-259.) Over the next 30 to 45 seconds, the men "threw a couple of punches" at each other and again "grasped each other and started wrestling around." (2 RT 258-260.) Perkins saw no punches land, and further testified that he could not recall who threw the first punch. (2 RT 260-261.) Appellant was treated for

"bruises and bumps" to his face, and McKinney was treated for an injured eye. (2 RT 262-269.)

Contrary to appellant's arguments below (2 RT 272-281), and in this Court (II AOB 315-318), the trial court did not err in finding, on the foregoing evidence, substantial evidence that appellant committed two misdemeanor batteries (2 RT 491-492). It is well settled that substantial evidence is evidence sufficient to deserve consideration by a jury—evidence from which a jury composed of reasonable persons could find the elements of the offense satisfied. (*People v. Wickersham* (1982) 32 Cal.3d 307, 323, overruled on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200.) That was certainly the case with respect to the 1988 incident, as a reasonable inference from the evidence that two men engaged in a fist fight (2 RT 247) is that each man unlawfully applied physical force against the other. That the witness, Deputy Pinkerton, could not recall whether punches landed (2 RT 248) doesn't mean punches didn't. It is clear that Mendoca made contact with appellant because appellant ended up with a cut lip. (2 RT 249.) A jury could reasonably infer it unlikely that only appellant's punches missed.

Likewise, regarding the 1991 incident, appellant and McKinney were "wrestling," broke apart, threw punches at each other, and then wrestled again. (2 RT 258-260.) Appellant had bumps and bruises on his face and McKinney ended up with an injured eye. (2 RT 262-269.) A reasonable inference from that evidence is that appellant injured McKinney in the fight and thus battered him in the sense that he unlawfully applied physical force against him. A reasonable juror could have also concluded that the wrestling (by definition an application of physical force on an opponent), was unlawful and therefore a battery. Appellant calls the wrestling "mutual" and thus not unlawful (II AOB 318), but that was a question for the jury, not a conclusion for the trial court to reach to preclude the admission of the evidence.

Appellant claims "that the evidence presented at the penalty phase itself demonstrates that the Mendoca incident was not proper aggravating evidence. Mendoca testified that he started the fight with [appellant] because [appellant] had wiped ketchup or mustard on his shirt. He threw the first and only punch, hitting [appellant] in the mouth. ([17] RT 3514-3515.) [Appellant] never struck his assailant. There was no evidence of [appellant's] 'use of violence' as required under factor (b)." (II AOB 317.) Mendoca was a defense witness at the penalty phase. Apparently appellant believes that the defense evidence introduced at trial contradicting the prosecution's evidence demonstrates the trial court erred in its pretrial ruling.

No state law violation occurred here.

B. No Federal Constitutional Error Occurred

Occasionally the admission of evidence at a state trial, even if properly admitted under state law, will prove so inflammatory and prejudicial that the evidence violates the defendant's federal constitutional rights to due process. (*Lisenba v. California* (1941) 314 U.S. 219, 228-229 [62 S.Ct. 280, 86 L.Ed.116]; *Estelle v. McGuire* (1991) 502 U.S. 62 [112 S.Ct. 475, 116 L.Ed. 385] [inflammatory evidence that is irrelevant may work a due process violation].) Reversal is in order where the reviewing court concludes that the defendant received a fundamentally unfair trial. (*Greer v. Miller* (1987) 483 U.S. 756, 767, fn. 7 [107 S.Ct. 3102, 97 L.Ed.2d 618].)

Here, appellant contends that the admission of the jailhouse batteries violated not only state law but also his federal constitutional right to due process because the evidence was so "inflammatory." (II AOB 318.) Appellant believes it "inflammatory" because he "was not the aggressor and did not use force." (II AOB 318.) Appellant also argues that the evidence was "de minimis aggravation" and its admission violated his Eighth Amendment right to a

reliable penalty determination by "'injecting irrelevant and prejudicial evidence into the sentencing equation.'" (II AOB 320.) Because appellant is not offering this federal constitutional argument as a theory of inadmissibility, but is claiming that the constitutional violation is a legal consequence of the inadmissibility theory he argued below, the claim is evidently cognizable. (*People v. Avila, supra*, 38 Cal.4th 491, 527, fn. 22; *People v. Partida, supra*, 37 Cal.4th 428, 437-438.)

The admission of the jailhouse-battery evidence violated no constitutional guarantees. The premise of appellant's argument is that his view of the evidence—the Mendoca testimony—is the correct view. A reasonable jury could have viewed the evidence differently, however, and found that appellant committed batteries, i.e., perpetrated violence, on two fellow inmates. We wholly fail to see anything inflammatory about that. "Evidence of prior violent conduct is admitted under Penal Code section 190.3, factor (b), 'to enable the jury to make an individualized assessment of the character and history of the defendant to determine the nature of the punishment to be imposed.'" (*People v. Davis* (1995) 10 Cal.4th 463, 544, citation omitted.) So long as the penalty phase jurors are not materially misled about the nature and degree of the defendant's individual culpability, they are entitled to know about other incidents involving the use of force for which the defendant is shown to be criminally liable beyond a reasonable doubt. (*People v. Ray, supra*, 13 Cal.4th 313, 351.) Appellant's prior criminal batteries fit this bill, and that evidence was not such that it uniquely tended to evoke an emotional bias against appellant as an individual, with little or no effect on the issues. (*People v. Yu* (1983) 143 Cal.App.3d 358, 377.)

No federal constitutional violation occurred.

C. Appellant's Remaining Theories Of Inadmissibility Are Forfeited

In addition to reiterating what he urged below, that the evidence of the alleged jail batteries was inadmissible because there existed insufficient evidence that the incidents were indeed batteries, appellant argues that the trial court erred in admitting the evidence because Penal Code section 190.3, factor (b) is unconstitutional. It permits the jury to punish prior acts of violence that are wholly un-related to any crimes proven at the guilt phase (II AOB 318); and because the misdemeanor batteries here were irrelevant to any penalty phase issue. (II AOB 318-319.)

These are theories of inadmissibility that appellant did not offer the trial court. (See 2 RT 419.) As such, they are forfeited (*People v. Thomas*, *supra*, 2 Cal.4th 489, 519-520; see also Evid. Code, § 353), and it matters not that one is a federal constitutional theory of inadmissibility (*People v. Partida*, *supra*, 37 Cal.4th at pp. 437-438.) At any rate, this Court has previously held that section 190.3, factor (b), is constitutional. (*People v. Anderson* (2001) 25 Cal.4th 543, 584.)

D. Any Error Did Not Prejudice Appellant

When a trial court erroneously admits section 190.3, factor (b) evidence under state law, the penalty phase judgment will be reversed if there is a reasonable possibility the error affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448; *People v. Gonzalez* (2006) 38 Cal.4th 932, 961.)

Here, assuming for the sake of argument that the trial court committed *Phillips* error in permitting the evidence of appellant's misdemeanor jail batteries to go before the penalty phase jury, reversal of the death judgment is not in order. Appellant's case in mitigation paled in comparison to the properly-admitted evidence in aggravation, particularly the circumstances of the crime. Appellant not only forced his way into the home and bedroom of a 60-

year-old woman, but then he attempted to violate her sexually, and likely completed that assault. (13 RT 2687-2688.) He thereafter stabbed her to death in a most callous and inhumane way. What appellant did to Olsson, and how he did it, overwhelmed the fact that he had dysfunctional parents, and a difficult childhood.

This finding of harmless error under the *Brown* "reasonable possibility" test is equivalent to a finding that the admission of the evidence was harmless beyond a reasonable doubt, and thus is a finding that the error was harmless under *Chapman v. California*, *supra*, 386 U.S. 18, 23-24 if, assuming arguendo, it was erroneously admitted under the federal Constitution. (*People v. Ashmus* (1991) 54 Cal.3d 932, 990 ["*Brown's* 'reasonable possibility' standard and *Chapman's* 'reasonable doubt' test . . . are the same in substance and effect"]; *People v. Gonzalez*, *supra*, 38 Cal.4th at p. 961.) Additionally, because the *Chapman* beyond-a-reasonable-doubt harmless error standard is more demanding than the "fundamental fairness" inquiry of the Due Process Clause (*Greer v. Miller, supra*, 483 U.S. at p. 765, fn. 7), any *Phillips* error here necessarily did not amount to a due process violation by rendering appellant's penalty phase trial unfair.

Appellant's thirteenth assignment of error garners him no relief.

XIV.

THE TRIAL COURT DID NOT ERR IN ADMITTING VICTIM IMPACT EVIDENCE AT THE PENALTY PHASE AND SEVERAL OF APPELLANT'S OBJECTIONS ARE FORFEITED

In *Payne v. Tennessee* (1991) 501 U.S. 808, 826-827 [111 S.Ct. 2597, 115 L.Ed.2d 720], the United States Supreme Court held the Eighth Amendment erects no bar to the admission of evidence about the impact of the murder on the victim's family. As outlined earlier, the prosecution presented such evidence at appellant's penalty phase. (See pp. 37-41, *ante*.)

Appellant lodges numerous objections to the admission of this evidence. He contends that the admission of any victim impact evidence is unconstitutional (II AOB 335-340); that its admission on the basis of case law that came into existence after he killed Olsson violates the ex post facto and due process clauses of the United States and California Constitutions (II AOB 340-347); that the scope of victim impact evidence must be limited to the facts or circumstances known to the appellant when he committed his capital crime (II AOB 347-351); that the particular victim impact evidence admitted in this case was unduly prejudicial and inflammatory (II AOB 352-354); that the trial court should have excluded victim impact evidence on inadequate-notice grounds (II AOB 355-358); and that the erroneous admission of the evidence requires reversal (II AOB 358-361).

Appellant concludes his argument with the claim that if the victim impact evidence did not otherwise prejudice him, reversal is nevertheless in order because the admission of the evidence deprived him of his rights to due process and a fair trial under the Fourteenth Amendment, his right to a fair and reliable penalty determination under the Eighth Amendment, and his parallel rights under article I of the California Constitution. (II AOB 361.)

No reversal is required here because no error occurred in the admission of

the victim impact evidence.

A. Victim Impact Evidence Is Constitutional

Appellant's attack on the constitutionality of victim impact evidence is particularly confusing. (II AOB 335-340.)

In *Payne v. Tennessee, supra*, 501 U.S. 808, 825, the nation's High Court overruled *Booth v. Maryland* (1987) 482 U.S. 496, 509 [107 S.Ct. 2529, 96 L.Ed.2d 440], insofar as *Booth* had barred states from admitting evidence of the "specific harm" the defendant had caused by his or her capital crime, namely, the loss to society and the victim's family of a "unique" individual. The *Payne* court opined that the prosecution has a legitimate interest in counteracting the relevant mitigating evidence introduced by the defendant. (501 U.S. at p. 825.) The federal Constitution bars victim impact evidence only if it is "so unduly prejudicial" as to render the trial "fundamentally unfair" in violation of the defendant's due process rights. (*Ibid.*)

Appellant's perplexing assertion that *all* victim impact evidence is unconstitutional because "recent Supreme Court opinions cast a looming shadow over the *Payne* holding" (II AOB 339; citing *Ring v. Arizona, supra,* 536 U.S. 584; *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335]) is addressed to the wrong court. Only the United States Supreme Court can overrule *Payne*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In *People v. Edwards* (1991) 54 Cal.3d 787, 835-836, this Court construed state law consistent with the principles of *Payne*, and held that unless the victim impact evidence invites a purely irrational response from the jury the devastating effects of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a). (Accord, *People v. Sanders* (1995) 11 Cal.4th 475, 549-550 [*Payne*

only encompasses evidence that logically shows the harm caused by the defendant and does not mean there are no limits on emotional evidence and argument].) The *Edwards* court directed trial courts to weigh the probative value of the victim impact evidence against its prejudicial effect. (54 Cal.3d at p. 836.)

Appellant calls *Edwards* "incorrect" and declares that this Court "must" reconsider it. (II AOB 336.) It is appellant who is incorrect, however, when he claims that all victim impact evidence "invites the jury to base their sentencing decision on emotion and bias" (II AOB 338), and that all victim impact evidence "is wholly unrelated to the defendant's personal responsibility and moral culpability" (II AOB 338). As *Payne v. Tennessee* makes clear, the loss to society and to a victim's family from the defendant's murder of a unique individual is a "specific harm" caused by the defendant and is something for which the defendant is personally responsible and something that is related to his or her moral culpability. States "may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." (501 U.S. at p. 825.)

In attacking the constitutionality of all victim impact evidence appellant makes two additional confusing arguments. He seems to argue that notwithstanding *Payne*, the admission of victim impact evidence is not relevant to a statutorily specified category of aggravating evidence and thus comprises error under state law. (II AOB 336-337.) Appellant also appears to argue that interpreting section 190.3, factor (a) ("circumstances of the crime") to include victim impact evidence renders the factor unconstitutionally vague. (II AOB 337-338.) This Court has previously rejected both arguments. (*People v. Boyette* (2002) 29 Cal.4th 381, 445 & fn. 12.)

B. Appellant's Ex Post Facto Attack Is Forfeited And Meritless

Appellant contends that because he committed the capital crime in this case in 1986, pre-*Payne*, and at a time this Court did not permit the introduction of victim impact evidence, the admission of the victim impact evidence at his post-*Payne* 1992 penalty trial violated ex post facto principles and his due process rights. (II AOB 340-347.)

At trial, in attacking the admissibility of the victim impact evidence, appellant made no ex post facto argument. (16 RT 3335-3397.) This Court has held that a failure to make an ex post facto theory of inadmissibility argument at trial precludes the defendant from making the argument on appeal as support for a challenge to the introduction of victim impact evidence. (*People v. Huggins* (2006) 38 Cal.4th 175, 236.)

In *Huggins* this Court also noted that it previously rejected the ex post facto argument in *People v. Brown* (2004) 33 Cal.4th 382, 394-395, and it refused to reconsider that *Brown* conclusion. (*People v. Huggins, supra*, 38 Cal.4th at p. 236; accord *People v. Jurado, supra*, 38 Cal.4th 72, 132.) *Brown* correctly holds that the case law amending victim impact evidence merely constituted a change in a type of admissible evidence and as such does not implicate the ex post facto doctrine.

C. Appellant's Assertion That It Is Unconstitutional To Permit The Admission Of Victim Impact Evidence That Is Not Limited To The Facts Or Circumstances Known To The Defendant At The Time Of His Or Her Capital Crime Is Forfeited And Meritless

Appellant claims that the admission of victim impact evidence that was not limited to the facts or circumstances known to him at the time he committed the murder of Olsson violated the federal Constitution because such evidence has "no bearing" on his moral culpability or character. (II AOB 347-351.)

This Court has previously rejected this argument on multiple occasions.

(*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1057; accord *People v. Pollock* (2004) 32 Cal.4th 1153, 1183; citing *People v. Boyette, supra*, 29 Cal.4th at pp. 440-441, 443-445.) Appellant offers no persuasive reason for this Court to reconsider this conclusion.

Again, because appellant did not offer this current argument as a theory of inadmissibility at trial (16 RT 3335-3397), it is forfeited. (See generally *People v. Rogers, supra*, 21 Cal.3d 542, 547-548; Evid. Code, § 353.)

D. The Victim Impact Evidence Was Not Unduly Prejudicial

To repeat, in *People v. Edwards, supra*, this Court noted that the trial court must exclude victim impact evidence that is more prejudicial than probative. (54 Cal.3d at p. 836; Evid. Code, § 352.) But here the trial court determined that the admitted victim impact evidence was more probative than prejudicial. (16 RT 3400.) Appellant assigns error to that ruling. (II AOB 352-354.) Appellant is wrong. An Evidence Code section 352 ruling is by its own terms reviewed for an abuse of discretion, and here the trial court did not abuse its discretion, i.e., it did not rule unreasonably in light of the facts and circumstances before it. (*People v. Rodrigues, supra*, 8 Cal.4th 1060, 1124-1125.)

Here, four witnesses testified to the impact of Sandy Olsson's murder on them. (See pp. 37-41, *ante*.) To summarize, Olsson's daugther Sandra Walters testified that her mother was her best friend whose death left Walters deeply hurt. (16 RT 3425, 3428-3432, 3438.) Among other things, Walters testified, "I don't want to have children because I don't want anybody to go through what I have, to lose your mother." (16 RT 3426-3427.) Olsson's son Trip testified, for example, about losing the unconditional love his mother had always had for him and the "anchor"she had always been for him. (16 RT 3444.) Her murder had been a "nightmare" and a "hell" for him. (16 RT 3443-

3443.) "I was very depressed. The loss of my mother, to me, I, I—can't—I do not know how to put that into words. It was devastating." (16 RT 3446.) Olsson's sister, Jan Dietrich, testified about the sadness of losing her "great friend" and the dread she felt about having to inform her elderly father of the murder. (16 RT 3459-3461.) Dietrich also testified about the difficulty and responsibility of trying to arrange her sister's funeral in an area in which Dietrich was a stranger, while all the while also trying to answer police questions. (16 RT 3664-3466.) The manner of her sister's death left Dietrich with a constant worry about Olsson's last 15 or 20 minutes, when, in Dietrich's words, "I wasn't there to help her." (16 RT 3473.) Finally, Olsson's 91-year-old father, Clifford Sandberg, testified to, among other things, being reminded of his daughter Sandy many times a day, and the difficulty sleeping the manner of her death has left him with. (16 RT 3487-3488.)

"This testimony was not dissimilar from, or significantly more emotion-laden than, other victim impact testimony that has been held admissible. For example, in *Payne v. Tennessee*, *supra*, 501 U.S. 808, the defendant was convicted of murdering a 28-year-old woman and her two-year-old daughter. At the trial, when asked how the woman's three-year-old son had been affected by the murders of his mother and sister, the boy's grandmother replied: '"He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie."' (*Id.* at pp. 814-815.) In *People v. Harris*, *supra*, 37 Cal.4th 310, the murder victim's mother 'described how she learned of the murder, and of the emotional and financial costs involved in planning and attending the funeral.' (*Id.* at p. 328; see also *id.* at pp. 351-352 [holding this evidence properly admitted].) In *People v. Panah*[] [(2005)] 35 Cal.4th 395, the murder victim's father testified that before the victim's death, her 16-year-

old brother 'was the family athlete, and was a "4.0 student," but, following her death, his grades deteriorated, "he is drinking a lot and doing drugs,"and would not talk about his sister but "kept it all inside himself," and refused to go to counseling.' (*Id.* at p. 495.) We concluded that this testimony was 'neither irrelevant nor prejudicial but, in context, depicted the "residual and lasting impact" he "continued to experience" as a result of [the victim's] murder.' (*Ibid.*) In *People v. Boyette, supra*, 29 Cal.4th 381, a murder victim's father 'testified and related how close he was with the victim, how her eight-year-old son had said he wanted to die so he could be with his mother, how her six-year-old son had nightmares and would telephone wanting to know where his mother was, and how [the victim] had been in a drug rehabilitation program and had turned her life around.' (*Id.* at p. 440; see also *id.* at p. 444 [holding the evidence was properly admitted].) As in these cases, we conclude that the victim impact evidence here 'did not surpass constitutional limits.' (*Id.* at p. 444.)" (*People v. Jurado, supra*, 38 Cal.4th at pp. 133-134.)

E. The Trial Court Did Not Err In Refusing To Exclude The Victim Impact Evidence On Inadequate Notice Grounds

Section 190.3 provides in relevant part: "Except for evidence in proof of the offense or special circumstances . . . no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial." The purpose of this notice requirement is to advise defendants of the evidence against them so that they may have a reasonable opportunity to prepare a defense at the penalty phase. (*People v. Miranda, supra*, 44 Cal.3d 57, 96.)

Here, the trial court overruled appellant's inadequate-notice objection to the admission of the victim impact evidence, holding that "in view of the court's

rulings as to admissibility, there is no evidence on the victim impact issue anticipated that was not already adduced at the guilt phase or is not within the range of evidence that is to be reasonably anticipated based on the notice given with respect to the death and loss of the family member." (16 RT 3403.). Appellant assigns error to this ruling. (II AOB 355-358.)

Appellant's contention is meritless, as he wholly fails to establish error. He claims only that the prosecutor did not limit his penalty phase presentation "to matters that had already been presented at the guilt phase," and appellant further asserts that the defense "did not have any notice that the prosecutor would elicit prohibited testimony concerning Ms. Olsson's children's personal relationships, their mental and emotional difficulties before or after the crime, Ms. Olsson's saving for retirement, or the police presence at the funeral." (II AOB 357.) The foregoing matters are, of course, ones the defense could have reasonably anticipated based on the prosecution's notice that it was going to provide victim impact evidence from family members. Instead of showing error, appellant next begins a discussion of prejudice, offering the conjecture that because of the inadequate notice "the defense did not have an opportunity to conduct its constitutionally required investigation into the aggravating factors. . . . Without notice, the defense was required to break the cardinal rule of cross-examination in an attempt to question Ms. Olsson's family members." (AOB 357.)

Appellant concedes that before the beginning of the guilt phase the prosecutor gave the defense notice that he intended to present victim impact evidence at the penalty phase through the testimony of family members. (II AOB 323.) Such general notice of evidence suffices and the prosecutor's failure to specify the precise evidence he intended to present does not render the notice constitutionally or statutorily insufficient. (*People v. Hart, supra*, 20 Cal.4th 546, 638-639; *People v. Carpenter* (1997) 15 Cal.4th 312, 421; *People v. Clark, supra*, 5 Cal.4th 950, 1033; *People v. Pride, supra*, 3 Cal.4th 195,

259; *People v. Visciotti* (1992) 2 Cal.4th 1, 71; *People v. Miranda, supra*, 44 Cal.3d at pp. 96-97.) Put differently, "the prosecutor is not prevented from introducing all the circumstances of a duly noticed incident or transaction simply because each and every circumstantial fact was not recited therein." (*People v. Hart, supra*, 20 Cal.4th at p. 639.)

In summary, the trial court committed no error whatsoever in ruling the victim impact evidence admissible. Appellant's arguments to the contrary are either forfeited, without merit, or both.

XV.

THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT DURING HIS PENALTY PHASE ELICITATION OF THE VICTIM IMPACT EVIDENCE AND SEVERAL COMPLAINTS ARE FORFEITED

Appellant contends next that the prosecutor, in his elicitation of the victim impact testimony from Olsson's family members, repeatedly committed misconduct by "flagrantly" ignoring the rulings of the trial court and exceeding the court's limitations on the scope of the admissible victim impact evidence. (II AOB 362-390.) He accuses the prosecutor of making a reprehensible attempt to persuade the jury through deception, and thus committed a violation of state law, as well as a federal constitutional violation, in that the misconduct was so egregious that it infected the penalty phase with fundamental unfairness. (II AOB 362, 381-382.) Appellant claims the misconduct violated his rights to due process, a fair trial, the effective assistance of counsel, and to a fair and reliable penalty verdict, in violation of state law, article I of the California Constitution, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (II AOB 390.) Appellant wants a reversal of his death sentence as a remedy for these alleged violations. (II AOB 390.)

A review of the record shows that no prejudicial misconduct occurred in the manner in which the prosecutor presented the penalty phase testimony of the victim's family members. Appellant overstates what occurred. Moreover, many of appellant's complaints are not cognizable.

Before the commencement of the prosecution's penalty phase case-in-chief, the trial court put limits on the evidence, including that relating to the victim's personal characteristics:

> Admissible victim impact evidence relating to the victim's personal characteristics, much of which has already been admitted in the guilt phase, would include her profession and such details about her job, which have already been received, her family and friends, again to the

extent that it has already been received, and that she was a caring individual which seem to be implicitly in the information previously admitted, and that she looked forward to retirement;

Inadmissible victim impact evidence would include, again, relating to the specific offer of proof, evidence as to her military service, leisure time pursuits and financial sacrifices which may have been made toward retirement.

(16 RT 3401-3402.)

The court then addressed evidence relating to the victim's family:

Admissible victim impact evidence relating to the victim's family would include that a family member enjoyed a close relationship with the victim and that she was loved and is missed, that the reality of her death was brought home while packing belongings and making other arrangements, that a son or daughter married and had children after her death, the impact of the loss of a child on a parent as a general matter, and the loss of her companionship during her anticipated retirement, and that would include traveling together, but not the specific plan or details of that travel, the impact of the nature of the death here as distinguished from accidental death or death from other causes, but specifically, excluding any opinion about the crime, the defendant, or what the appropriate sentence should be which is prohibited by the *Payne* decision and the impact of having to tell a family member of the victim's death.

Inadmissible victim impact evidence, however understandable relating to family members, would include a family member's difficulties with alcohol abuse, fear for personal safety or that of another family member, guilt feeling because of a failure to contact the victim by phone on the night of the death—on the night of her death, a sense of suspicion as to other people, or testimony about what the victim's thoughts may have been immediately prior to her death.

(16 RT 3401-3402.)

The court told the prosecutor that it would give him latitude to ask leading questions to comply with its several rulings, and that it "contemplated" "relatively brief direct testimony" from each victim impact witness. (16 RT 3403.) No citation to authority is needed for the proposition that prosecutors commit misconduct when they violate court orders and seek to elicit testimony

on matters the trial court has ruled inadmissible. However, appellant is simply wrong when he contends the prosecutor "deliberately" and "willfully" "committed pervasive and continuous misconduct" by asking questions of certain of his penalty phase witnesses involving areas expressly ruled inadmissible by the trial court. (II AOB 383, 385.) And, as stated, many of appellant's assertions are forfeited.

A. The Alleged Misconduct During The Direct Examination Of Sandra Walters

During the prosecutor's direct examination of Olsson's daughter Sandra Walters at the penalty phase, defense counsel lodged 11 objections. (16 RT 3424-3433.) Only five of those objections (e.g., "relevancy," the "form" of the question is improper, the question is "too broad"), remotely suggested a belief on defense counsel's part that the prosecutor had committed misconduct by asking a question that called for an answer in contravention of the trial court's rulings on victim impact evidence.

At one point the prosecutor asked Walters if she had ever discussed with her mother the possibility that she (Walters) might someday have children. After Walters answered affirmatively, the prosecutor asked, "And what were her thoughts about that?" (16 RT 3426.) Walters answered, "I have one guilt, that I never provided my mom with a grandchild, something she always wanted." (16 RT 3426.) Defense counsel objected that the prosecutor needed to ask "narrower" questions, and asked the court to strike the answer. (16 RT 3426.) The court did so. (16 RT 3426.)

We detect no misconduct in the prosecutor's question. How Olsson felt about the possibility of grandchildren was not a prohibited victim impact subject. (See 16 RT 3401-3402.) In any event, appellant suffered no harm given that the court struck Walters's answer.

Moments later, the prosecutor asked Walters whether "the impact" of her mother's murder had affected her relationships with others. (16 RT 3427.) Before Walters could answer the court sustained, "as to form," defense counsel's objection. (16 RT 3427.) Again, no misconduct occurred. The prosecutor was exploring a permissible subject: The impact to a child caused by the loss of a parent. (See 16 RT 3402.) In all events, appellant suffered no harm because the witness gave no answer.

At another point in his direct examination of Walters the prosecutor asked her whether, on the day she had learned of her mother's death, she received from her boyfriend "any more information, about what, if anything, had happened to your mother?" (16 RT 3430.) Walters answered: "Yes. He told me that he had called and talked to the detective." (16 RT 3430.) The court struck this answer after sustaining defense counsel's objection that the question had not been "narrow" enough. (16 RT 3430.) We discern no misconduct in asking Walters to describe the events leading her to the discovery of the circumstances surrounding her mother's death. Moreover, no harm could have accrued to appellant in light of the court's striking of a completely innocuous answer. (16 RT 3430.)

At the end of the prosecutor's direct examination of Walters, he asked her how she felt when she accompanied her mother to the hospital for a breast biopsy. (16 RT 3433.) Before Walters could answer the trial court sustained, on relevancy grounds, defense counsel's objection to the question. (16 RT 3433.) The prosecutor then asked Walters in "what way" her mother's breast cancer had "brought home" for her the reality of her mother's "mortality." (16 RT 3433.) The court sustained defense counsel's "too broad" objection to this question. Neither that question nor the previous question constituted misconduct, however. Context makes clear that the prosecutor had not attempted to elicit inadmissible evidence, but merely posed questions

concerning "the impact of the nature of the death here as distinguished from accidental death or death from other causes." (16 RT 3402.) The prosecutor's next and final direct examination question of Walters, which defense counsel did not object to, was this: "The fact that cancer is life threatening, how does her death by murder impact on you, as opposed to if she had just died from the cancer?" (16 RT 3434.) No misconduct there.

Appellant alleges the prosecutor committed misconduct when he asked Walters, "When you say she made you the person you are today, what do you mean by that?" (II AOB 364, quoting 16 RT 3425.) However, defense counsel objected to that question on the ground that it "call[ed] for a narrative," not that the prosecutor had attempted to elicit inadmissible evidence. (16 RT 3425.) As noted previously, appellants may not change the theories underlying their trial objections on appeal. (*People v. Thomas*, *supra*, 2 Cal.4th 489, 519-520.) In any event, Walters never answered the question.

Appellant also protests (II AOB 364-365) the prosecutor's questions to Walters, "Has her murder had an impact on your relationships with people?" (16 RT 3427), and, "What are the hardest times of the year for you?" (16 RT 3433.) Appellant offered no objection to the former question and a general objection to the latter. Again, appellant's attempt to make an allegation of prosecutorial misconduct for the first time on appeal is forbidden. (*People v. Frye*, *supra*, 18 Cal.4th 894, 969-970.) This waiver rule applies even for alleged prosecutorial misconduct that occurs in the penalty phase. (*People v. Coddington* (2000) 23 Cal.4th 529, 636.)

Likewise, appellant protests that the prosecutor asked Walters in "what way" the manner of her mother's death had had an impact on her relationships with others. (II AOB 366, citing 16 RT 3427.) Appellant calls it a "prohibited theme," but because he lodged no such objection below, he cannot do so now. (*People v. Frye, supra*, 18 Cal.4th at pp. 969-970.) Nor did he

object to Walter's answer ("It's had a big impact on me being intimate with anybody (16 RT 3427)), nor to the prosecutor's follow-up question, "You indicated that you had some difficulty being intimate. What do you mean by that?" (16 RT 3439.) Again, no misconduct occurred in all events through these questions. The prosecutor did not elicit inadmissible evidence but simply sought to explore how Walters's loss of a parent affected her, a permissible area of inquiry. (See 16 RT 3402.)

Finally, appellant protests (II AOB 366) that the prosecutor asked Walters in "what way" her mother's murder had impacted her, "even after all these years." (16 RT 3432.) This was a proper question and appellant's failure to claim otherwise at the time renders the issue forfeited on appeal. (*People v. Frye, supra*, 18 Cal.4th at pp. 969-970.) It is true that Walters's answer, "I am 35 years old, and I sleep with a night light, and I have a hatchet underneath my bed because I am afraid" (16 RT 3432), ran afoul of the court's order excluding victim impact evidence related to "fear for personal safety." (16 RT 3402.) However, when a witness gives a nonresponsive answer, or one the prosecutor does not otherwise expect, that does not amount to prosecutorial misconduct. (*People v. Valdez, supra*, 32 Cal.4th 73, 125.) It is also true that appellant did not ask to have the offending answer stricken. (16 RT 3432.)

B. The Alleged Misconduct In The Direct Examination Of Trip Walters

During the prosecutor's direct examination of Olsson's son Trip, defense counsel lodged nine objections. (16 RT 3441-3449.) Six of those objections (e.g., "relevancy," "materiality," "speculation," the question is not "narrow" enough), were arguably on the ground that the prosecutor's questioning exceeded the scope of the trial court's victim impact ruling.

Early in his direct examination of Trip, the prosecutor asked him to

describe how he felt going into his mother's home for the first time after her murder. (17 RT 3443.) Trip answered, "Walking into that house was part of that nightmare. There was fingerprint powder, dust all over the house. And it had just the eeriest feeling to me about walking in that house, because inside of that house, my mother—my mother wasn't there, but all of her things were, and everything that reminded me of my mother as a child, and she collected—she called them Kokeshi dolls. She collected them when she was stationed over in Japan and Korea in the service. And like I said, I gave her a turtle at birthdays, and she probably had 200 turtles and Kokeshi dolls and all these family things." (16 RT 3443-3444.) When defense counsel immediately objected that the prosecutor needed to ask narrower questions, the court told the prosecutor to ask his next question. (17 RT 3444.)

The question was a proper one. It is true that Trip's answer touched on the inadmissible area of Olsson's military service. (See 16 RT 3401.) Again, however, when a witness gives a nonresponsive answer, or one the prosecutor does not expect, that does not amount to prosecutorial misconduct. (*People v. Valdez, supra*, 32 Cal.4th at p. 125.) Furthermore, appellant did not ask to have the answer stricken, no doubt because counsel appreciated that the "service" reference was so fleeting it could not have prejudiced appellant.

Later, the prosecutor asked Trip, "Growing up before your parents were divorced, did you always live in Marin?" (16 RT 3444.) Trip answered, "No sir. I was born in Greenville, Mississippi, prior to living in Marin in 1966, which I would have been about age 11 at that time." (16 RT 3444-3445.) Defense objected to this on relevancy grounds, and the court sustained that objection, but defense did not move to strike the answer, again demonstrating that counsel realized the harmlessness of it. The trial court also sustained, before Trip could answer, defense counsel's relevancy objection to the prosecutor's question, "From your birth in Mississippi, to age 11, when the

family finally moved to Marin, how many times did the family move?" (16 RT 3444-3445.) The court sustained the objection, no answer was provided, and prejudice to appellant is simply inconceivable.

The prosecutor asked Trip, "Did you ever talk with your mother about her having grandchildren?" (16 RT 3447.) After Trip answered affirmatively, the court sustained defense counsel's materiality objection but the court did not strike the answer sua sponte nor did defense counsel request a strike. (16 RT 3447.)

Later the prosecutor asked Trip if the manner in which his mother died had had an impact on the family. (16 RT 3448.) Inexplicably, the trial court sustained defense counsel's materiality objection before Trip could answer. (16 RT 3448.) Regardless of which was error—the question or the ruling—the incident was harmless.

The prosecutor's last question to Trip was if, in light of Trip's realization that his mother had had cancer at one point, "is there any difference if you had lost her as a result of that cancer or some other illness as opposed to the fact she was murdered?" (16 RT 3448-3449.) The trial court overruled defense counsel's "speculation" objection, and Trip answered this way: "Yes. Unfortunately, we live life on life's terms. If my mother died of cancer or of an automobile accident or something like that, I am sure I would be able to understand that. [¶] For her to be murdered, I cannot understand that. And I can—I—I cannot understand that; it's absolutely asinine." (16 RT 3448-3449.)

Appellant challenges only the answer, not the question (II AOB 368-369), again ignoring that when a witness gives a nonresponsive answer, or one the prosecutor does not expect, prosecutorial misconduct has not occurred. (*People v. Valdez, supra*, 32 Cal.4th at p. 125.) In any event, appellant's failure to challenge the answer below or request that it be stricken forfeits any

challenge to it now. (Evid. Code, § 353 [reversal is not in order for the erroneous admission of evidence when defendant did not lodge a timely and specific objection at trial].)

C. The Alleged Misconduct In The Direct Examination Of Jan Dietrich

During the prosecutor's direct examination of Olsson's sister Jan Dietrich, defense counsel lodged 17 objections. (16 RT 3457-3476.) Ten of those objections (e.g., "relevancy," "materiality," "lack of specificity"), were arguably on the ground that the prosecutor was committing misconduct by asking a question that called for an answer outside the scope of the trial court's earlier victim impact ruling.

Early in the examination the court, before Dietrich could answer, sustained a general objection to the prosecutor's question, about Olsson, "Did you get a sense of the professional esteem she was held in?" (16 RT 3458-3459.) By its earlier ruling, the court had expressly permitted the admission of victim impact evidence that included details about Olsson's profession. (16 RT 3401.) The later ruling sustaining an objection to just such evidence is inexplicable. In any event, the question went unanswered, and no prejudice to appellant resulted.

Next the court sustained a relevancy objection, before Dietrich could answer, to the question, "When you got to your father's home in Topeka, Kansas, the concerns that you had, what was he doing when you saw him?" (16 RT 3462.) Again, that no answer was given to the question means no prejudice flowed to appellant from any misconduct in the question. That same conclusion applies to later questioning, when, before Dietrich could answer, the court sustained a relevancy objection to the question "And aside from finding a funeral parlor, what else did that entail?" (16 RT 3466.)

Similarly, the court sustained a relevancy objection, before Dietrich could answer, when the prosecutor asked whether the police had told Dietrich why they were going to attend Olsson's funeral. (16 RT 3467.)

Later, the prosecutor asked Dietrich,"On Wednesday, following your father's birthday, what transpired at that point?" (16 RT 3468.) Before Dietrich could answer, the court sustained—on vagueness grounds—defense counsel's "narrowness" objection. (16 RT 3468.)

Later the prosecutor asked Dietrich, "With regard to your sister, given the manner in which she died, are there any thoughts that constantly reoccur?" (16 RT 3472.) Dietrich answered, "The terror." (16 RT 3472.) The court sustained defense counsel's lack-of-specificity objection but did not sua sponte strike Dietrich's answer, nor did defense counsel ask the court to strike the answer. (16 RT 3472.) Contrary to appellant's argument (II AOB 373-374), no prosecutorial misconduct occurred here. Although the answer arguably referenced matter deemed inadmissible by the trial court (16 RT 3402), the question did not ask for the *victim's* thoughts, but permissibly asked for the *witness's* thoughts on how her sister's murder, as opposed to another type of death, had impacted her. The prosecutor made this clear with his next question. (16 RT 3473.) Reviewing courts should not presume sinister intent or motive in unclear or vague questions by counsel.

The conclusion of the prosecutor's direct examination of Dietrich ended this way:

> Q. Has the manner of her death, given the fact she was murdered, has that had an impact differently than it would have been if she would have been if she had died from the cancer or an accident or something like that?
>
> A. Yes, of course.
>
> Q. In what way?
>
> A. In that you lose someone, which is bad enough, but to worry about her last fifteen or twenty minutes, as I do all the time, when I

wasn't there to help her.

[Defense Counsel]: Your Honor—

THE COURT: Just a moment. Excuse me, at this point I will sustain the objection. You may restate another question with specificity consistent with my previous ruling.

THE PROSECUTOR: Q. Have you ever lost someone through death before that was close to you?

A. My mother.

Q. The loss of your mother, how did she die?

A. She died of a heart attack but we were—had the chance to be there with her.

[Defense Counsel]: There is no question pending.

THE COURT: Let's have the next question.

[THE PROSECUTOR]: Q. With regard to the loss of your mother, and the manner in which she died, compared with the loss of your sister, have you gotten over—let me rephrase it this way, six years after the loss of your mother, did you feel the way you feel now?

A. No.

[Defense Counsel]: Your Honor, I am going to object to this line of questioning.

THE COURT: Well, as it is presently phrased let's see what the next question is, then I will entertain an objection. Go ahead.

THE PROSECUTOR: Q. With regard to, as you indicated earlier, that if your sister died by way of accident or illness or something like that, there is some sense of normalness to it; is that correct?

A. Correct.

Q. Given the manner in which she was murdered or the fact that she was murdered, does that have the impact of not being put to rest?

A. Not a closure.

Q. With regard—has the manner of her death impacted you in such a fashion that when you think of your sister, you think of what was happening to her the last fifteen minutes of her life?

A. Yes. And the guilt that I wasn't there to do something to help

her.

[Defense Counsel]: I'm sorry, I think it called for a "yes" or "no" answer, and I would ask anything after the "yes" get stricken. I didn't hear it, but's it's nonresponsive.

THE COURT All right. After the "yes" answer, the objection will be sustained, and the answer will go out.

[THE PROSECUTOR]: Okay.

THE COURT: Go ahead.

THE PROSECUTOR: Q. Let me, just so we don't run into this problem, if you would just confine yourself to "yes" or "no" to my question.

A. Yes.

Q. With regards to the thoughts that you had of your sister, and what she went through the last fifteen minutes of her life, do you also think about what thoughts must have been going through her mind?

A. Yes.

[Defense Counsel]: I am going to object to this. This is specifically something the court ruled on.

THE COURT: All right. The objection will be sustained. The last answer may go out. The jury is to disregard it.

And move into another area.

[THE PROSECUTOR]: Okay.

Q. Do you think about how—at what point her spirit actually left her body?

A. Yes.

[Defense Counsel]: Object to that as rephrasing.

THE COURT: Sustained. Answer may go out. Jury to disregard. Move forward.

[THE PROSECUTOR]: Thank you. I have nothing further.

(16 RT 3473-3476.)

Here, the witness answered questions in a way that ventured into areas foreclosed by the trial court's earlier ruling that witnesses not be asked about

their own "guilt feelings" and the thoughts of the victim before she died. (16 RT 3402.) No prosecutorial misconduct occurred, however. As the prosecutor told the court when responding to the mistrial motion appellant made on the completion of Dietrich's testimony, he had wanted Dietrich to answer yes or no to whether she had given any thought to what Olsson's last thoughts might have been. (16 RT 3479-3480.) The court denied the mistrial motion, accepting the prosecutor's explanation, finding no intent on the prosecutor's part to disregard its victim impact rulings, and noting that the complexity of the law governing victim impact evidence had made the process of examining witnesses unavoidably difficult. (16 RT 3481-3482.)

Finally, appellant protests the questions of the prosecutor to Dietrich that permitted her to answer that she had been afraid her father would die from shock upon learning of Olsson's murder, and that when she had arrived at her father's home, he "was getting all set and prepared" for Olsson's planned arrival and was making Olsson a chicken dinner. (II AOB 372-373, citing 16 RT 3461-3463.) These assignments of error are forfeited by appellant's failure to object to the questions at trial and seek an admonition. (*People v. Frye, supra*, 18 Cal.4th at pp. 969-970.)

D. The Alleged Misconduct In The Direct Examination Of Clifford Sandberg

The trial court had ruled that the prosecutor could elicit from Olsson's family members victim impact evidence concerning "the loss of her companionship during her anticipated retirement, and that would include traveling together, but not the specific plan or details of that travel." (16 RT 3402.) During the early part of the prosecutor's examination of Olsson's father, after Sandberg affirmatively answered the prosecutor's question about whether he and Olsson had made plans to travel after she retired, the court

sustained a defense objection to the following question: "Basically you were in the stage of—was it a car you were going to buy, or some other, like a van or—." (16 RT 3486.) The objection interrupted the question and it went unanswered, resulting in no prejudice. (16 RT 3486.)

Next, near the end of the prosecutor's direct examination, he asked Sandberg, "With regard to losing [Sandy], has her death been different in its effect on you, given how she died?" Sandberg answered, "Yes sir. Yes sir, because I know she was tortured to death." (16 RT 3487.) The trial court sustained defense counsel's immediate objection, struck Sandberg's answer from the record, and directed the jury to disregard the answer. (16 RT 3487.)

Contrary to appellant's position (II AOB 378-381), the prosecutor did not commit misconduct. There is no indication he purposely elicited the "torture" answer. Rather, as he explained, he was pursing a line of inquiry expressly permitted by the trial court—how the manner in which Olsson died impacted Sandberg differently from how it might have affected him if her death had resulted from accident or sickness. (16 RT 3491-3492, 3494-3495; see *People v. Valdez, supra*, 32 Cal.4th at p. 125.)

This was essentially the finding of the trial court in denying the mistrial motion made by appellant upon Sandberg's "torture" statement. (16 RT 3497-3498.) Appellant vehemently protests the denial of this mistrial motion, contending that it matters not that the prosecutor did not intend to elicit inadmissible evidence. (II AOB 384; citing *People v. Hill, supra*, 17 Cal.4th 800, 822-823 & fn. 1 [a showing of bad faith or knowledge of the wrongfulness of his or her conduct is not required to establish prosecutorial misconduct].) However, this Court has also established that it is the prosecutor's *intentional* elicitation of inadmissible evidence that constitutes misconduct. (*People v. Smithey* (1999) 20 Cal.4th 936, 960, and cases there cited.)

E. Any Misconduct Did Not Prejudice Appellant

A review of the record refutes appellant's assertions that the prosecutor "deliberately," "pervasively," and "continuously" sought to elicit inadmissible victim impact evidence at the penalty phase. Indeed, we think it at least as arguable that no misconduct of any sort occurred. But even assuming otherwise, appellant was not prejudiced, either singly or cumulatively.

As discussed, whether misconduct at the penalty phase is considered a state law violation or a federal constitutional violation, the harmless-error test is the same. Here, there is no reasonable possibility that had the alleged misconduct not occurred appellant would have received an LWOP sentence. (*People v. Brown*, *supra*, 46 Cal.3d 432, 446-448 ["reasonable possibility" of a different result is the harmless-error test for state-law error at the penalty phase]; *People v. Ashmus*, *supra*, 54 Cal.3d 932, 990 ["*Brown's* 'reasonable possibility' standard and *Chapman's* 'reasonable doubt' test . . . are the same in substance and effect"]; see *Chapman v. California*, *supra*, 386 U.S. 18, 23-24 [federal constitutional error does not require reversal where the error is harmless beyond a reasonable doubt, and, there is "little, if any, difference between our statement . . . about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."]) By parity of reason, in no way did the misconduct rise to the level of a due process violation in that the prosecutor's challenged questions rendered appellant's penalty trial fundamentally unfair.

First, as we established, many of the prosecutor's questions upon which appellant focuses yielded no answer. No harm no foul. Second, on those occasions that a witness gave an answer foreclosed by the trial court's earlier victim impact ruling, the court struck the answer on defense request and

ordered the jury to disregard it. (See e.g., 16 RT 3475, 3487.) Appellant claims that the Sandberg "torture" reference was particularly prejudicial, and that the jury would not have disregarded it. He further argues that the jury would have inferred that Sandberg "could only have had this information regarding the mode of death because it was told to him by someone who knew. The jurors may well have inferred that the police and prosecutor knew that this was what happened and that the whole truth had been kept from them by a legal technicality." (II AOB 388.) Not so. It is presumed that the jury followed the instructions and admonitions given it. (*People v. Jones* (1997) 15 Cal.4th 119, 168; *People v. Wash*, *supra*, 6 Cal.4th 215, 263.)

Third, there is no merit to appellant's contention that the prosecutor placed the defense "in the position of constantly interrupting the already sympathetic and vulnerable family members of the victim. This made the defense, and the defendant, appear callous and cruel and without remorse for the victim." (II AOB 386.) Indeed, the argument insults jurors, who understand they have a solemn and serious decision to make and who appreciate that counsel have a serious job to perform. Jurors know that they have to decide the case based on the facts and law only. The notion that a jury's verdict will reflect a desire to penalize a party's counsel for interposing objections is far-fetched in the extreme.

Finally, as noted earlier, the prosecution presented a powerful case in aggravation, particularly the circumstances of the crime, and including the victim impact evidence. The aggravating factors clearly outweighed the defense case in mitigation. There exists no reasonable possibility the jury would have reached a different penalty verdict had it not heard that Olsson had been in the service, that Sandberg thought his daughter had been tortured, that Walters slept with a hatchet under her bed, and that Dietrich thought often of the terror her sister must have gone through as she was murdered.

Appellant's penalty trial was not fundamentally unfair.

XVI.

THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT IN PENALTY PHASE OPENING STATEMENT OR SUMMATION; MANY OF APPELLANT'S CONTRARY CLAIMS ARE FORFEITED

Appellant alleges that penalty-phase prosecutorial misconduct pervaded not only the presentation of evidence, but the prosecutor's opening statement and opening and rebuttal summations. (II AOB 391-427.) Appellant asserts that the misconduct violated state law (including state constitutional law), as well as his rights to due process, to confront the witnesses against him, to a fair trial, to fundamental fairness and to a reliable penalty phase determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. (II AOB 391, 427-429.) Appellant contends that the misconduct compels reversal of the death judgment, whether viewed singly or cumulatively. (II AOB 427-429.)

The People disagree. Many of appellant's allegations of misconduct are forfeited, without merit, or both. And no conduct by the prosecutor prejudiced appellant under state law or rose to the level of a prejudicial federal constitutional violation.

To briefly reiterate the governing law, a prosecutor's conduct violates the Constitution only when it is "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; citations and internal quotation marks omitted.) Conduct that does not rise to the level of a constitutional violation will constitute prosecutorial misconduct under state law only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820; citations and internal quotation marks omitted.)

A. The Prosecutor Did Not Commit Prejudicial Misconduct During Penalty Phase Opening Statement And Two Of Appellant's Allegations Are Waived

"The purpose of the opening statement is to inform the jury of the evidence the prosecution intends to present, and the manner in which the evidence and reasonable inferences relate to the prosecution's theory of the case." (*People v. Millwee* (1998) 18 Cal.4th 96, 136.) Appellant contends that on multiple occasions the prosecutor overstepped that line. (II AOB 393-395.)

(1) A few moments into his opening statement the prosecutor stated, "And what brings us here today is for you to decide whether this man should die for what he did to Shirley Olsson or spend the rest of his life in prison." (16 RT 3409.) Appellant calls this statement an attempt to mislead the jury. (II AOB 393.) "Their task at the penalty phase is not to simply determine whether the penalty is suited to the charged offense, but also to make an individualized assessment of the defendant." (II AOB 393.)

But nothing the prosecutor said reasonably suggested that "individual assessment" was not subsumed by the broader inquiry into determining appropriate punishment. The prosecutor simply put into colloquial terms what everyone knows to be true and what the prosecutor was able to eventually tell the jury in summation without objection ("that's what you're here to decide, what this punishment should be for what he has done" (17 RT 3635; see also 17 RT 3641)). The prosecutor did not "mislead" anyone. In any event, the subclaim is forfeited. Appellant made no "attempt to mislead" objection below or request an admonition. (*People v. Frye*, *supra*, 18 Cal.4th 894, 969-970.) He objected on the grounds that the prosecutor was not referencing any evidence. (16 RT 3409.) Again, on appeal appellants may not change the theory behind their trial objections. (*People v. Thomas*, *supra*, 2 Cal.4th 489, 519-520.)

(2) After appellant made the aforementioned "no reference to the

evidence" objection the trial court told the prosecutor to "proceed in fashion of opening statement" (16 RT 3409), and the prosecutor continued as follows:

> As I was saying, we're there, now in this phase, and as the court had instructed you when we were selecting you, in this phase you will hear evidence to make that determination as what the penalty should be: Death, in the gas chamber, or now by legal [*sic*] injection, at the first of the year, or life without possibility of parole.

(16 RT 3409.)

Appellant calls this an attempt to bring an "irrelevant matter" (method of execution) before the jury, and thus misconduct. (II AOB 394.) Because he made no such objection below, the subclaim is forfeited. (*People v. Frye*, *supra*, 18 Cal.4th at pp. 969-970.) The claim is also meritless. The jurors would have understood that the prosecutor was not putting a method-of-execution issue before them, but was again, in plain terms, reminding them that they were ultimately going to have to try to determine the appropriate punishment for appellant—death or LWOP.

(3) The prosecutor's four-page opening statement ended this way:

> My phase of this penalty trial will be very brief, and it will probably be completed by noon today, because part of the aggravating factors you have heard in three weeks of testimony that started a month ago, because part of the aggravating factors are the circumstances surrounding the commission of his crimes. All of those circumstances, the nature of those crimes, the fact that he broke into the home of Sandy Olsson, got control of her with the use of—
>
> [Defense Counsel]: Your Honor, I renew my objection. That's not evidence being adduced at this penalty phase.
>
> THE COURT: At this point I will sustain on those grounds. Proceed.
>
> [THE PROSECUTOR]: All right. But I just don't want you to forget that all that evidence is a part of the aggravating evidence, and don't be fooled by the fact that the evidence that I will produce will just consume itself today, because the heart --
>
> [Defense Counsel]: Your Honor, I object again. He still hasn't gotten to the evidence he will introduce.

THE COURT: Let's proceed now with what you expect to show in this phase.

THE PROSECUTOR: So based upon the evidence that has already been produced in three weeks of testimony, what will be taking up the rest of today will be another additional factor of the circumstances of the crime, a factor that was not relevant to be produced during the guilt phase but is very relevant in your evaluation of the nature of his crimes, and that includes the impact of the brutal murder of Sandy Olsson on her family. And you will hear them testify. You will hear them testify about how they heard, the impact it had upon them, and the fact they are now different people today. Because that is part of the whole picture of the crimes of the defendant, with the extinguishment of the life of Sandy Olsson, it did not stop the pain and the suffering of her family.

Then you will hear evidence from the defense talking about mitigating evidence, or as each of you were told during the jury selection phase—

[Defense Counsel]: I am going to object again. Mr. [Prosecutor], if he could be confined to the description of the evidence he will present in this case, and let us worry about our case, please.

THE COURT: Let's proceed with an opening statement, Mr. [Prosecutor].

THE PROSECUTOR: Sure. When all is said and done, the evidence in aggravation will substantially outweigh the evidence in mitigation, and the only just verdict to render in this case is death.

(16 RT 3410-3411.)

Notwithstanding the technical propriety of the prosecutor's phraseology, he in no manner committed any act that rose to the level of a federal constitutional violation by infecting the trial with such unfairness as to make the death judgment a denial of due process (*People v. Gionis*, *supra*, 9 Cal.4th at p. 1214), nor did his opening statement reflect the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Espinoza*, *supra*, 3 Cal.4th at p. 820). Nor was there any prospect of prejudice. The jury already knew of the guilt phase circumstances of the crime, and the prosecutor was ultimately able to argue them in summation.

Indeed appellant wholly fails to show any prejudice. His claim that the prosecutor successfully "challenged the integrity of the defense" by referencing guilt phase circumstances of the crime in penalty phase opening statement (II AOB 395) simply makes no sense. The jury ultimately knew that it had to decide the case based on the evidence and the law as given to it by the court, and, because the court repeatedly so told it, also knew the statements of counsel were not evidence. (17 RT 3660, 3662-3663, 3708, 3713, 3716; 18 RT 3722-3723, 3727, 3731, 3803, 3806, 3810, 3812-3813, 3823-3824, 3868.) Any prosecutorial missteps during opening statement were harmless under any standard of harmless-error review.

B. The Prosecutor Did Not Prejudicially Argue Facts Not In Evidence So As To Inflame The Jury Or Engage In Speculation About The Crime During Penalty Phase Summation; Two Of Appellant's Seven Allegations Are Otherwise Forfeited

Appellant claims that during the prosecutor's penalty phase opening summation he repeatedly argued facts not in evidence, and used "speculation to arouse fear and emotion in the jury." (II AOB 396, 405-406.) By the end of the prosecutor's argument, appellant continues, the circumstances of the crime as the prosecutor had described them "bore no resemblance to the evidence upon which the guilt phase verdicts had been based, the penalty phase evidence, or the facts as described to the jury during voir dire." (II AOB 396, 405-406.) Appellant calls the misconduct both a state-law and federal constitutional violation. (II AOB 412.)

The People view the record differently.

(1) At one point in his opening summation at the penalty phase the prosecutor commented on the murder weapon, as follows:

> But, you know, a knife is an interesting weapon, aside from being very personal. You can do things with a knife that you couldn't do if you had a baseball bat or even a gun. You can threaten that you're

going to hit him or you're going to shoot him.

> But with a knife, you point. You can run it down the side of a face. You can play with buttons with a knife. You can put the knife in places that are terribly intimidating and threatening—

(17 RT 3707-3708.)

At that moment appellant objected, on both "federal and state grounds," that there existed no evidence to support the prosecutor's argument. (17 RT 3707-3708, 3718.) The trial court did not rule on the objection, but instead simply reiterated for the jury "that the statement is argument, the statements of the attorneys are not evidence in this case." (17 RT 3708.) The prosecutor then stated, "With a knife you can indicate you can do more than simply kill. You can maim. You can disfigure." (17 RT 3708.)

A prosecutor commits misconduct when he or she argues facts not in evidence. (*People v. Benson*, *supra*, 52 Cal.3d 754, 794-795.) In this Court appellant renews his argument that the prosecutor committed this type of misconduct with the above-quoted references to the knife. (II AOB 396-397, 406-407.) Appellant is wrong. Prosecutors not only have a wide-ranging right to discuss the case in closing argument, fully stating their views as to what the evidence shows and what conclusions are proper (*People v. Thomas*, *supra*, 2 Cal.4th at p. 526), but they may make reference to matters of common knowledge (*People v. Wharton* (1991) 53 Cal.3d 522, 567-568). It is a matter of common knowledge that a perpetrator can potentially use a knife to threaten or to run down the side of a face, and can play with buttons with it or place it in an intimidating place. Here the prosecutor did not argue that appellant used the knife in these ways, but was making the point that because a knife can be used in that manner—that it has that potential—appellant's resort to it became all the more intimidating. And appellant's claim that the evidence doesn't support the prosecutor's statement that appellant used the knife to maim and disfigure Olsson (II AOB 397, 407) is unfathomable. She

suffered 28 stab wounds all over her body. Appellant used a "considerable amount of force" to plunge the knife two inches deep into Olsson's left orbital ridge. (13 RT 2658, 2663-2664.) He used the amount of force necessary to stab through a three- to four-inch raw steak when he inflicted the seven stab wounds to Olsson's neck and left shoulder. (13 RT 2658-2659, 2669-2670.)

(2) Later in his opening penalty phase summation, the prosecutor argued that the facts showed that appellant had premeditated his crimes; relatedly, the prosecutor argued that appellant had told Olsson he was only going to rape her, and not kill her, and that this

> was cruel. It was vicious. It was cruel in that he dangled it out in front of her, that all he wanted to do is rape her. That's all he wanted. You know, "You just take your clothes off, take your clothes off, do what I tell you and you won't get hurt." You know, do you think—
>
> [Defense Counsel]: Your Honor, I'm going to object. Counsel is again calling to speculation. There's no evidence of this in the record and I'm going to object again on both federal and state grounds. I ask for an admonition to the jury.
>
> THE COURT: The jury has been previously advised, first of all, that, as you know now, statements of attorneys are not evidence in this case and, also, you are not to speculate about things that were not presented in evidence.
>
> All right. Let's go forward.
>
> [THE PROSECUTOR]: Look at the evidence. Look at the evidence. Do you think this woman would have layed [*sic*] quietly on her bed and let him rape her without putting up a fight if she thought he was going to kill her? Do you think she would do that? Do you think she would have tolerated that?
>
> She was 5'6", weighed about 155 pounds. She could have fought. She would have fought but she submitted, because he dangled out the knife in front of her. I mean, surely if she thought that he raped her and he was going to kill her, she would have started fighting, would have started struggling. You would have seen that bedroom—something in that bedroom would have been knocked over. The reading lamp, the little knickknacks, little glasses that had coke in it or ice, whatever it might be. Don't you think she would have fought

if you thought that he was going to kill you? Do you think she would have let him defy her body if it wasn't going to do her any good? Do you think he could have violated her body without a fight if he didn't hold up that element of hope that all I want to do is rape you. Come on. Who's kidding who? It is cruel. It is a hoax because he held out the carrot to her that he wasn't going to hurt her.

[Defense Counsel]: Same objection.

THE COURT: Let's move into another area, Mr. [Prosecutor].

(17 RT 3713-3714.)

Appellant contends the prosecutor's argument amounted to "impermissible speculation." (II AOB 397-398, 407.) We disagree, as the prosecutor's comments were based on a reasonable view of the evidence and inferences reasonably drawn therefrom. Indeed, the evidence showed a lack of disturbance in the bedroom, a circumstance that suggests the encounter between appellant and the victim was not initially violent, and only escalated later. As the prosecutor reasonably asked, "Do you think this woman would have layed [*sic*] quietly and let him rape her without putting up a fight if she thought he was going to kill her?" (17 RT 3713.) No misconduct occurred.

(3) The prosecutor did not complete his opening penalty phase summation before adjournment on the evening of September 14, 1992. (17 RT 3720.) Before he resumed his summation on the morning of September 15, the court told the jury, "I wish to remind you again that nothing the attorneys say in argument is evidence in this case. If anything said by an attorney at any point in their argument conflicts with the evidence or with the law, you are to rely on the evidence presented in the trial, and the law as stated by the court." (18 RT 3722-3723.)

Shortly after the prosecutor resumed, he told the jury that the aggravating nature of the circumstances of appellant's crimes against Olsson increased "his guilt and the enormity and the injurious effects." (18 RT 3725.) He also argued:

> As I said, there's more than just that. You can't forget Sandy. You can't forget Sandy Olsson. You just can't. That's what this is all about, at this phase, you can't forget her. You know, you have to imagine the terror and the pain and the horror and the fear and the anguish and the revulsion, all those emotions she went through; you have to do that. You have to. That's what you've got to do here, the manner in which she died and what was going through her head during the time she was forced to be with this thing.

(18 RT 3725-3726.)

Appellant assigns misconduct to the above remarks of the prosecutor, calling them an another attempt "to inflame the jury with improper argument." Because appellant made no such objection below, however, this contention is forfeited. (*People v. Montiel*, *supra*, 5 Cal.4th 877, 914-915.) And no misconduct occurred. That Olsson must have gone through "horror and revulsion" and the like was not speculation but a reasonable inference from the evidence of the manner in which he assaulted and killed her—a death that may not have occurred until up to an hour after infliction of the knife wounds and strangulation. (13 RT 2674-2677, 2680.) As the prosecutor had already reasonably argued to the jury, its consideration of what Olsson must have gone through physically and emotionally as appellant sexually assaulted her and then killed her "were circumstances of this crime and it is part of the aggravation of this crime." (17 RT 3632.)

(4) Later in argument (18 RT 3725-3726) the prosecutor stated:

> You know, I really grapple with words to call him, because you hate to call him a man. In the generic sense, that's what he is, but we'd like to think of mankind having decent values and decent things about them, and he doesn't have them. There is nothing there that reflects manliness. So then you say maybe he is an animal. Well, you know, folks, as horrid as it is, to call him an animal is an insult to the animal kingdom, because animals, in the animal world, don't do the things that he did. They don't. They don't treat their own the way he treated Sandy Olsson. Only we, mankind, are capable of those types of things. I mean the animal world kills, they kill, they kill—see, to eat.

(18 RT 3726.)

At this point appellant objected on the ground the prosecutor had again attempted to "inflame the passions of the jury." (18 RT 3726.) The trial court directed the prosecutor to move to another area. (18 RT 3726.) Appellant continues with his assignment of misconduct. (II AOB 401, 409-410 & fn. 99.)

No misconduct occurred, just as it did not occur in guilt phase summation when the prosecutor used similar epithets. In *People v. Hawkins* (1995) 10 Cal.4th 920, 961, this Court held that the use of opprobrious epithets by a prosecutor during summation is not necessarily misconduct. There, the prosecutor's labeling of the defendant as a "coiled snake" and "rabid dog" did not amount to misconduct. In *People v. Thomas*, *supra*, 2 Cal.4th at page 537, the prosecutor used part of his summation to call the defendant such things as a "perverted murderous cancer" and "walking depraved cancer." This Court rejected the defendant's argument that the prosecutor committed misconduct, finding that in light of the egregious nature of the defendant's crimes, the prosecutor's epithets fell within the wide range of permissible prosecutorial comment.

That is this case.

(5) The prosecutor next argued:

> The manner in which she died and what was going through her head, you have a duty, a duty to mentally visualize what he put her through. You have a duty to vicariously feel what was going on in those minutes that she was forced to be with him. You have to do that. You have to do that in order to do justice in this case. You absolutely have to.
>
> And what was—you have to fully appreciate what she suffered physically, emotionally, and psychologically at his hands, because these, too, are the facts and circumstances that go to increasing the guilt and the enormity of what he did and the injuries that he inflicted. It is part and parcel of the crime.

(18 RT 3726-3727.)

Appellant objected to this argument on the ground the prosecutor was "asking the jury to speculate on something there has been no evidence on, and I ask for an admonition to the jury to preclude this call for speculation." (18 RT 3727.) The parties then had a bench conference wherein they discussed the limits on argument that asked the jurors to place themselves in the shoes of the victim. (18 RT 3758.)

The prosecutor's argument in this regard was not misconduct. Appellant is wrong. (II AOB 401-402.) This Court has repeatedly held "that it is proper at the penalty phase for a prosecutor to invite the jurors to put themselves in the place of the victims and imagine their suffering." (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1212, and cases there cited.)

(6) At another point in his opening penalty phase summation the prosecutor argued:

> Given the evidence here and the logical inferences that can be drawn, that's what you've got to do. And you've got to walk in her shoes and place yourselves there, the pain, what she felt.
>
> You know, it's one thing to kill somebody, but from the evidence here, he played with her. He played with her. She submitted to a sexual assault, didn't knock anything over in that bedroom, and he took her by surprise. And we know the stab wounds to the front of the body occurred first. When I say "the front of the body," talking about 1, 2, 3, 4 and 5. 1, 2, 3, 4. 1, 2, 3, and 4 and 5. Which of these occurred first? We don't know. *But we know that she didn't have a chance after he raped her, before she can raise an arm to try and block, he stabs her in the chest, the side of the head, in the throat, whatever it was. He played with her.*

(18 RT 3731-3732; emphasis added.)

Appellant calls the above-emphasized remarks of the prosecutor yet another example of the prosecutor's misconduct in "speculating" so as to "inflame the jury." (II AOB 403-404.) This subclaim is not cognizable on appeal however, because at trial appellant made no objection to the remarks at issue and requested no admonition. (*People v. Frye*, *supra*, 18 Cal.4th at

pp. 969-970; *People v. Montiel, supra*, 5 Cal.4th at pp. 914-915.) Moreover the argument presented a reasonable view of the evidence and reasonable inferences therefrom.

(7) Appellant alleges that the prosecutor's final act of misconduct in arguing "speculation" about "the crime" so as to "inflame the jury" occurred during the prosecutor's rebuttal penalty phase summation. (II AOB 403-405, 408-409.)

> Sandy Olsson had hope. She had hoped that her son, Trip, would get his act together. She had hoped that three more years, she would be able to retire. She had hoped that in two days she would join her father to celebrate his 85th birthday. She had hoped that her children would meet nice people and marry. She had lots of hopes. She had hoped that when he held the knife on her that all he wanted was perhaps money or something.
>
> When he told her to take her clothes off, she knew what was coming—
>
> [Defense Counsel]: Objection. Here we are again, speculation, I object.
>
> THE COURT: All right. The jury is reminded that you are not to speculate about matters that are not in evidence. Please remember my previous admonition.
>
> [THE PROSECUTOR]: What you know about Sandy Olsson, did she sleep in the nude? You look at those items, those pajamas. They're not torn. They're worn in a couple of places, but her clothing wasn't torn off of her. She took it off. Logical inference is—logical inference is he told her to take it off. He ordered her to.
>
> And when that situation arose, she still had hope.
>
> She had hope that all he wanted to do was rape her. What a perversion of hope. Imagine that. To be in a situation to hope that all somebody wants to do is rape you. To violate your body. That you still have hope—
>
> [Defense Counsel]: Your Honor, I'm going to object again. I objected and the court admonished and he's right in the same vein. He's asking them to speculate what her state of mind was. It's improper.

THE COURT: All right. Your objection in that regard is noted. Proceed.

[THE PROSECUTOR]: Thank you. Life is precious. Life is precious. You're ordered onto the bed. You get on the bed. And you still cling to the hope of life. You still cling to it, until he crushes that hope with that knife. She hoped for life. She did everything she could to continue that life. She didn't resist. She did what she was told to do.

And when you get into a situation like that, none of us want to believe things are going to get so bad that the ultimate thing is going to happen because that's what hope is all about. And he crushed that hope.

(18 RT 3812-3814.)

The prosecutor committed no misconduct here. Appellant is wrong. (II AOB 408-409.) Everything the prosecutor urged was either in evidence, or based on a reasonable inference from the evidence. We know that Olsson was looking forward to visiting her father, retiring, and seeing her children marry and have children. (16 RT 3426, 3459, 3468, 3486.) We also know that the prosecutor could legitimately argue common experience (*People v. Wharton*, *supra*, 53 Cal.3d at pp. 567-568), and invite the jurors to put themselves in the place of the victim and imagine her suffering (*People v. Slaughter*, *supra*, 27 Cal.4th at p. 1212). Common sense tells us that Olsson would have hoped appellant only wanted money after he broke into her house and pulled a knife on her, and common sense teaches she would have known a sexual attack was coming when he told her to take her clothes off. We know he told her take her clothes off because she didn't sleep in the nude. (14 RT 2797-2798.) Of course she would have been hoping to live. That's not "speculation."

C. The Prosecutor Did Not Prejudicially Argue Facts Not In Evidence So As To Inflame The Jury Or Engage In Speculation About Irrelevant Matters During Penalty Phase Summation

Appellant claims that during the prosecutor's penalty phase summations he prejudicially argued facts not in evidence and used "speculation to arouse fear and emotion in the jury" regarding the circumstances of the crime. (II AOB 396, 405-406.) He also argues that the prosecutor did the same thing with respect to other, "irrelevant matters." (II AOB 414-420.)

No prejudicial misconduct occurred.

(1) At one point in his opening guilt phase summation the prosecutor quoted portions of his cross-examination of appellant's brother Roger:

> "QUESTION: [] Now, what's your feeling about—what's your feeling about your brother's responsibility for his actions?
>
> "ANSWER: The only thing between me being up here and him being down there, was the fact that I had a religious conversion when I was 18. I knew what road I was going down. I knew what it was going to lead to, and I was able to get out of it. But I was 18 and he was 12 when I left. It's his responsibility. He's got to take responsibility for his reactions."
>
> *It's his responsibility. What is it that was ticking in Roger that he sees in that defendant, that he doesn't say, "spare my brother?"*
>
> [Defense Counsel]: Object to that; it's asking the jury to speculate, your Honor.
>
> THE COURT: I will remind the jury that the statements of counsel are not evidence, and that you are not to speculate about evidence that was not presented to you.

(17 RT 3694-3695; emphasis added.)

To the extent appellant is correct that the prosecutor committed "speculation" misconduct with the above-emphasized remarks (II AOB 414-415) appellant was not prejudiced. The remark was fleeting and not easily understandable and the jury knew from the court's admonition that it could not engage in speculation.

(2) The prosecutor concluded his rebuttal penalty phase summation thusly:

Now, he can continue writing and have phone calls and continue in that type of situation on the main line of, you know, you can have a televison, *get a VCR*, use one of those libraries, those prison libraries where you can read whatever is in the library there. You can derive joy from that. Stereo, radio, listen to music. Music. That's soothing, that's enjoyable. Television is entertaining, movies, whatever. *You get conjugal visits*. You can fall in love. Now, it's restricted.

That was a type of life, apparently, he had before. It's somewhat restricted, but nowhere near, obviously, I'm not minimizing it in that sense, but you see the thing of it all is that when you're talking about what he's done in the aggravating circumstances in this case, that's too good for him. That is too good for him.

We have a situation where we have homeless people who live in condemned buildings, in cardboard boxes. He's going to have shelter. *We have people who work here in California who struggle, who don't have medical insurance. He'll have medical insurance.*

Now, while more Californians are becoming unemployed, he's always going to have a house, a roof over his head, food on the table and medical care and he'll be able to do these things. He'll still have the choice of life. They're limited, but you have hope. Where there's life, there's hope.

And you can hope about many, many, many things. I mean you can derive pleasure out of many, many, many things.

As, you know, with hope, *you might hit the big lottery or there might be an earthquake and the jail falls apart and the prison falls apart. It's not likely to happen, but it's a hope—*

[Defense Counsel]: I object that's improper argument. That's suggesting that—I ask for an admonition.

THE COURT: The jury is advised to disregard that last comment. Proceed.

THE PROSECUTOR: He doesn't deserve hope. He does not deserve simple pleasures of life. The only thing he deserves is your verdict of death and that's what justice demands.

(18 RT 3814-3816; emphasis added.)

Appellant assigns "facts not in evidence" and "speculation" misconduct

to all of the above-emphasized remarks of the prosecutor. To the extent appellant is challenging remarks he did not object to below, the misconduct allegations are waived. (*People v. Frye*, *supra*, 18 Cal.4th at pp. 969-970; *People v. Montiel*, *supra*, 5 Cal.4th at pp. 914-915.)

The record reflects that appellant could not have been prejudiced by the one remark he did object to because the court instructed the jury to disregard it. Jurors follow the instructions given them. (*People v. Wash*, *supra*, 6 Cal.4th 215, 263.)

As for the challenged comments appellant did not object to below, they do not amount to misconduct. The jury undoubtedly knew as matters of common knowledge that at least some prisoners can watch TV, perhaps have conjugal visits, and receive medical treatment. The prosecutor did not have to present evidence to support those assertions. The gist of the prosecutor's argument was that appellant did not deserve prison life—that he deserved death. No misconduct there.

D. The Prosecutor Did Not Prejudicially Misstate The Law

A prosecutor commits misconduct when he misstates the law. (*People v. Bell* (1989) 49 Cal.3d 502, 538.) Appellant contends that the prosecutor did this "again and again" in his penalty summations, particularly regarding sympathy and the law dealing with mitigation and aggravation, thereby "lightening" the government's "penalty phase burden." (II AOB 420-424.) Appellant calls the misconduct both prejudicially "reprehensible" under state law, and a federal constitutional violation. (II AOB 424.) Appellant's subclaims are without merit

(1) At one point in his opening penalty phase summation, immediately after arguing that "this lingering doubt stuff doesn't apply," the prosecutor urged:

What it really comes down to is this issue of sympathy, the sympathy issue. Sympathetic or any aspect of his character or record. And it's not sympathy for his sister. It's not sympathy for his brother. It is not sympathy for his children. It is sympathy to him—

[Defense Counsel]: I'll object. That is mitigating circumstances, he knows it.

[Defense Counsel]: I don't believe that's a fair statement.

THE COURT: Again, I remind the jury that the statements of attorneys at this point are not evidence and the court will be instructing you on the applicable law at the conclusion of the arguments.

THE PROSECUTOR: Any sympathetic or other aspect of the defendant's character or record.

(17 RT 3659.)

Contrary to appellant's contention (II AOB 420-422), the prosecutor did not commit misconduct here, and two prior decisions of this Court makes this clear:

> We recently held that "sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation, but that family members may offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character." (*People v. Ochoa*[,] [*supra*,] 19 Cal.4th 353, 456 [].) We explained in *Ochoa* that when considering mitigating evidence in determining the penalty, the relevant factor "is a defendant's background and character—not the distress of his or her family. A defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. But this evidence is relevant because it constitutes indirect evidence of the defendant's character. (*Ibid.*) Thus, we determined that the trial court did not err in refusing the defendant's requested instruction that would have invited the jury to consider in mitigation sympathy for the defendant's family. Such an instruction impermissibly would have allowed the jurors to return a verdict of life imprisonment without the possibility of parole solely because they wished to spare the defendant's family the emotional distress of an execution.
>
> Therefore, the prosecutor's argument in the present case properly directed the jury not to consider sympathy for the defendant's family

as mitigating evidence. His comments did not preclude the jury from considering the testimony of defendant's family to the extent it might have been relevant to sympathy for defendant. Indeed, the prosecutor expressly told the jurors that the law required them to weigh sympathy for defendant in making their penalty determination. Contrary to defendant's assertion, the prosecutor's argument did not have the effect of inviting the jury to disregard all the testimony of defendant's family that was related to mitigating evidence of defendant's background. We find no prosecutorial misconduct and no constitutional violation.

(*People v. Smithey*, *supra*, 20 Cal.4th 936, 1000-1001.)

(2) During his rebuttal penalty phase summation, the prosecutor tried to make the point that appellant did not have to have prior convictions in order for death to be the appropriate penalty:

You know, we didn't say that in order for you to impose the death penalty, that he not only has to break into the home of a woman, sexually assault her, and intentionally kill her, and also in addition to that, a horrendous criminal history in the sense of prior felony convictions. Huh-uh.

That certainly tells us an awful lot about someone's background, but we're talking about this kind of case. You know, is this the pristine case, or is this a case that is horrendous in the crime itself, and given his background, that there is no justice—

[Defense Counsel]: I'm going to object. He's asking this jury to disregard mitigating evidence.

[THE PROSECUTOR]: I'm not doing that at all.

THE COURT: Just a moment. Let me remind the jury, as I have previously, again, his arguments are not evidence. You're going to be instructed as to the law by me. If there's anything said that's contrary to my instructions, you follow my instructions. Go ahead.

[THE PROSECUTOR]: Thank you. If the mitigating evidence is there, and is it there, that it so offsets what we've got in aggravation and what we've got in aggravation standing all by itself, not anything more, is the crime. Is there anything about his character and background that offsets the crime?

(17 RT 3802-3803.)

Misconduct occurred if there is a reasonable likelihood the jury would

have understood the prosecutor to be arguing here that the jury should disregard the mitigating evidence. (*People v. Clair*, *supra*, 2 Cal.4th 629, 662-663.) Contrary to appellant's contention (II AOB 421), that is not what occurred here. A reasonable juror would not have understood the argument as one urging him or her to disregard the mitigating evidence. The prosecutor's words ("is this the pristine case, or is this a case that is horrendous in the crime itself, and given his background, that there is no justice") were so fleeting and confusing that one cannot be exactly sure what he meant, but those remarks do not remotely carry the import appellant wants to ascribe to them.

As for the prosecutor's use of the word "offset," appellant claims the jurors would have understood the prosecutor to be arguing that there exists a presumption that death is the appropriate penalty, and a death verdict is in order unless the mitigating evidence "offset" the presumption. (II AOB 422.)

This subclaim is forfeited because appellant did not make such an objection below nor request an admonition. (*People v. Frye*, *supra*, 18 Cal.4th at pp. 969-970; *People v. Montiel*, *supra*, 5 Cal.4th at pp. 914-915.) Appellant also forgets this: "Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion and not of evidence, . . . like all closing arguments of counsel, are seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear." (*Donnelly v. DeChristoforo, supra,* 416 U.S. 621, 646-647.) Here, the trial court fully and correctly instructed the jurors on the law, including that they had to weigh the aggravating and mitigating circumstances, and could return a death verdict only if each juror was "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (18 RT 3880.) The jury did not believe that it could

not return a life sentence unless it found the mitigating evidence "offset" the aggravating evidence. (II AOB 422.)

(3) As the trial court instructed the jury, it had "to take into account and be guided by" the section 190.3 factors, including factor (b), "The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (18 RT 3873.)

Appellant contends that on three occasions during the prosecutor's summation he, over objection, attempted to mislead the jury into believing that it could consider appellant's force and violence against victim Olsson as factor (b) aggravation. (II AOB 422-423; citing 17 RT 3644, 3645, 3662.) No misconduct occurred. The jury would have understood the prosecutor as arguing that appellant's acts of violence against Olsson came under factor (a), not factor (b). In fact, in one remark appellant calls misconduct, the prosecutor expressly told the jury that under factor (b), "We don't double dip. We're talking about something else, other acts beyond what we've got here, what he did to Sandy Olsson, other acts of violence, and then whether or not he had any felony convictions." (17 RT 3645.)

Appellant also seems to claim, without citation to the record, that the prosecutor committed misconduct by arguing that appellant's rape of Olsson fell under factor (b), rather than factor (a). (II AOB 424-425.) The prosecutor make no such argument. Nor, of course, did appellant interpose any objection on this ground. Hence, the claim is forfeited. (*People v. Frye*, supra, 18 Cal.4th at pp. 969-970; *People v. Montiel*, *supra*, 5 Cal.4th at pp. 914-915.)

In conclusion, appellant is not entitled to relief on any of his allegations of penalty phase opening statement and summation prosecutorial misconduct. Several of the subclaims are not cognizable on appeal because appellant did

not object to the alleged acts of misconduct at the time and request an admonition. (*People v. Frye*, *supra*, 18 Cal.4th at pp. 969-970; *People v. Montiel*, *supra*, 5 Cal.4th at pp. 914-915.) All of the allegations of prejudicial misconduct are without merit. At no point did the prosecutor engage in deceptive or reprehensible methods of persuading the court or jury. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.) Nor did the prosecutor ever commit an act so egregious that it infected the trial with such unfairness as to render appellant's death judgment unconstitutional. (*Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 643; *People v. Padilla*, *supra*, 11 Cal.4th 891, 939.) As for those occasions that the prosecutor arguably misstepped, any error was, as demonstrated, harmless.

XVII.

THE RELIGIOUS REFERENCES BY THE PROSECUTOR AND DEFENSE COUNSEL DID NOT PREJUDICE APPELLANT; APPELLANT'S CONTRARY CLAIMS ARE FORFEITED

Appellant continues down the prosecutorial misconduct path by contending that the prosecutor, in his two penalty phase closing arguments, improperly relied with "zeal" on the Bible, religious law, and biblical authority. (II AOB 430-459.) According to appellant, the prosecutor "told the jury the Bible required [appellant's] execution. He asked the jury to consider God's will. Worse yet, he based his argument on his own interpretation of the 'true' meaning of scriptural passages." (II AOB 432.)

Appellant also concomitantly asserts that the prosecutor's misconduct forced defense counsel to address the religion question in their own summations, and that defense counsel's responses added to the prejudicial effect from the prosecutor's misconduct. Appellant asserts that as a result of religion "permeating the penalty phase," the decision between life and death for him amounted to, in essence, the jury believing that the prosecution won the battle in the "ecclesiastical Court." (II AOB 431, citing *People v. Wash*, *supra*, 6 Cal.4th 215, 283 (conc. & dis. opn. of Kennard, J.).) Appellant asserts that the prosecutor's misconduct in this regard violated the First Amendment's Establishment Clause and the required separation of church and state, and that the prosecutor's religious arguments (as well as defense counsel's) amounted to a violation of appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to a fair trial, due process, and a fair and reliable penalty decision (and a violation of parallel provisions of the California Constitution). (II AOB 431, 450-454.) He demands reversal. (II AOB 433, 455-466.)

Both the prosecutor and defense counsel argued as though they were

> theological experts. Taken together, the arguments created "an intolerable risk that the jury . . . abandoned logic and reason," and instead condemned [appellant] to death "for reasons having no place in our judicial system."

(II AOB 432-433; quoting *People v. Roldan*, *supra*, 35 Cal.4th 646, 743.)

A careful review of the record shows that appellant overstates the problem. Appellant was not prejudiced by the religious references, and his assignments of prosecutorial misconduct to them are otherwise forfeited.

A. The Law Is Well Established

"It is well settled that biblical law has no proper role in the sentencing process. 'Penalty determinations are to be based on the evidence presented by the parties and the legal instructions given by the court. Reference by either party to religious doctrine, commandments or biblical passages tending to undermine that principle is improper.'" (*People v. Roybal* (1998) 19 Cal.4th 481, 520; quoting *People v. Sandoval* (1992) 4 Cal.4th 155, 194.)

This Court has therefore "condemned prosecutorial reliance on the Bible as support or approval of the death penalty," along with "prosecutorial invocation to a different or higher law than that found in the state Penal Code." (*People v. Ervin* (2000) 22 Cal.4th 48, 100.) Reference to religious authority in support of the death penalty is "patent misconduct" and improper because it tends to diminish the jury's personal sense of responsibility for the verdict. (*People v. Sandoval*, *supra*, 4 Cal.4th at pp. 191-194; *People v. Roldan*, *supra*, 35 Cal.4th at p. 743.) Prosecutorial invocation of religious authority is federal constitutional error. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1130.) Appellant's penalty phase trial took place in the fall of 1992, well before this Court handed down all of the decisions cited above.

B. Appellant Made Not A Single Objection To Any Of The Prosecutor's Religious References

Although in this Court appellant lodges many challenges to the religious references the prosecutor made in penalty phase summation (II AOB 430-436), the record reflects that at trial appellant made not a single "religious reference" objection or request for admonition to anything the prosecutor argued (17 RT 3630-3717; 18 RT 3723-3757, 3797-3816). Accordingly, appellant has failed to preserve the current claims of misconduct for review. (*People v. Wash*, *supra*, 6 Cal.4th at pp. 259-260; *People v. Bradford* (1997) 14 Cal.4th 1005, 1061; *People v. Ervin*, *supra*, 22 Cal.4th at p. 100; *People v. Roldan*, *supra*, 35 Cal.4th at p. 743.)

Defendants will be excused from the necessity of objecting to prosecutorial misconduct and requesting an admonition only when either would have proved futile. (*People v. Hill*, *supra*, 17 Cal.4th 800, 820.) This exception is not applicable here. None of the prosecutor's alleged religious reference transgressions involved misconduct so severe that an objection and curative admonition would not have cured the harm. Nor does this case resemble *Hill*, where the trial court failed to rein in the prosecutor's excesses when the defense did object, and where the court made comments before the jury suggesting defense counsel was an obstructionist, and delaying the trial with "meritless" objections. (17 Cal.4th at p. 821.)

C. The Prosecutor's Religious References In Opening Penalty Phase Summation Did Not Prejudice Appellant

Well into the prosecutor's opening penalty phase summation, while discussing the testimony of appellant's brother, Roger, concerning Roger' s religious conversion, the prosecutor contrasted that conversion with the absence of any similar evidence about appellant, and then argued:

You heard Roger tell us about what a difference in his life his religious conversion had. Have you heard anything like that about the defendant? Roger said he's different now, there's been this intervention. You know, Roger puts it in terms of, but for this woman, I wouldn't have been converted to God, but the reality is, it takes two to tango.

Now, you can hit somebody over the head all day long, but if they're not willing, if they're not receptive, it's not going to happen, and there had to have been something going on in Roger's life, rather than this idea I was just uncontrollable, I was going to keep on going here but somebody reached out and grabbed me.

Well, Roger paid attention. He didn't have to, but he chose to. And when we start to talk about religion, it has to be discussed in this type of setting, because remember what I told you about my concern of having fortitude? Because this is tough. And when we talk about religion, it is not something that is to be used in aggravation at all, what the Bible or Koran or anything has to say, but the one thing that is universal is this idea that murderers are to be punished, and that the death penalty is sanctioned and that it is appropriate. And just so there isn't anybody who lies awake at night saying, gee, as a good, what I am, is it permissible under my religion to do this sort of thing? I mean, obviously, that was something that we hoped you thought of beforehand. And there is a question to that effect in various forms that asks you about your religious beliefs: Is that going to stand in the way?

Well, many times people get to this point, and then they start thinking about that. When we start talking about religion, I use the Bible more out of convenience but the same concepts are found in the Koran and other religious writings, to the effect that the Bible does, in fact, sanction capital punishment. There is one that is just so right on point:

"He who strikes him with an instrument of iron so that he die, he is a murderer, the murderer will surely be put to death. And you shall take no reparations for the soul of a murderer who deserves to die, but he shall be put to death.

"He who shed the blood of man by man shall his blood shed. For in his image did God make man. His blood or his life will be shed by man."

Now, as I said, religion is not supposed to be the guiding factor in

finding aggravation, but I just want to clear the air there that religion does not stand in the way, and that's not supposed to enter into your evaluation.

(RT 17 3691-3693.)

Although the prosecutor referenced Bible passages that support capital punishment, appellant was not prejudiced. There is no reasonable possibility the jury would have reached a more favorable penalty verdict for appellant had the prosecutor not made the comments. (*People v. Sandoval*, *supra*, 4 Cal.4th at p. 194; *Chapman v. California*, *supra*, 386 U.S. 18, 23-24.) The prosecutor's remarks, in context, argued that imposition of the death penalty would not be a usurpation of God's authority, but a legitimate carrying out of California law. One cannot reasonably read the argument as appellant does: an argument with the message that God and religion mandated a death sentence (II AOB 445-447) and an attempt to diminish the jury's sense of responsibility (II AOB 443). Nor would a reasonable juror have understood the prosecutor as appellant also contends, to have argued that appellant was a "unrepentant heathen" whose lack of religious belief was a factor in aggravation. (II AOB 442.) The prosecutor expressly told the jury that religion was not "supposed to be the guiding force." Thus, the prosecutor's brief allusions to biblical law in his opening summation "amounted to little more than commonplaces, to emphasize his point that the jurors should instead judge defendant primarily by his acts." (*People v. Roybal*, *supra*, 19 Cal.4th at p. 521.)

D. Defense Counsel Responded In His Own Opening Penalty Phase Summation

Again, "we note that defense counsel not only failed to object to the prosecutor's remarks, but countered them by citing a number of religious authorities to support his argument against the death penalty." (*People v.*

Wash, *supra*, 6 Cal.4th at p. 260.)

I'm going to talk about religion for a minute and about—by the way, I'm Jewish and not Christian. I want to get that disclaimer in too because I'm about to cite the New Testament, and I don't want to pretend I'm a great authority on it. I am not.

But my memory, if it serves me correct, said that Jesus at one point in time said, "Hate the sin, but love the sinner."

Now, did he mean by that that you're supposed to love Richard Tully? No.

You know what he meant by that? He meant that we should not lose sight of the fact that even though a bad act has been done it was done by a human being that breathes, who bleeds, who thinks.

Remember the speech from Attila, "Am I not human? Do I not bleed if you cut me?" Remember that?

Now, [the prosecutor] has told you death is okay because all of the world is a great religious sanctuary.

I could be wrong, but I don't think Buddhism does, and 25 or 30 percent of the population in the world is Buddhist. Now, I may be wrong, but that's my best recollection.

Most of the statements about the propriety of death are quoted out of the Old Testament, you know, my religion, the things those Jews throw out.

But there's an interesting thing that we fairly rarely hear. Along with the Old Testament, there is a book called the Talmud, and what the Talmud is is the wisdom of old Jewish rabbis who sat down and talked about those rules and those laws and what they meant.

It is from the Talmud that most of the rules we think of as Kosher, as I'm sure you heard of, you're not supposed to [eat pork], you're not supposed to eat shell fish, you shouldn't turn the light on during the Sabbath and so forth. These rules came really from interpretation of the Torah. The Torah is a great force. It is what people thought of those words.

Now, many, many years ago, and when I say many, we're talking several thousand, the Jews for a period of time had their own nation, and they had their own court called the Sandhedra. And the person[s] who sat on the court were in fact rabbis and they wrote in the Talmud, and they wrote in the Talmud about capital punishment, and what they

said was this:

> They said that a Sandhedra, that once in 30 years should you sentence a man to die, it would be called a bloody Sandhedra. And then what happened, because if you've ever seen the Talmud, the Talmud has a page of the Torah in the middle and then commentary all around it. Another rabbi said, no, if they should do it once in 80 years, it would be a bloody Sandhedra. And a third rabbi said, no, once in a 160 years.
>
> Do you know what you had to do under the Jewish law to be eligible for a death penalty? At the moment that you are going to kill him, a witness had to say to you, "Do you realize this is wrong? Do you understand the gravity of your offense? Do you understand you're taking a human life?" Short of that kind of testimony, you do the following, suffice it to say, very few people were executed.
>
> Now, Israel is a country, again, and with one exception, and I'll talk about it because I'm bitterly disappointed by it. Israel, like every civilized country in the Western Civilization, does not have a death penalty. There is under the Israeli Penal Code no death penalty, save and except—and to my taste are wrong about that, save and except for a crime against humanity, which translates into a person left over from the Holocaust. I think they should not have it for that either. I think it is inappropriate.
>
> I live in one of the few theoretically civilized countries in the world that still sanctions of taking a human life as part of a governmental function. We do it. South Africa does it. Canada doesn't do it. England doesn't do it. France doesn't do it. Spain doesn't do it. Portugal doesn't do it. Norway doesn't do it. Sweden doesn't do it.
>
> You hear what I'm saying, so that's kind of where we start out. That's a frame of reference.

(18 RT 3764-3766.)

At the close of his defense counsel's opening penalty phase summation, he said the following:

> And what I'm asking you to do is look into your own souls and remember, vengeance is mine, said the Lord. Our job is not to use God's function, but to allow society to move forward. Killing my client will neither be justice, nor will it move society forward. It will move society backward. It will be an angry lash outward. It will be an effort toward appeal rather than the best, and I very humbly beg you for

my client's life, because I believe, based upon the evidence, that is the appropriate disposition.

(18 RT 3796.)

E. The Prosecutor's Religious References In Rebuttal Penalty Phase Summation Did Not Prejudice Appellant

At the beginning of his closing penalty phase summation, the prosecutor attempted to respond to some of defense counsel's religious references:

> We get into this process that we go through here and it's a lot different than it was in the Old Testament. The Old Testament, when God spoke, He made it very clear. Very clear. Murderers shall die. And God also made it very clear that it was man who going to impose that penalty.
>
> Now while [defense counsel] got up here and quoted from, I believe it's Romans, vengeance is mine, say it the Lord. In the next chapter, Paul makes it very clear, the ruler bears not the sword in vain for he is the minister in God, a revenger to execute wrath upon him that do with evil.
>
> Now, we could bounce religions back forth all day long, but that's not the purpose here because you have to start at the very, very beginning when you, in the sense that when we start talking about religions, and as I said, God made it clear, when man starts getting into the act he starts softening up the rules a little bit and that's okay. You can do that.
>
> You hear about the Talmud, and I could tell you about other things, but all you have to do is take a look what's going on here and there are good reasons for it. Good reasons for it. I mean, our process, the due process that gives this guy over here two attorneys from the time this case starts is part of that due process. And we have two trials, not one. Two trials. We have a guilt trial; did he do it. And then we get to this phase where we start talking about aggravating and mitigating and he gets to bring in anything that could cause you to have some sympathy that shows something about his character. His record that causes you to say that the aggravating circumstances don't substantially outweigh the mitigating and that the proper penalty is not death. You have to do all that. Now, part of that is just to make sure we don't make mistakes, so we're here for that.

(RT 3797-3798.)

The foregoing religious references were harmless beyond all doubt. (*People v. Sandoval*, *supra*, 4 Cal.4th at p. 194; *Chapman v. California*, *supra*, 386 U.S. at pp. 23-24.) First, as this Court has held, a prosecutor's religious references in response to defense counsel's own reliance on biblical text cuts against a finding of prejudice. (*People v. Ervin*, *supra*, 22 Cal.4th at p. 100; *People v. Lenart*, *supra*, 32 Cal.4th at p. 1130.) Second, with all due respect to the prosecutor, his first set of religious references in rebuttal summation were hardly matters of clarity; no reasonable juror would have understood them as appeals to extraneous authority or invitations to ignore what occurred in the courtroom. The prosecutor did clearly state that he did not want the jurors to "bounce religions back and forth" and concluded his challenged remarks by emphasizing the importance of the trial, due process, and aggravation and mitigation. Appellant is wrong when he claims the jury would have understood this argument as "undercutting" the jury's sense of responsibility for determining the proper punishment. (II AOB 449.)

Appellant next objects to the following-emphasized remarks of the prosecutor in rebuttal summation:

> You heard [defense counsel] talk very, you know, an awful lot about the fact that this is not an appropriate death penalty case. This is not an appropriate death penalty case. This is not an appropriate case for the death penalty. As [defense counsel] told you there is no such case that would call for the death penalty in his mind. He is totally and completely against the death penalty. So no matter what the facts were, it would always be a situation that the death penalty wasn't called for.
>
> Now, what's going on here and what can you later hear, expect to hear? And those arguments that you should listen to and listen to with care is how much of the defense argument goes to the philosophical issue as to whether or not we should have a death penalty as opposed to the mitigating circumstances are there, and the aggravating circumstances do not substantially outweigh the mitigating circumstances.

That's the real issue. But that's not what you're going to hear. You're going to hear things like it shouldn't happen. *You know, vengeance is mine, say it the Lord.*

Now, when you start talking about religions, it's very interesting because you remember, you know, in this country its easy to keep in mind the holiday of Easter. You know what it represents is Christ up there being crucified and we have the good thief and the bad thief. And we've labeled them good thief and bad thief. But what makes the difference is one of them repented, one of them said, "Forgive me Lord, I believe in you." The other one just, you know, cussed at Christ, turned his nose, whatever. Christ said to the good thief, you know, you'll be with me in heaven, he was saved. The good thief was saved. The bad thief wasn't.

Well, the moral of that story was that the good thief was not cut down off that cross until he was dead and his soul was saved in heaven. But Caesar law was completed. And the good thief died along with the bad thief.

When you start talking about things, well, this is the only civilized country next to South Africa that has the death penalty, what does that have to do with what's going on here? Your function, your function is not to decide whether the death penalty is a good law or a bad law. Whether we should have the death penalty or not have a death penalty, that's not what this is all about. If you disagree with it, you write to your legislator and you change the law. You've taken an oath to follow the law and to apply the law. And your duty is to uphold the law. And then the appropriate case, as this is your duty, is to impose the death penalty because the aggravating outweighs the mitigating, substantially, and that is the only proper penalty for what he has done.

(18 RT 3799-3801; emphasis added.)

The prosecutor's religious references here did not prejudice appellant. The prosecutor stated that the religious question was not the issue before the jury. The above-emphasized remarks came in response to comments of defense counsel, and the prosecutor's discussion of the "good thief/bad thief" was not a biblical reference in support of the death penalty or an invocation to a "higher law," but simply expressions of the prosecutor's view that *repentance* is a precursor to salvation. He did not, as appellant claims (II AOB 455) argue

that *"execution"* is a prerequisite to salvation. (II AOB 455.) And the prosecutor did not, as appellant additionally alleges, place his "imprimatur" on Christianity. (II AOB 450.) What the prosecutor did was again remind the jurors to follow and apply the law the court would give them, and make their penalty determination based on that law. (18 RT 3800-3801.)

Appellant lastly protests that the prosecutor improperly argued the concept of "*lex talionis*" in his rebuttal penalty phase summation, "the ancient law of retributive justice based on Mosaic law" (II AOB 438, 452-454; see *People v. Hill, supra*, 17 Cal.4th at p. 836, fn. 6):

> You know, we have evolved beyond the rule of [Hammurabi], talking about an eye for an eye. I mean I think there are some people who believe that and there's a lot to be said about it in many, many regards. But, you know, when push comes to shove, you basically want a little bit more and there's this idea that justice basically, and punishment in a rough sense, ought to be related to the crime and the person and their moral culpability of what they've done and that's what our system tries to do. That's what it tries to do. And that's why we got the death penalty. The sense of fairness. Because there is some kinds that is so heinous, so vicious, so violent that they outrage us and they say this person has forfeited their right not to just live in society, but to live, to live. They've given that up, and we talk in terms of fairness.

(18 RT 3808-3809.)

Any "religious" content in the foregoing did not prejudice appellant. No reasonable juror would have understood the argument as one suggesting that religious authority sanctified or compelled imposition of the death penalty for appellant; indeed, the remarks are decidedly secular in tenor and tone. Nor did the prosecutor tell the jurors they could shift their sentencing responsibility somewhere else. The prosecutor merely observed that society has *moved beyond* "eye for an eye," and argued for the value and social function of proportionality in punishment; i.e., that the punishment must fit the crime.

F. In Rebuttal Penalty Phase Summation Defense Counsel Again Responded

In rebuttal penalty phase summation, defense counsel offered the view that appellant was "one of God's children." (18 RT 3820, 3823.) Later, at the close of his argument, counsel offered:

> Now, the prosecution originally broached the subject of religion by giving you quotes from the Old Testament which claims, justifies man killing man. But then, in the same breath, turns around and says religion shouldn't play a part in the decision.
>
> And [co-counsel] made some arguments drawing from his own heritage, and then [the prosecutor] comes back and said, God made it clear that man can kill man.
>
> I am sure there's much in the religious writings that you can find anything you want, but there are other instances here. And I am not a religious expert, but I've done my homework, I think. And you can draw on your own experience, your own common knowledge in this. Even in the Old Testament, God did not sentence Cain to death for killing his brother. He banished him. It's clear that the message of the New Testament is love and mercy. Jesus himself in the Sermon on the Mount preached the doctrine of an eye for an eye should be discarded. But you see in a sense that is what you're getting here. If you ignore this, murder equals death.
>
> My recollection, from my research here, my recollection of—somebody here is going to know it—my recollection of Jesus on the cross at Calvary, the people on both sides of him were forgiven. But to bring religion into it as some justification for you to do it, to kill somebody is misleading. The major, the major religious groups in this country, many of them in the world, the American Baptist Convention, Episcopals and Methodist, and particularly the Roman Catholic Church have taken rigorous stands against the death penalty.
>
> Now, I don't want to mislead you. You are here on this jury because have said that you can in these circumstances impose either of two penalties. Now, there's a conflict whether religious aspect of the thing, you shouldn't be here where you could not impose the death penalty; you shouldn't be here, I am not saying that. But there is another aspect of this, and the Pope, some of the other people that have been the most articulate spokesman on this, one of the things that you do, when you—one the things that you do when you evaluate these

principles in—and also talk about mercy is you hear, you give what moral and sympathetic value you have. To much of us, much of our moral character and moral background in some way partly rests upon religious principles. And to the extent that your moral values, and so on, are in the way you gauge these things are based upon those religious principles, you should at least do this, you look and say that I should be reluctant except in the worst, you should be reluctant except in the most extreme circumstances, the worst of the worst, you should be reluctant to impose to kill somebody, to impose the death penalty. I should be reluctant.

Now, I have, as [co-counsel] did, I have no hesitation, no shame, no ego involvement in begging you for the mercy of this man's life. He's one of God's children. I hope I have given you the reason to extend him that mercy.

(18 RT 3863-3865.)

G. Conclusion: Still No Prejudice

Appellant vehemently asserts that the prosecutor's (and defense counsels') religious references are reversible per se. (II AOB 459-463.) However, as previously stated, this Court has consistently applied the *Chapman* "harmless beyond a reasonable doubt" test of federal constitutional error to its prejudice reviews of religious-reference misconduct. (*People v. Lenart, supra*, 32 Cal.4th at p. 1130.) References to religion in closing argument are not "structural errors," i.e., "defects affecting the framework within which the trial proceeds, rather than simply errors in the trial process itself." (*Arizona v. Fulminante, supra*, 499 U.S. 279, 310.)[28/]

---

28. The United States Supreme Court has found "structural error" only in a very limited class of cases: *Gideon v. Wainwright* (1963) 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799] (a total deprivation of the right to counsel); *Tumey v. Ohio* (1927) 273 U.S. 510 [47 S.Ct. 437, 71 L.Ed. 749] (lack of impartial trial judge); *Vasquez v. Hillery* (1986) 474 U.S. 254 [106 S.Ct. 617, 88 L.Ed.2d 598] (unlawful exclusion of grand jurors of defendant's race); *McKaskle v. Wiggins* (1984) 465 U.S. 168 [104 S.Ct. 944, 79 L.Ed.2d 122] (the right to self-representation at trial); *Waller v. Georgia* (1984) 467 U.S. 39 [104 S.Ct. 2210,

Here, the religious references, even viewed cumulatively, were harmless beyond a reasonable doubt. (*People v. Sandoval, supra*, 4 Cal.4th at p. 194; *Chapman v. California, supra*, 386 U.S. at pp. 23-24.) First, the references represented just a small part of the hundreds of pages of closing argument. The religious references were not as "lengthy and intense," as appellant claims. (II AOB 464.) In the overwhelming majority of pages representing the prosecutor's summation he engaged in a detailed recitation of the factors in aggravation in this case, particularly the brutal circumstances of the crime. He urged a death sentence based on appellant's legal and moral culpability in light of the statutory factors in aggravation. The trial court ultimately gave the jury the standard instructions, which again reminded the jurors, for the umpteenth time, that this constituted the statement of legal principles the jurors were obligated to apply. (18 RT 3867-3880.) Finally, nothing the prosecutor (or defense counsel) said about religion would have led a reasonable juror to believe he or she was not required to follow the court's instructions but could instead follow God's law (whatever that may be) and thereby shift the responsibility for any death verdict to Him.

---

81 L.Ed.2d 31] (the right to a public trial); and *Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182] (erroneous reasonable doubt instruction to the jury). Religious references in closing argument in no way fit within this limited class of cases.

XVIII.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN ARGUING APPELLANT'S FUTURE DANGEROUSNESS

Appellant next alleges that during closing argument the prosecutor violated *People v. Murtishaw* (1981) 29 Cal.3d 733, by arguing appellant's future dangerousness. (II AOB 467-474.) Appellant claims the comments violated his rights to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, as well as his Eighth Amendment rights and his rights under article I of the state constitution. (II AOB 467, 473.) He maintains that this Court must reverse the death judgment against him because the People cannot prove the misconduct harmless beyond a reasonable doubt, or harmless under state law. (II AOB 473-474; citing *Chapman v. California*, *supra*, 386 U.S. 18, 23; *People v. Brown*, *supra*, 46 Cal.3d 432, 448.)

No misconduct occurred.

During his opening penalty phase summation, after referencing the evidence of appellant's misdemeanor jailhouse batteries, the prosecutor stated:

> What does that tell you about this defendant and his future violence or his violence in the future? Now, what is it that we do to—what happens when he gets a life prison sentence?
>
> [Defense Counsel]: I will object to this line of argument as improper argument, your Honor, both federal and state.
>
> THE COURT: Again, I remind the jury that the arguments of counsel are not evidence. You will be instructed on the applicable law at the end of arguments.
>
> Move forward, Mr. [Prosecutor].
>
> [THE PROSECUTOR]: Thank you, your Honor. He is put in the main line, with all the other prisoners. You have to keep him on death row where he is isolated because he gets on the main line with all the

> other prisoners, with his life sentence, he has an American Express Platinum Card to do violence at will. Because what can they do to him? They can't give him another day, he's got life. And some other prisoner, some other guard, some hospital or some jail prison nurse, or social worker does something that he doesn't like, and he acts out violently, hits, maims, hurts, he can do it at will. They can't do anything to him. They can't give him another day, because he's serving life for the rest of his life, can't give him anymore.

(17 RT 3696.)

Although in *People v. Murtishaw*, *supra*, 29 Cal.3d at page 779, this Court "'held that at the penalty phase of a capital case the prosecutor may not introduce expert testimony forecasting that, if sentenced to life without the possibility of parole, a defendant will commit violent acts in prison,'" this Court has "'never held that in closing argument a prosecutor may not comment on the possibility that if the defendant is not executed he or she will remain a danger to others.'" (*People v. Michaels* (2002) 28 Cal.4th 486, 540; quoting *People v. Champion* (1995) 9 Cal.4th 879.) Rather, this Court has "concluded that the prosecutor may make such comments when they are supported by the evidence." (*Ibid.*)

That is this case. Actual violence while in custody, such as appellant's two fights with other inmates, logically and reasonably supports an inference of future dangerousness. The prosecutor here did not rely on the predictions of an expert to support his claim of future dangerousness; instead he relied on the circumstances of appellant's two prior misdemeanor jailhouse batteries. Appellant is simply incorrect when he claims the prosecutor violated *Murtishaw*. Appellant is equally incorrect when he argues that the jailhouse evidence "lacked probative value" as to his future dangerousness and supported no such inference. (II AOB 470.) Whether the jailhouse "scuffles" were "trivial" or probative of future dangerousness was a jury question.

At bottom, the trial court was correct in ruling "there can be appropriate arguments on the subject matter of future dangerousness based on the

evidence that was presented in this case." (17 RT 3675.)

This rejection of appellant's claim of "future dangerousness" prosecutorial misconduct is also a rejection of appellant's earlier claim that the same statement by the prosecutor amounted to misconduct because it amounted to an argument of facts not in evidence and argument premised on speculation about irrelevant matters. (II AOB 414-415.)

XIX.

NO TRIAL COURT ERROR OR PROSECUTORIAL MISCONDUCT OCCURRED WITH RESPECT TO THE PROSECUTOR'S CHARTS

Appellant contends that during opening penalty phase summation, without notice to the defense or trial court approval, "the prosecutor displayed six large charts to the jury." (II AOB 475.)

> The six charts were: Chart 1. "Factors for Consideration"; Chart 2. "Battery"; Chart 3. "Aggravating Factor, Increases Guilt, Enormity, Injurious Consequences"; Chart 4. "What You Didn't Hear About Richard Christopher Tully"; Chart 5. "What You Have Heard About Richard Christopher Tully"; and Chart 6. "The Bible Sanctions Capital Punishment." (Court Exhibit 5.)

(II AOB 475; footnote omitted.)

Appellant contends that his trial judge "committed error by allowing the prosecutor to display these inflammatory charts to the jury." (II AOB 475.) Appellant claims that the error was that the charts and related prosecutorial argument "improperly directed the jury to convert the absence of possible mitigating factors into aggravating factors" (II AOB 477, citing *People v. Davenport* (1985) 41 Cal.3d 247, 288-290), and that the error amounted to a prejudicial violation of his rights to due process and a fair and reliable penalty determination (II AOB 481, citing U.S. Const., amends. 5, 6, 8, 14; Cal. Const., art. I). Appellant's claim fails.

The record shows the following. During the lunch break, which took place in the middle of the prosecutor's opening penalty phase summation, defense counsel complained that the prosecutor had used charts and displayed them to the jurors without having first revealed them to the defense. (17 RT 3667-3669.) The trial court directed the prosecutor that before the afternoon session began he should show the defense the charts he intended to use when he resumed his summation. (17 RT 3669.) Defense counsel expressed concern

only about what he is now calling Chart 4, which was entitled, "'What You Didn't Hear About Richard Christopher Tully.'" (17 RT 3667-3670.) Defense counsel specifically objected to the following subcaptions on that chart: "That This Violence Is Out Of Character For Him"; "That He Is Not Violent In A Prison Setting";"That He's Remorseful, Sorry For What He Did"; "That He Has Done One Decent Thing In His Life, That He Found God and Repented"; "The Family Members Bred Murderers/Rapists"; "That He Is A Loving, Gentle, Supportive, Caring Father, Husband, Brother, Human Being"; "That He Was A Good Provider"; "That He Was Physically Abused As A Child"; "That He Was Sexually Abused As A Child"; "That He Was Addicted To And/Or Abused Drugs, Alcohol"; "That He Had Some Head Injury Or Low I.Q. Or Learning Disability"; and "That He Has Some Mental Disease, Defect Or Disorder, That He Can't Help Himself." (17 RT 3670-3673.)

Appellant contended that through the use of these subcaptions the prosecution sought to make the defense "prove the nonexistence of an aggravating fact as a mitigating fact," and thereby erroneously suggested that the absence of mitigating facts was itself an aggravating fact. (17 RT 3671-3674.)

The trial court acknowledged, correctly, that the absence of a mitigating factor does not amount to evidence in aggravation. (17 RT 3674-3675.) The court also recognized that "remorselessness" could be an appropriate subject for argument, but felt the prosecutor's chart references to remorse and repentance "could be misleading" and that one or more jurors might "inadvertently" understand the references as a comment on appellant's failure to testify. (17 RT 3675-3676.) The court therefore ordered the prosecutor not to publish those subcaptions to the jury. The court also ordered the prosecutor not to publish two additional subcaptions—"That This Violence Is Out Of

Character For Him," and "That He Is Not Violent In A Prison Setting"—out of a concern that the jury might deem absent mitigation factors to be a factor in aggravation. (17 RT 3675-3676.)

It is unclear whether appellant now alleges trial court error and prosecutorial misconduct *to all of the prosecutor's charts*, or just the subcaptions on Chart 4 that he objected to below and which the court refused to strike. To the extent appellant is challenging all of the charts in addition to Chart 4, his assignment of error is forfeited for the failure to object below.[29/]

In any event, appellant's claim of trial court error and prosecutorial misconduct fails on the merits. As noted, appellant's position is simply that the prosecutor's charts and arguments improperly directed the jury to convert the absence of possible mitigating factors into aggravating factors. (II AOB 477-481.) But not only did the prosecutor tell the jury that the absence of a mitigating factor was not a factor in aggravation (17 RT 3688), but the trial

---

29. As noted, Chart 3 was entitled "Increases Guilt/Enormity/Injurious Consequences." The record makes clear that at one point in the prosecutor's summation appellant objected to the subcaption on that chart that read "Did She Try To Bargain With Him," on the ground that that statement was without support in the evidence and invited the jury to speculate. (18 RT 3759.) The trial court held a bench conference on the objection and then, at appellant's request, admonished the jury as follows: "Ladies and gentlemen, as you can see we have returned. What I would do at this moment is, as I have, to remind you, as I know you have in mind and have had in mind, that the subject of the arguments are not evidence. And you are not, based on any arguments or anything else, to speculate about matters that are not in evidence." (18 RT 3731, 3759.)

As one of the subclaims in his argument 16 assignment of prosecutorial misconduct, appellant contends that the above-quoted admonition was "insufficient" to cure the harm from the subcaption at issue on Chart 3. (II AOB 402-403.) Even assuming appellant were correct in that regard, and we submit he is not, because the admonition was one appellant specifically requested, he cannot now challenge it. One "whose conduct induces or invites the commission of error by the trial court is estopped afterwards from taking advantage of such error." (*Abbott v. Cavelli* (1931) 114 Cal.App. 379, 383.)

court instructed the jury to that same effect (18 RT 3874). We presume the jury followed this instruction. (*People v. Jones*, *supra*, 15 Cal.4th 119, 168; *People v. Wash*, *supra*, 6 Cal.4th 215, 263; *People v. Yoder* (1979) 100 Cal.App.3d 333, 338.)

XX.

THE TRIAL COURT DID NOT ERR WHEN RESPONDING TO THE JURY'S INQUIRY REGARDING THE "LEGAL DEFINITION OF LIFE WITHOUT THE POSSIBILITY OF PAROLE"; APPELLANT'S CONTRARY CONTENTION IS FORFEITED

In its penalty phase instructions to the jury the trial court stated:

> It is the law of this state that the penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstance alleged in this case has been specially found to be true.
>
> Under the law of this state, you must now determine which of said penalties shall be imposed on the defendant.

(18 RT 3867-3868; CALJIC No. 8.84.)

At the conclusion of the penalty phase instructions the court told the jury in part:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.

(18 RT 3879; CALJIC No. 8.88.)

During its penalty phase deliberations, the jury sent the court a note asking for the "legal definition of life in prison without possibility of parole." (18 RT 3890.) Outside the presence of the jury the court put the following on the record:

> The court and counsel have conferred with regard to the issue of a response to this matter, and it has been agreed the court will respond to this inquiry as follows: For the purpose of determining the appropriate sentence for this defendant, you should assume that either the death penalty or confinement in state prison for life without the possibility of parole would be carried out. You are not to consider or speculate as to any other possibility or any circumstance that might preclude either of the two penalties from being carried out.

(18 RT 3890.)

The court made clear that this response was based in part on the following four decisions of this Court: *People v. Ramos* (1984) 37 Cal.3d 136, 159; *People v. Thompson, supra*, 45 Cal.3d 86, 151; *People v. Whitt* (1990) 51 Cal.3d 620; and *People v. Fierro* (1991) 1 Cal.4th 173, 250. (18 RT 3890-3891.)

The court next brought the jury into the courtroom, and the following occurred:

> . . . as you recall, the court had received a request by the jury which reads as follows: "We, the jury in the above entitled cause, request the following:" it reads, "legal definition" and the word definition is then crossed out, "definition of life" and it goes on to read, "legal definition of life in prison without possibility of parole."
>
> And ladies and gentlemen, I would respond to that inquiry as follows: for the purpose of determining the appropriate sentence for this defendant, you should assume that either the death penalty or confinement in state prison for life without the possibility of parole would be carried out. You are not to consider or speculate as to any other possibility or any circumstance that might preclude either of the two penalties from being carried out. "
>
> Now, I would be happy to read that again. Would it be helpful for me to read it one more time? One more time, Mr. Foreman?
>
> THE FOREPERSON: Yes.
>
> THE COURT: For the purpose of determining the appropriate sentence for this defendant, you should assume that either the death penalty or confinement in state prison for life without the possibility of parole would be carried out. You are not to consider or speculate as to any other possibility or any circumstance that might preclude either of the two penalties from being carried out.
>
> All right. So, then, that is the response to that inquiry, and having responded, I will ask you to return upstairs and continue your deliberations. Thank you.

(18 RT 3891-3892.)

Appellant assigns error to the trial court's response to the jury question, claiming the court did not directly answer the question the jury asked, that the

answer it did give only led to greater confusion among the jurors, and that as a result his "constitutional rights" were violated. (II AOB 483-490.) More specifically, appellant contends that the trial court's answer violated *Simmons v. South Carolina* (1994) 512 U.S. 154 [114 S.Ct. 2187, 129 L.Ed.2d 133] and its progeny, in that the court left the jury with the "grievous misperception" that the only way to prevent appellant's future release was to sentence him to death. (II AOB 483-490.) Appellant contends the error compels a per se reversal of the death judgment, or a reversal because there exists a reasonable likelihood the court's answer to the jury caused them to misapply the penalty phase instructions as a whole in an unconstitutional way. (II AOB 490-492; citing *Boyde v. California, supra*, 494 U.S. 370, 380; *Estelle v. McGuire, supra*, 502 U.S. 62, 72.)

Appellant is entitled to no relief. No error occurred.

A. Appellant's Present Claim Of Error Is Procedurally Barred

Petitioner claims: "The trial court failed to tell the jury whether there is a 'legal definition' of life without the possibility of parole. The trial court failed to tell the jury to interpret the phrase based on the standard meaning of the words. The trial court failed to tell the jury that life without the possibility of parole meant that [appellant] will not be eligible for parole if so sentenced." (II AOB 484.) "[Appellant] does not suggest that the trial court had to tell the jurors that he would *never* be released from prison, or even that he would *never* be paroled. Instead, the direct, proper, and constitutionally required answer to the question was: 'Life without the possibility of parole means that the defendant will not be eligible for parole,' or 'Life without the possibility of parole' has no special meaning and therefore you should interpret the terms based on the standard meaning of the words." (II AOB 487.)

The problem with these assertions, and with all others advanced by

appellant in support of his claim, is that he makes them for the first time on appeal. The record of proceedings below clearly shows that appellant agreed with the court's response to the jury inquiry. (18 RT 3890.) And where, "as here, appellant consents to the trial court's response to jury questions during deliberations, any claim of error with respect thereto is waived. (*People v. Rodrigues*[,] [*supra*,] 8 Cal.4th 1060, 1193.)" (*People v. Bohana* (2000) 84 Cal.App.4th 360, 372-373.)

B. The Current Claim Is Devoid Of Merit

Appellant's contention is also baseless. The crux of appellant's argument is that the court's "response did not answer the question asked by the jurors. The court simply told them to assume something that they did not understand." (II AOB 488.) This Court, however, has repeatedly "rejected the claim that the term 'life without the possibility of parole' confuses jurors or has a technical meaning that requires a sua sponte definition of instruction." (*People v. Smithey*, *supra*, 20 Cal.4th 936, 1009, and cases there cited.) When a jury inquires about the meaning and definition of life without possibility of parole it is implicitly raising "the commutation question." (*People v. Whitt*, *supra*, 51 Cal.3d at p. 657.) And this Court has held that in such a situation, where the jury expresses "misunderstanding or concerns regarding the consequences of its choice of penalty, the court properly may address such confusion by instructing the jury to *assume* that whatever penalty it selects will be carried out." (*People v. Smithey*, *supra*, 20 Cal.4th at p. 1009, original emphasis, citing *People v. Kipp* (1998) 18 Cal.4th 349, 378-379.) That is precisely what the trial court did here. No error occurred. Appellant now prefers that the trial court had answered the jury's question by stating, "Life without the possibility means that the defendant will not be eligible for parole." (II AOB 487). But the jury received essentially that same message

when told to "assume that either the death penalty or confinement in state prison for life without possibility of parole would be carried out." (18 RT 3891.)[30/]

Lastly, appellant argues that when the trial court instructed the jury to assume the sentence would be carried out and not to speculate to the contrary, the jury would have concluded that the court had to believe "there was a reason" the jury could "do otherwise." (II AOB 489.) The jury, appellant continues, therefore would have "concluded that life without parole does not mean what it says, otherwise the court would have told them that it did. The court's answer resulted in the same 'grievous misperception' of a false sentencing choice prohibited in *Simmons*, and led the jurors to vote for death on the false belief that death was the only way to guarantee that [appellant] would not get out of prison and commit more crimes." (II AOB 489.)

It is appellant who is impermissibly speculating here, and who is ignoring what this Court has held: Jurors are presumed to understand and follow the instructions given them. (*People v. Jones*, *supra*, 15 Cal.4th 119, 168; *People v. Wash*, *supra*, 6 Cal.4th 215, 263; *People v. Yoder*, *supra*, 100 Cal.App.3d 333, 338.)

---

30. Because the jury understood that appellant would not be eligible for parole, this case is unlike *Simmons v. South Carolina, supra*, 512 U.S. 154, 168-171. There, the High Court held that when the prosecution urges a capital jury to sentence a defendant to death because of a potential for future dangerousness, the trial court cannot prevent the jury from learning that the defendant is not eligible for parole. Thus, when the jury in *Simmons* was required to choose between a death sentence and what was described merely as "life imprisonment," prohibiting the defendant from informing the jury that "life imprisonment" actually meant life in prison *without the possibility of parole,* a violation of due process resulted. Here, of course, the penalty alternative to death was identified, correctly, as "life without possibility of parole."

XXI.

THE TRIAL COURT DID NOT ERR UNDER EITHER STATE LAW OR THE FEDERAL CONSTITUTION IN DENYING APPELLANT ALLOCUTION

Prior to the commencement of penalty phase summations, appellant asked the trial court to give him "the right of allocution," i.e., "a chance to address the jury," and he offered that he would "express his extreme remorse for the death of Miss Olsson and the terrible shock on her family." (17 RT 3621.) The prosecutor stated that he had no objection, provided the defense re-opened its case so that he could cross-examine appellant. (17 RT 3621.) The prosecutor stated specifically:

> As far as getting up here right before we start arguing to now express his remorse without the ability of me to cross-examine him and test his sincerity of that, I have a strong objection. I don't believe there's any authority. In fact, I think the authority is to the contrary.

(17 RT 3621.)

Appellant disagreed, asserting that the right of allocution does not implicate cross-examination, and that he had a right to address the ultimate sentencer in this case (the jury), just as he would have the right to address the ultimate sentencer in a non-capital case (the judge). (17 RT 3621-3622.)

The trial court then denied appellant's request, holding as follows:

> The court is not aware of any authority which would be in support of any right to elocution [*sic*], as you've described it, with respect to the defendant having an opportunity to address the jury, as you have described it. And there being no such authority that I'm aware of, that request will be denied.

(17 RT 3622.)

Appellant contends that the trial court's ruling violated state law, as well as his rights to due process, fundamental fairness, equal protection, and a fair and reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I to the

California Constitution. (II AOB 493-499.) Appellant contends that the error requires a reversal of his death sentence, both as a matter of federal constitutional law (because the People cannot demonstrate that the error was harmless beyond a reasonable doubt (*Chapman v. California, supra*, 386 U.S. 18, 23)), and as a matter of state law (because there is a reasonable possibility the jury would not have sentenced him to death had the trial court permitted him to allocute (*People v. Brown, supra*, 46 Cal.3d 432, 448)).

This Court need not engage in any prejudice analysis because the trial court ruled correctly.

A. No Error Occurred

This Court has repeatedly held that a capital defendant has no right to address the penalty phase jury in allocution. (*People v. Robbins* (1988) 45 Cal.3d 867, 888; *People v. Keenan* (1988) 46 Cal.3d 478, 511; *People v. Nicolaus* (1991) 54 Cal.3d 551, 583; *People v. Davenport, supra*, 11 Cal.4th 1171, 1209.) As this Court persuasively put it in *Robbins*, the sentencing phase of our capital trials specifically provides the defendant with the opportunity to present testimony on what penalty he or she feels is appropriate. (45 Cal.4th at p. 889.) "The defendant is allowed to present evidence as well as take the stand and address the sentencer. Given this, we fail to see the need, much less a constitutional requirement, for a corresponding 'right to address the sentencer without being subject to cross-examination' in capital cases." (*Ibid.*)

B. Appellant's Contrary Arguments All Fail

Appellant claims that *Green v. United States* (1961) 365 U.S. 301 [81 S.Ct. 653, 5 L.Ed.2d 670], supports his position that this Court has "wrongly concluded" that because a capital defendant has the right to testify and present

evidence in mitigation at the penalty phase the defendant has no right to allocution. (II AOB 494.) "'The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.'" (II AOB 494, quoting *Green v. United States*, *supra*, 365 U.S. at p. 304.)

Green, however, is not applicable to this case. It involved Federal Criminal Rule 32(a), which read in pertinent part as follows: "Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment." That a federal rule of procedure mandates that federal defendants may present unchallenged statements to the judge prior to imposition of sentence doesn't mean state capital defendants have a federal constitutional right to present unchallenged statements to their penalty juries, especially when they already have the right to present such statements and evidence in mitigation that the prosecution may challenge.

Appellant next wonders why the trial court should not be permitted to "limit the subject matter of the defendant's address to the jury to matters that do not require any cross-examination, such as an expression of remorse. This Court's concern that allocution is a means of 'cloaking' the right to testify with immunity from cross-examination (see *People v. Keenan*, *supra*, 46 Cal.3d at p. 511), is easily addressed where an offer of proof is made by the defendant. Here, there was an offer of proof made by [appellant]." (II AOB 495; footnote omitted.) This argument fails because its premise is false. A capital defendant can "cloak" or lie about remorse just as he or she can concerning any other subject. As the prosecutor noted below, expressions of remorse might not be exposed as insincere absent cross-examination. The prosecution has a right to try to prevent fraud on the penalty process.

Appellant next contends that because one Court of Appeal has held that

section 1200 gives non-capital defendants a right to allocution, "[d]enial of that same right to capital defendants violates principles of equal protection." (II AOB 495-496, citing *In re Shannon B.* (1994) 22 Cal.App.4th 1235). While *Shannon B.* does so hold (but see, contra, *People v. Sanchez* (1977) 72 Cal.App.3d 356, 359; *People v. Wiley* (1976) 57 Cal.App.3d 149, 166; *People v. Cross* (1963) 213 Cal.App.2d 678, 682)), it does not follow that as a matter of equal protection a capital defendant must be given allocution. As this Court recognized in *People v. Massie* (1998) 19 Cal.4th 550, 571, the first prerequisite to a valid equal protection claim is "'a showing that "the state has adopted a classification that affects two or more similarly situated groups in an unequal manner."'" The rule against allocution-as-a-matter-of-right "applies to individuals who, like defendant, have been sentenced to death. Defendant fails to identify any other similarly situated group that is treated differently [by the rule against allocution]." (*Ibid.*; see *People v. Lucero* (2000) 23 Cal.4th 692, 717-718 [trial court does not violate a defendant's equal protection rights when it does not, on its own initiative, offer the defendant allocution.].)

Looked at from another angle, in the noncapital context allocution provides the defendant with an opportunity to make a statement to the trial court during the course of the court's sentencing procedure in which the jury played no role. But that's not what appellant wanted here. He did not want the opportunity to address the court on sentencing, but wanted to address the jury. That is, he wanted the opportunity to make an unsworn statement to the jury for consideration along with testimony given under oath and the arguments of counsel. Such a statement could at the very least confuse the jurors, and also might impair their ability to weigh the aggravating and mitigating factors disclosed by the evidence. A capital defendant has no constitutional right to that.

Nor does a capital defendant in California have a statutory right to allocution. Appellant asserts that section 1200 gives trial courts in capital cases the discretion to permit allocution, and here the trial court abused its discretion in denying his request for allocution because it did not exercise any discretion. (II AOB 497.) Section 1200 provides in pertinent part: "When the defendant appears for judgment he . . . must be asked whether he has any legal cause to show why judgment should not be pronounced against him." The plain language of this statute does not apply to or envision what appellant sought below, and he offers no persuasive reason for this Court to hold that it does.

The trial court did not err under either state law or the federal constitution in denying appellant allocution.

XXII.

NEITHER THE TRIAL COURT NOR THE PROSECUTOR PREJUDICIALLY TRANSGRESSED THE LAW GOVERNING REMORSE

Appellant identified several respects in which the trial court permitted the prosecutor to reference "remorse" (or appellant's lack thereof) in alleged violation of the state and federal Constitutions. (II AOB 500-540.) Appellant concurrently asserts that this Court's precedents on remorse are wrongly decided and inconsistent not only with California's death penalty statute but the state and federal Constitutions. (II AOB 500, 507-513, 529-534.) Appellant's contentions are without merit.

A. The Law In This Area Is Well Settled

This Court has stated that "'the propriety of commenting on lack of remorse depends to a degree on the inference one is asking the jury to draw from it'" (*People v. Cox* (1991) 53 Cal.3d 618, 685, citations omitted), as "the presence or absence of remorse is a factor relevant to the jury's penalty decision" (*People v. Ghent* (1987) 43 Cal.3d 773, 771). While "[t]he concept of remorse for past offenses as a mitigating factor sometimes warranting less severe punishment or condemnation is universal" (*ibid.*), it would be fundamentally unfair for a prosecutor to argue "that a defendant's failure to confess his guilt after he has been found guilty demonstrates his lack of remorse and that therefore such failure should be considered as a ground for imposing the death penalty" (*People v. Coleman* (1969) 71 Cal.2d 1159, 1168).

Aggravating factors under California's death penalty law are limited to those expressly set forth in section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 762, 773.) This Court has held that "overt remorselessness" by the defendant

at the immediate scene of the crime is a statutory sentencing factor because factor (a) of section 190.3 allows the sentencer to evaluate all aggravating and mitigating aspects of the capital crime itself. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232.) *Gonzalez* continued: "there is nothing inherent in the issue of remorse which makes it mitigating only. The defendant's overt indifference or callousness toward his misdeed bears significantly on the moral decision whether a greater punishment, rather than a lesser, should be imposed." (*Ibid.*)

On the other hand, postcrime evidence of lack of remorse is not included in the statutory list of aggravating and mitigating factors. (See § 190.3, factors (a)-(k); *People v. Keenan*, *supra*, 46 Cal.3d 478, 510.) Thus, it is improper for a prosecutor to reference the absence of postcrime remorse as a factor in aggravation (*People v. Boyd*, *supra*, 38 Cal.3d at pp. 771-776; *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1232.) Furthermore, defendants "would be placed in an intolerable dilemma" if their expressions of innocence "could be urged at the trial on the issue of penalty as evidence of lack of remorse." (*People v. Coleman*, *supra*, 71 Cal.2d at p. 1168.)

Yet, the prosecutor can properly "suggest that evidence of remorselessness, or an absence of evidence of remorse, weighs against the finding of remorse as a mitigating factor." (*People v. Keenan*, *supra*, 46 Cal.3d at p. 510, citations omitted, original emphasis.)

B. Application Of The Facts To The Law Shows No Trial Court Error Or Prosecutorial Misconduct

As noted earlier, the trial court denied appellant's request for allocution; thereafter, defense counsel moved to prevent the prosecutor from arguing that the evidence showed a lack of remorse by appellant. (17 RT 3622-3623.) The defense essentially argued that the denial of allocution prevented the

presentation of evidence of remorse, and that the prosecutor, who objected to allocution, should not be able to take advantage of that and argue lack of remorse. (17 RT 3622-3623.)

The prosecutor responded that the "record speaks for itself," and that the court should not bar him from arguing lack of remorse, inasmuch as there existed no evidence in the record as to remorse. (17 RT 3623.) The trial court ruled, "I'm not going to at this time make any order with regard to limitation of argument, however, that—and I don't know whether this subject will be argued, but if it is, I'm not precluding you, depending on how it's argued, from making any objection you think is appropriate, but I'm not going to issue an order at this time barring anybody from arguing that subject." (7 RT 3623.)

During the first portion of his penalty phase summation the prosecutor did not mention remorse. (17 RT 3630-3666.) As discussed earlier, during the lunch break it became clear that the prosecutor had a chart captioned, "'What You Didn't Hear About Richard Christopher Tully'" (17 RT 3667-3670), and subcaptioned, "'That He's Remorseful, Sorry For What He Did'" and "'That He Has Done One Decent Thing In His Life, That He Found God and Repented.'" (17 RT 3670, 3672.) Defense counsel objected to the reference to remorse on the ground that arguments bearing on remorse are "restricted primarily to things that may or may not have happened at the actual crime scene," and that here there existed the danger that the remorse caption would unconstitutionally call attention to the fact that appellant did not testify. (RT 3671.) Counsel also objected that the chart's captions discussed "items in mitigation" and conveyed the message that "the absence of these items" was "therefore, aggravation." (RT 3673-3674.)

The trial court noted that, under the law, the absence of a mitigating factor does not amount to evidence in aggravation. (17 RT 3674-3675.) As discussed previously, the court recognized that "remorselessness" could be an

appropriate subject for argument, but the court felt that prosecutor's chart references to remorse and repentance "could be misleading" and expressed concern that one or more jurors might "inadvertently" understand the references as a comment on appellant's failure to testify. (17 RT 3675-3676.) The court therefore ordered the prosecutor not to publish those captions to the jury. (17 RT 3675-3676.)

The court lastly noted the truism that the appropriateness of argument is dependent on context, and that while it is appropriate for a prosecutor to argue that a "crime that lacks mitigating factors" and is "less deserving of leniency," and to comment on the mitigation evidence presented and not presented, the court also reminded the prosecutor that he could not argue that the absence of mitigation was itself a factor in aggravation. (17 RT 3676.)

Shortly thereafter the prosecutor continued with his summation, wherein appellant contends the prosecutor made numerous prejudicial misstatements regarding remorse.

(1) During his discussion of things the jury had not heard about appellant (17 RT 3682), the prosecutor stated, "You heard Roger tell us about what a difference in his life his religious conversion had. Have you heard anything like that about the defendant?" (RT 3691.) Moments later the prosecutor stated:

> What else didn't you learn about the defendant? That he doesn't deserve the death penalty? You know, what is in the law, we call it a condition precedent, something has to happen before another thing follows, a prerequisite, something that you would expect to see in existence before you give sympathy, before you grant mercy, remorse, the presence of remorse, the fact that your sorry for what you have done can be a mitigating factor, can be a mitigating factor, but it's not present here. It is not present in this case.

(17 RT 3693.)

Defense counsel objected "based on the matters already discussed," and the court noted the objection for the record. (17 RT 3693.) The prosecutor

then stated that, "The absence of remorse, after the commission of a crime, after the crime has been completed, cannot be used as an aggravating factor." (17 RT 3693-3694.)

> But in this particular case, when it comes to asking for mercy, the absence of remorse is not—or the fact there is no remorse, or there isn't any evidence in this record at all, you haven't heard any evidence that this defendant has demonstrated any remorse, so it's not present here as a mitigating factor.

(17 RT 3694.)

Appellant contends that the above-quoted statements of the prosecutor amounted to an unconstitutional and prejudicial argument that *the law* precluded the jury from considering and giving any effect to his mitigating evidence. (II AOB 500, 503-504, 513-517.) "The prosecutor made clear that the jury could not consider [appellant's] mitigating evidence unless they first found that he was remorseful." (II AOB 514.) "The effect of the prosecutor's argument was the imposition of a mandatory death penalty." (II AOB 515.) Phrased another way and in an earlier argument, appellant claims the prosecutor committed misconduct here by attempting to mislead the jury. (II AOB 424-427.)

The People disagree. Fairly read, the prosecutor's argument comported with the law. His comments sought to note that no evidence of remorse had been presented ("you haven't heard any evidence that this defendant has demonstrated any remorse, so it's not present here as a mitigating factor"), not suggest that the absence of remorse was itself a specific aggravating factor ("[t]he absence of remorse, after the commission of a crime, after the crime has been completed, cannot be used as an aggravating factor"). Again, this Court has explained that it reviews allegations of misconduct under the following standard: Is there a reasonable likelihood that the jury understood or applied the complained-of remarks in an improper or erroneous manner? (*People v. Clair*, *supra*, 2 Cal.4th 629, 662-663.) Here, it is not reasonably

likely that a juror would have understood the prosecutor's "condition precedent" language to mean that *under the law* the jury could not consider or accept appellant's evidence in mitigation because he had not first expressed remorse. The prosecutor simply set forth his position that before the jury considered sympathy or mercy it should want to see remorse. That is not an improper or unconstitutional view. The prosecutor did not argue that his view was the law the jury was compelled to follow. The jury knew that the arguments of counsel were just that—argument, and that it would get the law from the trial court. (18 RT 3722-3723.) The jury knew that if the attorneys had said anything which conflicted with the law as given to them by the court, they had to follow the court. (17 RT 3722-3723.) The court instructed the jury that in determining the appropriate penalty it had to consider *all of the evidence presented*, "except as you may be hereafter instructed." (18 RT 3872-3873.) The trial court did not instruct the jury that it could only consider or give effect to the mitigating evidence if it first found remorse.

(2) Appellant also argues that by stating, "before you grant mercy, remorse, the presence of remorse, the fact that your sorry for what you have done can be a mitigating factor," the prosecutor unconstitutionally sought to have the jury penalize appellant for not testifying. (II AOB 500, 517-522, citing 17 RT 3693; *Griffin v. United States*, *supra*, 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106].) Appellant's interpretation is an unreasonable one. No juror would have understood the prosecutor as referencing appellant's failure to testify. In any event, the court instructed the jury: "A defendant in a criminal trial has a constitutional right not to be compelled to testify in either the guilt or penalty phase. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way." (18 RT 3872.) Again, a jury is presumed to follow the instructions given it. (*People v. Jones*, *supra*,

15 Cal.4th 119, 168; *People v. Wash*, *supra*, 6 Cal.4th 215, 263.)

Appellant's first two assignments of "remorse" prosecutorial misconduct fail.

(3) At a later point in the prosecutor's summation the following statements by him and colloquy with the court and defense counsel occurred:

> Another aggravating factor is his callousness at the scene and his failure to show any remorse at the scene of that crime. Totally callous. Different to what she was going through, totally and completely.
>
> What does he do? What does he do at the scene? You see something that is hurting. You see something that is struggling to get relief from pain. You see something that needs help, and your humanity calls out to you and you reach out. You stretch out that hand, that hand of compassion, that hand to try and give some help. And what did he do? What he did as she is laying on her bed crying, because her voice box is broken and she's trying to breathe, he takes this purse, her purse, off the dresser and goes out in the living room and starts looking though it.
>
> Remember the grapes that are on the floor there and the bottles, the coke bottles, he's going through it. What else is he doing? He's trying to think, "How can I get away without being caught? What should I do here so it's clear that, you know, it wasn't a burglar who did this. It was perhaps some other type of situation."
>
> While she is struggling to live, does he lift one finger to call for help?
>
> [Defense Counsel]: Your Honor, I'm going to object. Again, he's asking to speculate what was going on in that room. There's no evidence of that and this is the third objection I've made on that vein and I ask the court for an admonition.
>
> [THE PROSECUTOR] There was—
>
> THE COURT: Just a minute, Mr. [Prosecutor]. All right, I remind the jury again as to the—what is occurring here is argument. It is not evidence in this case. Proceed.
>
> [THE PROSECUTOR]: Thank you. Not one call to the police to go to her home to investigate until Barbara Green goes over there and finds this grizzly sight. He didn't lift a finger to help. Just coldly, callously, without any remorse there figured out what he had to do. He

> let her die, drown, basically suffocate in her own blood. A truly innocent victim. There is no way she placed herself in this situation. No way.
>
> These crimes and the circumstances of these crime greatly increase the guilt and the enormity beyond the mere elements of what he did. Far beyond. And that's why this is such an egregious, horrendous, vicious, violent crime which makes him all those things, this filth, garbage. Words just cannot describe how low this individual is. Someone who could do something like that under these circumstances. There is nothing that offsets, nothing that offsets the horrendousness of these aggravating factors. And there's more which, unfortunately, will have to wait until tomorrow.

(17 RT 3715-3717.)

Appellant recognizes that section 190.3, factor (a), authorizes the jury to consider the circumstances of the crime as aggravating evidence and that "overt remorselessness," i.e., a murderer's callous attitude toward his actions and the victims at the time of his offense, is a circumstance of the crime. (*People v. Gonzalez*, *supra*, 51 Cal.3d at pp. 1231-1232.) In this Court appellant challenges the above-quoted remarks of the prosecutor on the same grounds advanced below—that they rested on impermissible speculation. (II AOB 398-399, 500, 504, 523-527; 17 RT 3716, 3718.) "Instead of relying on the evidence, in urging the jury to consider [appellant's] remorselessness at the scene, the prosecutor speculated as to [appellant's] behavior. For example, the prosecutor speculated that while Ms. Olsson was 'laying on her bed crying,' [appellant] failed to 'lift one finger to call for help,' but instead was rifling through her purse." (II AOB 524.)

The contention is meritless. As the prosecutor correctly told the court, "my argument is totally within the scope of the evidence and the logical inferences that can be drawn from that evidence." (17 RT 3718.) The law indeed provides that prosecutors have a wide-ranging right to discuss the case in closing argument, fully stating their views as to what the evidence shows and what conclusions are proper. (*People v. Thomas*, *supra*, 2 Cal.4th 489, 526.)

And here, the evidence and reasonable inferences therefrom supported the prosecutor's argument that appellant acted with overt remorselessness at the crime scene. A reasonable jury could infer that appellant did not lift a finger to help Olsson given that it was possible she lived for up to an hour after the attack and no one contacted the police until Barbara Green did so. (13 RT 2674-2677.) A reasonable jury could have concluded that Olsson cried as she lay dying given the number and severity of wounds appellant inflicted on her, and a reasonable jury could have inferred that appellant rifled through Olsson's purse, as grapes were found on the floor of Olsson's house and she was known to keep grapes in her purse. (10 RT 2024-2025; 11 RT 2121, 2132.) Also, the purse was found not to contain the change Olsson would have received at her last visit to the supermarket. (11 RT 2207; 12 RT 2313, 2339-2340.)

The evidence overwhelmingly supports a finding that appellant acted with overt remorselessness at the scene.

(4) Later the prosecutor argued the following (as also quoted earlier):

> Now, when you start talking about religions, it's very interesting because you remember, you know, in this country, it's very easy to keep in mind the holiday of Easter. You know what it represents is Christ up there being crucified and we have the good thief and the bad thief. And we've labeled them good thief and bad thief. Why? They're both thieves. But what makes the difference is one of them repented, one of them said, "Forgive me, Lord, I believe in you." The other one just, you know, cussed at Christ, turned his nose, whatever. Christ said to the good thief, you know, you'll be with me in heaven. He was saved. The good thief was saved. The bad thief wasn't.
>
> Well, the moral of that story was that the good thief was not cut down off that cross until he was dead and his soul was saved in heaven. But Caesar law was completed. And the good thief died along with the bad thief.

(18 RT 3800.)

Appellant assigns misconduct to this portion of the prosecutor's argument.

Its "effect," he argues, was to inform the jury that "someone who has not demonstrated remorse should not be saved by them." (II AOB 504-505.) But the allegation is forfeited because appellant did not object to the alleged misconduct at trial nor request an admonition. (*People v. Cain*, *supra*, 10 Cal.4th 1, 48.) Moreover, the jury knew from the court's instructions that it was required to consider *all of the evidence presented* to it, "except as you may be hereafter instructed." (18 RT 3872-3873.) The jury was not instructed that it could only consider or give effect to the mitigating evidence if it first found remorse.

C. Appellant's Additional Arguments All Fail

Appellant additionally contends that this Court's precedents regarding "absence of remorse" lack "sufficient definition" for trial courts to ensure that capital juries can understand how to consider remorse properly when determining penalty. (II AOB 500, 529-534.) "Without definition, the jury considering whether or not the defendant has shown remorse essentially becomes an 'unguided missile,' left free to establish its own penalty criteria." (II AOB 529.) Appellant seeks "reconsideration" of this Court's remorse precedents. (II AOB 507.) Appellant specifically argues that allowing the jury to consider evidence of "overt remorselessness" at the crime scene as a circumstance of the crime creates additional non-statutory aggravation, and impermissibly broadens section 190.3, factor (a), in violation of the state and federal Constitutions. (II AOB 508-510.) Appellant also argues that permitting a prosecutor to point out the absence of post-crime remorse to show the inapplicability of remorse creates "the 'presence' of a non-statutory lethal aggravating factor." (II AOB 510-513.) "This Court's suggestion that the prosecutor can argue that the absence of evidence of remorse 'weighs' against the finding of mitigation evidence transforms the absence of remorse

into an aggravating factor. If the jury may weigh the absence of remorse in its penalty determination, the absence of remorse has the force of an aggravating factor, no matter what it is called." (II AOB 512.) "The prosecutor's right to comment on the apparent absence of remorse to disprove 'potential mitigation' or to undermine any mitigation that was presented is limitless." (II AOB 532.)

This Court has previously declined an invitation to reconsider its holdings permitting a prosecutor to comment on lack of remorse in light of federal constitutional principles guaranteeing the rights to remain silent, and to fair trial, due process, and a reliable penalty determination. (*People v. Lewis*, *supra*, 25 Cal.4th 610, 674.) It should so again.

Appellant next argues that permitting the prosecutor to argue "absence of remorse" below was "materially inaccurate" and fundamentally and unconstitutionally unfair because all of the parties knew that appellant wanted to express that remorse through allocution. (II AOB 500, 527-529.) This contention is wholly without merit. *People v. Keenan*, *supra*, 46 Cal.3d 478, is instructive. There, the defendant urged that the prosecutor had acted in bad faith to mislead the jury in arguing the absence of remorse from defendant because the prosecutor knew of facts which suggested the defendant's remorse. (*Id.* at p. 509.) Specifically, the prosecutor knew, through pretrial motions, that the defendant had written the victim's sister a note expressing regret for the killing, and knew that the defendant had moved to limit cross-examination, if he took the stand, to testimony that he did shoot the victim and was "very sorry" for it and regretful. (*Ibid.*) This Court held:

> In general, . . . the prosecutor may comment on the record as it actually stands. The record contains no explanation why the defendant did not present any "remorse" note as mitigating evidence. Further, defendant chose not to take the stand and express his remorse after a proper trial court ruling deferring his motion to limit cross-examination.

(*Ibid.*)

Likewise here the prosecutor commented on the record as it actually stood, as appellant chose not to testify.

Finally, appellant urges that the trial court prejudicially erred in not instructing the jury "on how to properly assess and consider the absence of remorse." (II AOB 500, 534-537.) More specifically, appellant contends that the trial court erred in not providing sua sponte instructions defining the term "lack of remorse," informing the jury that it can only consider the absence of remorse if such absence is reasonably inferable from the evidence; directing the jury "not to speculate that a capital defendant lacks remorse simply because he did not take the witness stand or otherwise make statements as to the charges"; informing the jury that overt remorselessness at the crime scene is the only remorse that could comprise an aggravating factor; cautioning the jury that it may only consider allegations of lack of remorse other than overt remorselessness at the crime scene as rebuttal argument to a defense presentation of the mitigating factor of remorse; and directing the jury that it may only consider remorse or its absence if those factors are applicable. (II AOB 535-536.)

The general rule is that in a criminal case the trial court must, on its own motion, even without request, instruct the jury on all general principles of law relevant to the issues raised by the evidence. (*People v. Hood* (1969) 1 Cal.3d 444, 449.) The general principles of law governing the case are those commonly or closely and openly connected with the facts of the case before the court that are necessary for the jury's understanding of the case. (*People v. Wilson* (1967) 66 Cal.2d 749, 759.)

No instructional error occurred here. "The law is settled that when terms have no technical meaning peculiar to the law, but are commonly understood by those familiar with the English language, instructions as to their meaning

are not required." (*People v. Anderson* (1966) 64 Cal.2d 633, 639.) This Court has already stated that jurors, in application of their common sense and life experience, understand the concept of remorse. (*People v. Keenan*, *supra*, 46 Cal.3d at p. 510.) Patently, a trial court also does not err in failing to instruct, on its own motion, on a matter that is covered by other instructions in different language. Here, the penalty phase instructions given the jurors told them they could not consider for any purpose appellant's failure to testify (18 RT 3872),[31] that they could only consider the evidence that was presented in court (18 RT 3868-3869), that they could only consider "applicable" mitigating and aggravating factors (18 RT 3873), and that the absence of a statutory mitigating factor did not constitute an aggravating factor (18 RT 3874). Furthermore, the prosecutor's summation made clear that appellant's overt remorselessness could be considered as an aggravating circumstance of the crime (17 RT 3715-3717), but that appellant's failure to express post-crime remorse was not an aggravating factor, just a missing potential aggravating factor (17 RT 3693-3694). In short, the jury had been informed of everything appellant now contends the trial court should have provided instruction on.

The trial court committed no sua sponte instructional error.

---

31. The well-established California rule is that instructions warning against adverse inferences from a defendant's silence are required only on the request of the defendant. (*People v. Gardner* (1969) 71 Cal.2d 843, 854.)

XXIII.

THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE TRIAL COURT INSTRUCT THE JURY THAT THE REASONABLE DOUBT STANDARD GOVERNS THE PENALTY DETERMINATION

Appellant contends that he "was sentenced to death under an unconstitutional death penalty scheme that failed to require that all sentencing factors be charged and found by a grand jury or magistrate, and found beyond a reasonable doubt by a unanimous jury. Specifically, the jury was not required to unanimously find beyond a reasonable doubt that any aggravating circumstances existed, that any unanimously proven aggravating circumstances substantially outweighed the mitigating circumstances or that death was the appropriate penalty. The death sentence in this case must be reversed because it offends the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as Article I of the California Constitution." (II AOB 541.) Appellant places heavy reliance on *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, *Ring v. Arizona*, *supra*, 536 U.S. 584, *Blakely v. Washington*, *supra*, 542 U.S. 269, and *United States v. Booker*, *supra*, 543 U.S. 229.

This Court has repeatedly rejected appellant's current contention. Recently in *People v. Dickey* (2005) 35 Cal.4th 884, 930-931, for example, the Court explained:

> "Defendant claims that it is unconstitutional to impose a sentence of death unless the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. This claim was first rejected by our court in *People v. Rodriguez* [(1986)] 42 Cal.3d [730,] 777-779 [], and has been rejected ever since. (See, e.g., [*People v.*] *Snow* [(2003)] 30 Cal.4th [43,] 125-127 []; [*People v.*] *Burgener*[] [(2003)] 29 Cal.4th [833,] 884, fn. 7; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1150-1151 []; [*People v.*] *Clair*, *supra*, 2 Cal.4th [629,] 691.) As we recently stated: 'The Constitution does not require the jury to find beyond a reasonable doubt that a particular factor in aggravation exists, that the aggravating factors outweighed the mitigating factors, or that death was the appropriate penalty.' (*Burgener, supra*, 29

Cal.4th at p. 884, fn. 7.)" (*People v. Cox* [(2003)] 30 Cal.4th 916, 971 [].)

Defendant acknowledges this court has previously rejected similar arguments. However, as did the defendant in *Cox*, defendant "asks us to reconsider this position in light of two recent United States Supreme Court cases, *Apprendi v. New Jersey*[,] [*supra*,] 530 U.S. 466 [], and *Ring v. Arizona*[,] [*supra*,] 536 U.S. 584 []. Specifically, defendant argues that the two cases read together mandate that the aggravating circumstances necessary for the jury's imposition of the death penalty be found beyond a reasonable doubt. We disagree. As this court recently stated in [*People v.*] *Snow, supra*, 30 Cal.4th at page 126, footnote 32: 'We reject that argument for the reason given in *People v. Anderson*[,] [*supra*,] 25 Cal.4th [543,] 589-590, footnote 14: "[U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death *is* no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without possibility of parole. (§ 190.2, subd. (a).) Hence, facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate do not come within the holding of *Apprendi*." The high court's recent decision in *Ring v. Arizona*[, *supra*,] 536 U.S. 584 does not change this analysis. Under the Arizona capital sentencing scheme invalidated in *Ring*, a defendant convicted of first degree murder could be sentenced to death if, and only if, the trial court first found at least one of the enumerated aggravating factors true. (*Id.* at p. 603.) Under California's scheme, in contrast, each juror must believe the circumstances in aggravation substantially outweigh those in mitigation, but the jury as a whole need not find any one aggravating factor to exist. The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another. Nothing in *Apprendi* or *Ring* suggests the sentencer in such a system constitutionally must find any aggravating factor true beyond a reasonable doubt.' (Accord, *People v. Smith* (2003) 30 Cal.4th 581, 642 []; *People v. Prieto* (2003) 30 Cal.4th 226, 275 [].)" (*People v. Cox, supra*, 30 Cal.4th at pp. 971-972.)

(*People v. Dickey, supra*, 35 Cal.4th at pp. 930-931.)

Appellant calls this Court's prior decision on this question "faulty" and

"wrong" (II AOB 546), but offers nothing new in the way of analysis. His claim merits no further attention. (*People v. Robinson* (2005) 37 Cal.4th 592, 654, and numerous cases there cited.)

XXIV.

NO CUMULATIVE ERROR REQUIRES REVERSAL OF THE DEATH JUDGMENT

Appellant contends as follows:

> The cumulative effect of the numerous errors that occurred during the penalty phase prejudiced [appellant] and rendered his death sentence unconstitutional. Although this Court may find that no single alleged error may warrant reversal of his sentence, the cumulative effect of the errors here deprived [appellant] of his rights to due process, to a fair trial, and to a reliable sentencing determination.

(II AOB 566.)

Appellant further invokes his rights to equal protection, a fair and impartial jury, and to present a defense, as being violated by the cumulative effect of the penalty phase errors. (II AOB 567-568.) Appellant seeks reversal for the "cumulative effect" of the prosecutorial misconduct he has alleged. (II AOB 427-429.)

The People disagree. Although we have assumed, for the sake of argument, the presence of some errors, appellant has failed to definitively establish any penalty phase error other than minor missteps by the prosecutor during opening statement, fleeting witness references to excluded victim impact evidence, and religious references by all counsel. When those errors are viewed cumulatively appellant is no more entitled to reversal of the death judgment than he is when the errors are viewed singly. It is not reasonably possible that an error-free trial would have resulted in the jury returning a life-without-parole penalty verdict. The properly admitted evidence in aggravation, particularly that revealing the egregious circumstances of the crime, was overwhelming. Appellant not only forced his way into the home and bedroom of a 60-year-old woman, but then he attempted to violate her sexually, and likely did. (13 RT 2687-2688.) Thereafter he stabbed her to death in a most callous and inhumane way. What appellant did to Olsson,

how he did it, and the devastation he caused those who loved her and worked with her, overwhelmingly outweighed the fact that he had dysfunctional parents and a difficult childhood.

Appellant is not entitled to relief under his "cumulative error" theory.

XXV.

THE TRIAL COURT DID NOT ERR IN ANY RESPECT IN ITS CONSIDERATION OF APPELLANT'S MOTION TO MODIFY THE VERDICT

The trial court denied appellant's automatic section 190.4, subdivision (e) motion to modify the death verdict. (18 RT 3906-3914.) Appellant now asserts that the trial court violated several of his federal and state constitutional rights by prejudicially "failing" to perform its duties in reviewing the jury's death verdict per the motion for modification. (II AOB 569-597.) According to appellant, the trial court erred by, among other things, failing to make written findings; making vague generalizations insufficient for review rather than appropriate findings; failing to discuss any of the evidence presented at trial; failing to assess the credibility of the witnesses; failing to determine the probative force of the testimony; failing to weigh the evidence; failing to consider valid mitigating evidence; using improper standards; considering improper information not presented to the jury; and making "broad findings" that "were often contrary to the undisputed evidence at trial." (II AOB 573-595.) Reversal of the penalty judgment is required here, appellant concludes (II AOB 595-597), although he neglects to specify whether a remand for a penalty phase retrial or for a reconsideration of the verdict-modification application would be the appropriate remedy for the errors he discerns. This Court need not decide on any remedy because no prejudicial error occurred.

A. The Law And Background Is Detailed

Section 190.4, subdivision (e), provides in relevant part:

> In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding

> . . . . In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

This Court has repeatedly declared that a trial court's function in ruling on a motion for modification of the jury's penalty verdict "is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether, in the judge's independent judgment, *the weight of the evidence supports the jury verdict*." (*People v. Cooper* (1991) 53 Cal.3d 771, 848, internal quotation marks and citations omitted.) An "independent" review is one the court undertakes in accordance with the weight it believes the evidence deserves. (*People v. Marshall* (1990) 50 Cal.3d 907, 942.)

While it is clear that no judge should deny the motion merely because the jury's penalty verdict is supported by "substantial evidence" (*People v. Bonillas* (1989) 48 Cal.3d 757, 800-801), it is just as clear that no judge may disregard the verdict or decide what result he or she would have reached if the case had been tried without a jury. (*People v. Risenhoover* (1968) 70 Cal.2d 39, 58, quoting *People v. Robarge* (1953) 41 Cal.2d 628, 633.) Indeed, that a trial judge's authority to reduce a jury's penalty verdict is more circumscribed than the jury's discretion to select appropriate penalty in the first instance follows ineluctably from the fact that the sentencing authority under California law *is the jury* (unless waived by both parties), not the judge. In ruling on the motion for verdict modification, the trial judge must "review . . . , consider, take into account, and be guided by" the very matters that the jury relied upon in reaching its penalty verdict. (§ 190.4, subd. (e); *People v. Jennings* (1988) 46 Cal.3d 963, 995.) The trial court must also, in deciding

the verdict-modification question, "specify reasons . . . sufficient 'to assure thoughtful and effective appellate review.'" (*People v. Rodriguez, supra*, 42 Cal.3d 730, 794, citation and footnote omitted.)

This Court subjects the trial court's verdict-modification ruling "'to independent review: the decision resolves a mixed question of law and fact; a determination of this kind is generally examined de novo. . . . Of course, when we conduct such scrutiny, we simply review the trial court's determination after independently considering the record. We do not ourselves decide the verdict-modification application.'" (*People v. Holt, supra*, 15 Cal.4th 619, 710; accord, *People v. Memro* (1995) 11 Cal.4th 786, 884; *People v. Berryman* (1993) 6 Cal.4th 1048, 1106.)

Here, the trial court began its determination of appellant's motion by reviewing the jury's verdict, count by count. The court also summarized the requirements of section 190.4, subdivision (e). (18 RT 3908-3909.) The court next reviewed the requirements of *People v. Rodriguez, supra*, 42 Cal.3d 730, 793, and other cases construing section 190.4(e), and acknowledged its duty to make an independent determination as to the appropriate penalty and to state its reasons on the record. (18 RT 3909-3910.) In the court's view, this required that it not only determine whether in its independent judgment the weight of the evidence supported the jury's verdict, but that it needed to "assess the credibility of the witnesses, determine the probative force of the testimony, and weigh the evidence." (18 RT 3910.)

Thereafter the trial court announced that it had reviewed the presence or absence of the aggravating and mitigating circumstances listed in section 190.3, "and specifically agrees that the jury's assessment that the circumstances in aggravation outweigh the circumstances in mitigation is supported by the weight of the evidence." (18 RT 3910.) "Further, the court finds that the evidence supporting the truth of the special circumstance, to wit:

that the murder of [Sandy] Olsson occurred while the defendant was engaged in the commission or attempted commission of a burglary is overwhelming, and that the jury's assessment that the evidence in aggravation outweighs the evidence in mitigation, so as to support the selection of the death penalty as the appropriate penalty is supported by the weight of the evidence." (18 RT 3910-3911.)

The trial court next found as follows: "In terms of credibility, the court agrees with the implicit findings of the jury that the witnesses for the People were credible and believable." (18 RT 3911.)

The trial court then stated that it knew under section 190.4 that it had to state on the record its reasons for its findings, and the reasons for the ruling on the present application, "and direct that they be entered into the clerk's minutes." (18 RT 3911.) The court stated that it had examined and reviewed all the evidence presented at both the guilt and penalty phases, examined all the exhibits admitted into evidence, reviewed the transcripts on the guilt, special circumstance and aggravation/mitigating issues, and "also reviewed its own personal notes relating to the evidence received as to all phases of the case." (18 RT 3911.)

The trial court next enumerated the verdict on the murder charge and special circumstance allegation and pronounced itself, after an independent review, satisfied beyond a reasonable doubt that each verdict was correct. (18 RT 3911-3912.)

The trial court then reiterated that it had personally and carefully reviewed the transcripts of and evidence from the penalty phase, and made the following detailed and lengthy statement to conclude its ruling:

> The court has reviewed and independently taken into account and is guided by the following factors in aggravation and mitigation: The court has reviewed the circumstances of the crime of which the defendant has been convicted and the existence of the special circumstance found to be true, and the court independently finds that

the circumstances surrounding the first degree murder of [Sandy] Olsson were vicious and pitiless. The defendant brutally stabbed the victim numerous times and exhibited a high degree of cruelty and callousness.

. . . . . .

The court has further examined the evidence offered in the penalty phase by the defendant and independently finds that there were no circumstances which extenuated the gravity of his crimes whether or not they be a legal excuse.

The court has further considered the evidence from the members of the defendant's family who have testified about his family history activities and background offered in the penalty phase, and the court independently finds that none of the evidence offered by the defendant could in any way be considered a moral justification or extenuation for his conduct.

The court further finds in evaluating all the evidence in the penalty phase that there are no factors in mitigation which will extenuate and mitigate the gravity of the crimes committed.

The court further finds that at the time of the offense, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to requirements of law, was not impaired as a result of mental disease or defect or the effects of intoxication.

The court further finds the offenses were not committed while the defendant was under the influence of extreme mental or emotional disturbance.

The court has also taken into consideration the age of the defendant at the time of the crime and finds that this is not a mitigating factor.

The court has further taken into consideration and independently reviewed any other circumstances which could extenuate the gravity of the crime even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's background or character or record that the defendant offered as a basis for a sentence less than death, whether or not related to the offenses for which he was on trial, and finds that there are none which extenuate the gravity of the crimes or mitigates these offenses.

Considering all of the evidence and by independent review, the court's personal assessment is that the factors in aggravation outweigh those in mitigation.

> And further, the court independently finds that the evidence in aggravation is so substantial in comparison to the evidence in mitigation that death is warranted and not life in prison without possibility of parole.
>
> Therefore, the defendant's motion to modify the verdict of death to life in prison without possibility of parole is denied.

(18 RT 3912-3914.)

Appellant now challenges the trial court's verdict modification ruling on several grounds, none of which he preserved below. Nevertheless, the contentions are not forfeited. In *People v. Riel, supra*, 22 Cal.4th 1153, 1220, this Court held that in light of *People v. Hill, supra*, 3 Cal.4th 959, trial court errors in deciding a verdict modification motion are waived absent a contemporaneous objection, but only in cases where the modification hearing is held after the finality of *Hill*. The *Hill* case became final on December 19, 1992. (See Cal. Rules of Court, rule 28.) The verdict modification hearing occurred in the present case on December 4, 1992. (18 RT 3906.)

As we shall explain, all of appellant's challenges fail on the merits.

B. The Trial Court Did Not Make "Deficient" Aggravation Findings

As outlined above, the trial court stated that it reviewed the presence of each aggravating factor listed in section 190.3 and independently determined that it was guided by aggravating factor (a): the circumstances of the crime. (18 RT 3910, 3912.) The court "independently finds that the circumstances surrounding the first degree murder of [Sandy] Olsson were vicious and pitiless. The defendant brutally stabbed the victim numerous times and exhibited a high degree of cruelty and callousness." (18 RT 3912.)

There exists no credible argument that this finding is one the trial court could not make, either factually or legally. Instead, appellant calls it "deficient" because, in his view, it is "vague," unsupported by "specific

reasons" and "incapable of appellate review." (II AOB 575-578.)

Not so. A review of the record shows that appellant stabbed Olsson numerous times in a cruel, callous, vicious and pitiless way. Those were the court's reasons for this finding and there is nothing "vague" about it, which is presumably why the experienced defense counsel made no such complaint below.

C. The Trial Court Did Not Make "Deficient" Mitigation Findings

With respect to trial court's verdict-modification statements regarding the evidence in mitigation, appellant claims the court's findings were "deficient" because they were "improper," "inadequate," ignored the evidence, were contrary to the uncontradicted evidence, "ignored other mitigation evidence," were made under the incorrect standard that mitigation evidence must relate only to the circumstances of the crime to be considered, and may have constituted a finding that no mitigation evidence existed. (II AOB 575, 579-586.)

Contrary to appellant's claim, a review of the trial court's ruling does not show the trial court to have "ignored" the mitigating evidence or ruled contrary to uncontradicted evidence. "The court has further examined the evidence offered in the penalty phase by the defendant and independently finds that there were no circumstances which extenuated the gravity of his crimes whether or not they be a legal excuse. [¶] The court has further considered the evidence from the members of the defendant's family who have testified about his family history activities and background offered in the penalty phase, and the court independently finds that none of the evidence offered by the defendant could in any way be considered a moral justification or extenuation for his conduct." (18 RT 3912-3913.)

The court was entitled to disbelieve or discredit the testimony of witnesses

appellant presented in mitigation. And, this Court "may not interpose or substitute its conclusion as to the relative balance of aggravating and mitigating circumstances for that of the trier of fact. Our inquiry must end with the finding that all constitutional and statutory considerations have been observed." (*People v. Hawthorne*, *supra*, 4 Cal.4th 43, 80.)

We also dispute any suggestion that the trial court operated under a misapprehension of law and believed evidence wasn't mitigating unless it related to the circumstances of the crime. "The court has further taken into consideration and independently reviewed and any other circumstances which could extenuate the gravity of the crime even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's background or character or record that the defendant offered as a basis for a sentence less than death, whether or not related to the offenses for which he was on trial, and finds that there are none which extenuate the gravity of the crimes or mitigating these offenses." (18 RT 3913-3914.)

Finally, as this Court noted in *People v. Dennis* (1998) 17 Cal.4th 468, 551, a trial court's failure to mention other possible mitigating evidence in its comments does not render its verdict-modification ruling defective.

D. The Trial Court Properly Found That The Circumstances In Aggravation Outweighed The Circumstances In Mitigation

The trial court not only stated that it "specifically agreed" with the jury's conclusion that the circumstances in aggravation outweighed those in mitigation because "the weight of the evidence" compelled such a conclusion (18 RT 3910), but held that "[c]onsidering all of the evidence and by independent review, the court's personal assessment is that the factors in aggravation outweigh those in mitigation. [¶] And further, the court independently finds that the evidence in aggravation is so substantial in

comparison to the evidence in mitigation that death is warranted and not life in prison without possibility of parole" (18 RT 3914).

Appellant dismissed the foregoing statement as "conclusory," and alleges that it fails to show that the trial court weighed the evidence in aggravation against the evidence in mitigation as required by section 190.4, subdivision (e). According to appellant, the trial court "did not sufficiently detail the specific aggravating evidence that it found to exist," the weight it gave to the aggravating evidence, the weight it gave to the mitigating evidence, "or the reasons why" it concluded that the former outweighed the latter. (II AOB 575, 586-587.)

The People submit appellant must be examining another record. Here, the trial court detailed the aggravation evidence it found to be true (the circumstances of the crime that showed appellant's callousness, viciousness, and pitilessness), and also detailed the mitigating evidence (appellant's family background, etc.) and his findings that this latter evidence did not sufficiently extenuate or mitigate the crime or outweigh the aggravating evidence. The court was not required to assign a specific weight to the aggravating and mitigating evidence; and its finding that aggravation outweighed the mitigation was "sufficiently specific to demonstrate his performance of the statutory requirement to review all the evidence independently. (§ 190.4, subd. (e).)" (*People v. Farnam*, *supra*, 28 Cal.4th 107, 195.) Indeed, as in *People v. Cunningham*, *supra*, 25 Cal.4th 926, 1040, the trial court noted the factors in aggravation and considered and weighed the circumstances in mitigation and aggravation; the trial court's statement to that effect "sufficiently set[s] forth" its reasons for its refusal to modify penalty, and is "adequate to permit appellate review."

Finally, although "a more detailed statement of reasons would have been helpful to understand more fully the trial court's independent determination

that death was warranted . . . the record here not only establishes that the court acted on a proper understanding of its statutory duties, it amply justifies the court's conclusion as well." (*People v. Farnam*, *supra*, 28 Cal.4th at p. 195, and cases there cited.)

E. The Trial Court Did Not Improperly Rely On His Notes

At one point in its denial of appellant's verdict-modification motion the trial court stated that it had "reviewed its own personal notes relating to the evidence received as to all phases of the case." (18 RT 3911.) Appellant assigns error for this, claiming that the trial court's use of its notes "violated the most basic notions" of fairness in that it amounted to a death sentence premised "on undisclosed and unknown information" that appellant could not confront and challenge and this Court cannot review. (II AOB 588-589.)

No error occurred. The trial court made clear that it knew "the only evidence which the court is to review is that which was before the jury." (18 RT 3910.) Thus, when the court reviewed "its own personal notes relating to the evidence received," it was reviewing notes of evidence presented to the jury, and was not relying on any unpresented matters. If judicial notetaking in this context was illegal, so too would juror notetaking during the course of trial. Appellant supplies no authority in support of the latter proposition.

F. The Trial Court Did Not Improperly Rely On The Probation Report

When a capital defendant is also convicted of a non-capital offense, the trial court is required to read the prepared probation report before sentencing the defendant on the non-capital conviction. (*People v. Lewis* (1990) 50 Cal.3d 262, 287, citing § 1203, subd. (b).) The *Lewis* court reiterated that in such situations "the preferable procedure" is for the trial court "to defer

reading the probation report until ruling on the automatic application for modification of verdict. This will ensure that the probation report does not influence the ruling on the section 190.4, subdivision (e) motion." (50 Cal.3d at p. 287.)

Here, the trial court stated that it had read appellant's probation report prior to ruling on appellant's verdict-modification motion. (18 RT 3917.) Appellant calls that a reversible error, asserting that here, as in *Lewis*, his probation report contained prejudicial information about himself that must have influenced the trial court in denying the verdict modification application. (II AOB 589-593.) Appellant's argument has merit only if this Court does not believe the trial court when it also stated, "it should be noted that the court has considered this report solely for the purpose of sentencing on the noncapital offense and did not consider it in ruling on the previous motion or for any other purpose." This Court has no reason not to take the trial court at its word. Because this Court must presume that the trial court followed the law (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913) it must presume the trial court was fully capable of compartmentalizing the information from the probation report (see *People v. Livaditis* (1992) 2 Cal.4th 759, 787 ["absent a contrary indication in the record, we assume that the court was not influenced by the report in ruling on the motion"]).

The trial court's statement that it did not consider the probation report in ruling on the verdict-modification motion distinguishes this case from *Lewis*.

G. The Trial Court Made An Independent Determination On The Appropriateness Of The Death Penalty

Contrary to appellant's final assertion (II AOB 575, 593-595), the trial court did indeed exercise its independent judgment in reweighing the penalty phase evidence. At least 10 times the court used the words "independent" or

"independently" to describe its penalty phase review and findings. Nothing the court did or said suggests it denied the verdict-modification motion simply because the jury's death verdict was supported by substantial evidence, or that it felt it had no authority to modify the penalty. Again this Court should take the trial court at its word (see 18 RT 3909-3910 [court is "mindful" that it must "make an independent determination whether imposition of the death penalty upon the defendant is appropriate in light of the relevant evidence and the applicable law"]) and reject appellant's claim that the trial court simply "deferred" to the jury.

We suggest that appellant's real complaint is not the trial court failed to make independent findings, but that the court viewed the evidence differently than appellant does and drew inferences unfavorable to him. The record amply supports all the inferences the court drew.

"In short" and in sum, "the court carefully and conscientiously performed its duty under section 190.4." (*People v. Steele*, *supra*, 27 Cal.4th 1230, 1268.)

XXVI.

DEATH-QUALIFICATION JURY VOIR DIRE PASSES MUSTER UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS

"A 'death qualified' jury is one from which prospective jurors have been excluded for cause in light of their inability to set aside their views about the death penalty that 'would "prevent or substantially impair the performance of [their] duties as [jurors] in accordance with [their] instructions and [their] oath."'" (*Buchanan v. Kentucky* (1987) 483 U.S. 402, 408, fn. 6 [107 S.Ct. 2906, 97 L.Ed.2d 336]; quoting *Wainwright v. Witt, supra*, 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; *Adams v. Texas* (1980) 448 U.S. 38, 45 [100 S.Ct. 2521, 65 L.Ed.2d 581].)

Appellant's jury was death qualified through *Hovey* voir dire and the individual questioning of jurors about their views on the death penalty. (*Hovey v. Superior Court* (1980) 28 Cal.3d 1.) Appellant contends that this is irrational, given that the *Witt* "substantial impairment" test is really only appropriate for a "fact-finding" jury and leads to the for-cause exclusion of prospective jurors with moral views against the death penalty, while at the same time the duty of a penalty phase jury is to exercise moral and normative judgments. (II AOB 598-604, 608, 637.)

More specifically, appellant contends that *Hovey* voir dire and death qualification in general in California:

- violates a defendant's right to a trial by an impartial jury under both the Sixth and Fourteenth Amendments, as well as article I of the California Constitution, because death qualification leads to juries "prone to convict" and prone to impose a death sentence, (II AOB 598, 617-628, 638);
- violates a defendant's right to a jury trial under both the Sixth and Fourteenth Amendments, as well as article I of the California

Constitution, because death qualification "defeats" the "purposes underlying the right to a jury trial" (e.g., death qualification makes "the 'commonsense judgment of the community' unavailable"; removes the hedges against the overzealous or mistaken prosecutor or biased judge; fails to preserve public confidence; and removes the belief that the sharing in the administration of justice is a civic responsibility), (II AOB 598, 631-633);

- violates a defendant's rights under the Sixth and Fourteenth Amendments, and article I of the California Constitution, because "the process" of death qualification "influences the deliberative process and the mind set of jurors concerning their responsibilities and duties" by "indoctrinating" the jurors "to a pro-conviction and pro-death" view, (II AOB 598, 630-631);
- violates a defendant's rights under the Sixth, Eighth, and Fourteenth Amendments, as well as article I of the California Constitution, because death qualification permits prosecutors to use "gamesmanship" in their exercise of peremptory challenges to obtain "pro-conviction" and "pro-death" jurors, (II AOB 598, 627-628, 633-635);
- violates a defendant's rights to a representative jury under the Sixth, Eighth, and Fourteenth Amendments, as well as article I of the California Constitution, because death qualification leads to the impermissible exclusion of women, African-Americans, and religious persons from capital juries, (II AOB 598, 616, 626-627, 638);
- violates a defendant's Eighth Amendment right against cruel and unusual punishment and to heightened reliability because death qualification leads to juries "prone to convict" and prone to impose a death sentence, (II AOB 598, 629-630, 637-638);

- violates a defendant's Eighth Amendment right against cruel and unusual punishment because "evolving standards of decency" are the cornerstones of Eighth Amendment analysis, the actions of sentencing juries are one of the sole reliable factors in the "evolving standards" analysis, and death qualification leads to an entire segment of the community *not* having their values represented in jury sentencing determinations and the contemporary standards of decency analysis, (II AOB 598, 629-630, 637);
- violates a defendant's Fourteenth Amendment right to equal protection, Fourteenth Amendment right to due process, and identical rights under article I of the California Constitution, because death qualification produces juries "prone to convict" and prone to impose a death sentence, (II AOB 598, 608-612, 616, 637-638);
- violates a defendant's rights to equal protection as illustrated by *Bush v. Gore* (2000) 531 U.S. 98 [121 S.Ct. 525, 148 L.Ed.2d 388], because death qualification in California has "no standards" and thus the unfettered and unreviewable trial court discretion in death qualification leads to "wildly disparate and arbitrary treatment of similarly situated capital defendants," (II AOB 598, 612-615, 637).

In light of the above, appellant demands a reversal of both his conviction and death sentence. (II AOB 635-638.) Appellant is entitled to no such thing.

Preliminarily, we note that appellant failed to object to the *Hovey* death-qualification voir dire on any of the aforementioned grounds and thus has failed to preserve these issues for appeal. (*People v. Gurule* (2002) 28 Cal.4th 557, 597, citing *People v. Avena* (1996) 13 Cal.4th 394, 413.)

Second, the United States Supreme Court has already previously rejected several of appellant's federal constitutional attacks on death qualification. For example, in *Lockhart v. McCree* (1986) 476 U.S. 162 [106 S.Ct. 1758, 90

L.Ed.2d 137], the defendant offered studies suggesting that juries from which jurors who were opposed to the death penalty were excluded were more "conviction prone" than other juries, studies whose validity the Court questioned but adopted for the purposes of the decision. The Court held that even assuming arguendo that a death-qualified jury was conviction prone, it did not violate the fair cross-section requirement because the petit jury was involved and not the jury venire. Moreover, the *Lockhart* court continued, even if the fair cross-section requirement were applied to a petit jury, a group of people sharing a fixed opposition to the death penalty was not a cognizable group within the meaning of the Fourteenth Amendment. Finally, the Court also focused on the jury actually impaneled in Lockhart and found there was nothing to suggest that any particular juror was partial.

Likewise, in *Buchanan v. Kentucky*, *supra*, 483 U.S. 402, the High Court found that the use of death-qualified jury for a joint trial in which the death penalty was sought only against one defendant did not violate the Sixth Amendment right to an impartial jury.

Appellant launches into an vigorous attack on *Lockhart*, claiming that "current empirical studies" show that death-qualified juries are indeed conviction prone and death prone. (II AOB 615-628.) However, this Court "may not depart from the High Court ruling as to the United States Constitution." (*People v. Steele*, *supra*, 27 Cal.4th 1230, 1243.)

Furthermore, in *People v. Jackson*, *supra*, 13 Cal.4th 1164, this Court considered the "social science evidence" the defendant there offered to show "that death-qualified juries are more prone to convict than those not thus qualified," and this Court concluded that such evidence does not support a constitutional prohibition of death qualification. (*Id.* at pp. 1198-1199.) In *People v. Cummings*, *supra*, 4 Cal.4th 1233, 1279, this Court held that death qualification does not violate a defendant's Fourteenth Amendment right to

a fair trial, and in *People v. Carrera* (1989) 49 Cal.3d 291, 333, held that death qualification does not violate a defendant's Sixth Amendment right to a fair and impartial jury. (Accord, *People v. Gurule*, *supra*, 28 Cal.4th at p. 597.) Nor does death qualification "improperly discriminate against racial minorities (*People v. Johnson*[] [(1989)] 47 Cal.3d [1194,] 1214-1215), or produce a conviction-prone or death-penalty-prone jury (*People v. Carrera*[,] [*supra*,] 49 Cal.3d [at p.] 331 []). Finally, the prosecutor's use of peremptory challenges does not exacerbate the alleged problem. (*Ibid.*)" (*People v. Gurule*, *supra*, 28 Cal.4th at p. 597.)

> Defendant claims that the prosecutor used his peremptory challenges to systematically exclude prospective jurors who professed skepticism about the death penalty but were not excludable for cause on that basis. He further claims that as a result he was denied due process, the right to an impartial jury, and the right to a reliable determination of guilt and penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their California equivalents. We have rejected substantially similar contentions (*People v. Marshall* (1990) 50 Cal.3d 907, 927 []), and decline to reconsider them here.

(*People v. Jackson*, *supra*, 13 Cal.4th at p. 1200.)

Finally, we note that in *People v. Catlin* (2001) 26 Cal.4th 81, 112, this Court held that death qualification does not violate the state constitutional right to an impartial jury, and in *People v. Stanley*, *supra*, 10 Cal.4th 764, 797-798, it held that death qualification does not violate a capital defendant's right to an impartial or representative jury. Appellant "presents no good reason [for this Court] to reconsider [its] ruling as to the California Constitution."

For all of the foregoing reasons this Court should reject appellant's twenty-sixth assignment of error.

XXVII.

CALIFORNIA'S DEATH PENALTY LAW ADEQUATELY PERFORMS THE CONSTITUTIONALLY MANDATED NARROWING FUNCTION

In *Furman v. Georgia* (1972) 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346], the United States Supreme Court made clear that death penalty statutes pass constitutional muster when they narrow the class of death eligible offenders so as to avoid arbitrary and capricious imposition. The death penalty law must "provide a meaningful basis" for distinguishing the few cases in which the penalty is imposed "from the many cases in which it is not." (*People v. Edelbacher*, *supra*, 47 Cal.3d 983, 1023.)

Here, relying primarily on a law review article which studied more than 400 appealed first degree California murder cases between the years 1988 to 1992, appellant claims that California's death penalty scheme does not sufficiently narrow the class of death-eligible defendants and thus violates *Furman*, as well as the Eighth Amendment prohibition against cruel and unusual punishment, the Fourteenth Amendment requirement of due process of law, and article I of the California Constitution. (II AOB 639-686.)

> The California death penalty scheme does not meaningfully, rationally, or genuinely narrow the class of death-eligible offenders. It does not narrow in a quantitative manner. It does not narrow in a qualitative manner. It was not carefully crafted by the Legislature, but instead through a misleading initiative process. It has grown further with the assistance of expansive ad hoc decisions by this Court. California's death penalty fails all three aspects of the *Furman* mandate and must now be deemed unconstitutional.

(II AOB 656; see also II AOB 639.)

Appellant complains particularly about the felony-murder special circumstance, the special circumstance the jury found true in his case, calling it among the most egregiously broad categories of death-eligible first degree

murder. (II AOB 649-651, 657-660.) "The felony murder special circumstances are so numerous that they include situations such as where the defendant yanked a purse off a victim who then gave chase and died of a heart attack, triggering the felony-murder robbery special circumstance; or where the defendant stole clothes from a department store and while fleeing, ran a red light, hitting another car, and killing the passenger, triggering the felony-murder burglary special circumstance. A death penalty scheme that renders such offenders death-eligible cannot be said to genuinely narrow the class of death-eligible offenders to a small subclass of murderers most deserving of death." (II AOB 659, citation omitted.)

"Since [appellant] was sentenced to death under this unlawful death penalty scheme, his death sentence is unconstitutional and must be vacated." (II AOB 639.)

Appellant's argument 27 is without merit.

Appellant cites (II AOB 642) and relies heavily on a law review article (Schatz and Rivkin, *The California Death Penalty: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283) in which the authors attempted to demonstrate that aside from cases where death was adjudged in this state between 1988-1992 (and, therefore, necessarily, where the trier of fact found at least one special circumstance allegation true), a large percentage of California first degree murder cases have "factually" been special circumstance cases. This, the authors continue, reflects a failure of the special circumstances to significantly narrow the class of death-eligible murderers as *Furman v. Georgia, supra*, 408 U.S. 238, and *Zant v. Stephens* (1983) 462 U.S. 862 [103 S.Ct. 2733, 77 L.Ed.2d 235], require for a constitutional death penalty. (See II AOB 665-671.) According to appellant, "these failures result in the arbitrary death penalty condemned" by the High Court. (II AOB 644-645.)

This Court, however, has repeatedly held that California's death penalty

law, as a whole, adequately narrows the class of death eligible murderers. (*People v. Dickey*, *supra*, 35 Cal.4th 884, 931; *People v. Roldan*, *supra*, 35 Cal.4th 646, 745; *People v. Griffin*, *supra*, 33 Cal.4th 536, 596; *People v. Morrison* (2004) 34 Cal.4th 698, 730; *People v. Gurule*, *supra*, 28 Cal.4th 557, 663-664; *People v. Koontz* (2002) 27 Cal.4th 1041, 1095; *People v. Lewis*, *supra*, 26 Cal.4th 334, 393-394; *People v. Ochoa*, *supra*, 19 Cal.4th 353, 479; *People v. Arias* (1996) 13 Cal.4th 92, 186-187; *People v. Wader* (1993) 5 Cal.4th 610, 619.)

This Court has ruled correctly. The Rivkind and Schatz article is based on numerous misapprehensions concerning both the operation of California's statutory scheme and the import of federal constitutional requirements.

First, the article rests on the curious theory that California does not sentence *enough* people to death, i.e., that there are too many defendants who "deserve" death (because they committed "factually special circumstances" murders) but have managed to avoid that sentence. (See Schatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p. 1389.)

As a general matter, respondent is unaware of any legal authority that condemns a state's statutory death penalty scheme for being *too* lenient, *too* forgiving, *too* compassionate, or otherwise *too* receptive to arguments upon which capital sentencing authorities may legitimately rely when deciding to *spare* a capital defendant's life. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 158 [96 S.Ct. 2909, 49 L.Ed.2d 859] ["Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the offender."].) Moreover, respondent is certain that a state is constitutionally

permitted to empower its capital sentencing authorities to reject a death sentence for reasons that have *nothing to do with whether the case "satisf[ies] one or more . . . special circumstances.*" (Schatz & Rivkind, *supra*, 72 N.Y.U. L. Rev. at p. 1327, emphasis added.) A state, for example, can allow its sentencing authority to spare a capital defendant's relief on the basis of "lingering doubts" about his or her guilt (*Smith v. Balkcom* (5th Cir. 1981) 660 F.2d 573, 580, modified on another point, *Smith v. Balkcom* (5th Cir. 1984) 671 F.2d 858, 1248, 1255), and California law, in fact, so allows. (See generally *People v. Kaurish* (1990) 52 Cal.3d 648, 706.) To be sure, this feature of California law will occasionally permit some persons who "deserve" death (on account of their having committed a "factually special circumstance murder") to avoid it. But such a state of affairs is neither unconstitutional nor particularly surprising. (*Tuliaepa v. California* (1994) 512 U.S. 967, 979-980 [114 S.Ct. 2630, 129 L.Ed.2d 750] ["'Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment.' . . . Indeed, the sentencer may be given 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.'"].) In launching his attack on the California death penalty scheme, appellant manifestly fails to take this and other constitutionally relevant features of California law into account.[32/]

---

32. For example, appellant never discusses the decidedly nonarbitrary role of plea bargaining, prosecutorial discretion, and host of constitutionally mandated rules that certainly permit, and sometimes even *require*, that capital sentencers be given discretion to reject death verdicts on bases that have *nothing* to do with the "special circumstance" nature of the crimes. (E.g., *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973] ["any aspect of a defendant's *character or record*" (emphasis added)].)

Relatedly, appellant seems to assume that *Furman v. Georgia*, *supra*, 408 U.S. 238, impliedly ruled that a statutory scheme that results in death sentences for as few as 15-20 percent of its "death eligibles" is, for that reason alone, in violation of the Eighth Amendment. (II AOB 668, 670-671.) No case decided in the 30 years since *Furman* has construed it to have established *any* statistically measurable standard of constitutionally tolerable death frequency. Indeed, one need look no further than to Schatz and Rivkind's own descriptions of the legal landscape to see that giving *Furman* the construction they urge would do great damage to *Lockett* and its progeny. (See generally Schatz & Rivkind, *supra*, 72 N.Y.U. L.Rev. at p. 1296 [lamenting that post-*Furman* decisions of the Supreme Court and lower courts have uniformly "not examined or attempted to quantify the death sentence ratio for the scheme as a whole"]; see *Tuilaepa v. California*, *supra*, 512 U.S. at p. 973 ["'[T]he proper degree of definition' of eligibility and selection factors often 'is not susceptible of mathematical precision'"].)[33/]

In all events, appellant also erroneously assumes that California's "first degree murder[ers]," or as many of them who present "*factually* special

---

33. Significantly, the Georgia statutes under evaluation in *Furman* gave juries "untrammeled discretion *to impose* or withhold the death penalty." (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 195, fn. 47. California's death penalty statute, by contrast, grants juries guided and limited discretion; i.e., it "contains carefully defined standards that . . . narrow discretion to *impose* the death sentence," but leaves juries virtually unlimited discretion to "*decline to impose* the death sentence." (*McCleskey v. Kemp* (1987) 481 U.S. 279, 304 [107 S.Ct. 1756, 95 L.Ed.2d 262]; see *California v. Ramos* (1993) 463 U.S. 992, 1005, fn. 19 [103 S.Ct. 3446, 77 L.Ed.2d 1171].) Whereas attempting to distill a constitutionally mandated minimum "death penalty ratio" from *Furman* would merely be unprecedented and wrong, applying that hypothesized ratio to invalidate a scheme that, like California's, *properly* "permits the defendant to present any evidence to show that a penalty *less than death is appropriate in his case*" (*California v. Ramos*, *supra*, 463 U.S. at p. 1005, fn. 19, emphasis added), would be nothing short of bizarre.

circumstances cases" (Schatz & Rivkind, *supra*, 72 N.Y.U. L. Rev. at p. 1329 (emphasis added)), constitute the pool of "death eligibles" against which the frequency of death imposition should be compared. This is incorrect,[34/] for under California law, the only persons statutorily eligible for the death penalty are those who are (1) charged and convicted of first degree murder, *and* (2) whose juries have found one or more special circumstances true, *and* (3) against whom the prosecution elects to seek death.

Appellant's manifest failure to understand these points of state law and federal constitutional teaching has led him to advance an ill-conceived claim, based on faulty statistics and erroneous legal assumptions. Appellant recognizes that this Court has repeatedly rejected arguments that California's death penalty statute unconstitutionally fails to narrow the number of murderers who are death eligible, but claims this Court's decisions fail to properly and fully address the issues, including the Rivkind and Shatz law review article. (II AOB 681-682.) In *People v. Vieira* (2005) 35 Cal.4th 264, 302, however, this Court specifically addressed the law review article in question, and concluded that the statistics therein did not persuade it that any of its prior decisions on the current issue were incorrect.

Appellant also makes the curious argument that California's death penalty statute is unconstitutional simply because many of the special circumstances listed at section 190.3 were enacted by the initiative process, rather than by the state Legislature. (II AOB 674-680.) "The *Furman* mandate specifically requires the Legislature to devise narrowing circumstances." (II AOB 674.)

---

34. But even if it were not incorrect, one should have little confidence in the capacity of law professors and criminal defense lawyers (see Shatz & Rivkind, *supra*) to accurately and reliably discern "death eligibility" by "empirical" means—i.e., by reading appellate opinions and probation reports for "fact situations" that appear *to them* to present "factually special circumstances cases." (*Ibid.*)

It is a curious reading of *Furman* indeed (and one not shared by the People), that an act that would be constitutionally sound permissible if enacted by the citizenry's elected representatives is somehow unconstitutional when instituted by the citizenry directly.

XXVIII.

THE COURT HAS PREVIOUSLY REJECTED ALL OF APPELLANT'S ATTACKS ON THE CONSTITUTIONALITY OF CALIFORNIA'S DEATH PENALTY LAW

Appellant next contends that many features of California's capital sentencing scheme, alone or in combination, violate the federal Constitution. (II AOB 687-727.)

> Although this Court has rejected various challenges to the California death penalty scheme, this Court must reconsider its prior rulings because they are incorrect both in their analyses and their conclusions. The various fatal constitutional defects in California's death penalty law and the trial court's failure to instruct in accordance with the constitutional mandates discussed below require that Mr. Tully's sentence be set aside.

(II AOB 687-688, footnote omitted.)

The People will set forth in abbreviated fashion the previous decisions of this Court which have essentially rejected all of appellant's challenges. The People also cite cases in which this Court has already declined to reconsider its previous rejections.

A. This Court has repeatedly rejected appellant's contention (II AOB 688-695) that factor (a) of section 190.3 ("circumstances of the crime") has no limitations and thus permits arbitrary and capricious imposition of the death penalty. (*People v. Osband*, *supra*, 13 Cal.4th 662, 703; *People v. Sanders*, *supra*, 11 Cal.4th 475, 563; *People v. Medina* (1995) 11 Cal.4th 694, 780; *People v. Turner* (1994) 8 Cal.4th 137, 208.)

B. In arguing that California's death penalty law contains no safeguards to avoid arbitrary and capricious sentencing, appellant again references section 190.3, factor (a). However,

this Court has repeatedly rejected appellant's claim (II AOB 696) that the breadth of the "circumstances of the crime" in factor (a) of section 190.3 results in arbitrary and capricious application of the death penalty. (*People v. Smith* (2005) 35 Cal.4th 334, 373; *People v. Jenkins* (2000) 22 Cal.4th 900, 1050-1053.) This Court has also repeatedly rejected the 12 additional arguments appellant makes in support of his contention (II AOB 695-717) that California's death penalty law contains no safeguards to avoid arbitrary and capricious sentencing.

(1) Contrary to appellant's view (II AOB 697-699) there is no constitutional requirement that aggravating factors (other than prior criminality) be proven beyond a reasonable doubt, that aggravating factors be proven to outweigh mitigating factors beyond a reasonable doubt, or that the jury unanimously find that death is the appropriate penalty beyond a reasonable doubt. (*People v. Dickey*, *supra*, 35 Cal.4th at p. 930; *People v. Stitely* (2005) 35 Cal. 4th 514, 573; *People v. Bolden* (2002) 29 Cal.4th 515, 566; *People v. Ochoa*, *supra*, 26 Cal.4th 398, 453-454; *People v. Barnett*, *supra*, 17 Cal.4th 1044, 1178.)

(2) Contrary to appellant's view (II AOB 699-701), there is no constitutional requirement that aggravating factors be proven by at least a preponderance of the evidence, that aggravating factors be proven to outweigh mitigating factors by at least a preponderance of the evidence, or that the jury find that death is the appropriate penalty by at least a preponderance of the evidence. "'Because the determination of penalty is essentially moral and normative [citation], and therefore different from the determination of guilt,' the federal Constitution does not require the prosecution to bear the burden of proof or burden of persuasion at the penalty phase." (*People v. Sapp* (2003) 31 Cal.4th 240, 317; citing *People v. Hayes* (1990) 52 Cal.3d 577, 643; *People v. Bemore* (2000) 22 Cal.4th 809, 859.)

(3) Contrary to appellant's view (II AOB 701-702), there is no constitutional requirement that the jury unanimously agree

on facts in aggravation used in penalty deliberations. (*People v. Dickey*, *supra*, 35 Cal.4th at p. 931; *People v. Danks* (2004) 32 Cal.4th 269, 316; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1053; *People v. Taylor* (1990) 52 Cal.3d 719, 749.)

(4) Contrary to appellant's view (II AOB 702-705), California's death penalty law is not unconstitutional because it fails to require that the jury base any death sentence on written findings regarding aggravating factors. (*People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Ochoa*, *supra*, 26 Cal.4th 398, 462; *People v. Fauber*, *supra*, 2 Cal.4th 792, 859; *People v. Belmontes* (1988) 45 Cal.3d 744, 805; *People v. Jackson* (1980) 28 Cal.3d 264, 316-317; *People v. Frierson* (1979) 25 Cal.3d 142, 178-180; see also *Clemons v. Mississippi* (1990) 494 U.S. 738, 750 [110 S.Ct. 1441, 108 L.Ed.2d 725]; *Harris v. Pulley* (9th Cir. 1982) 692 F.2d 1189, 1195-1196, vacated and remanded on other grounds, *Pulley v. Harris* (1984) 465 U.S. 37 [104 S.Ct. 871, 79 L.Ed.2d 29].)

(5) Contrary to appellant's view (II AOB 705-708), California's death penalty law is not unconstitutional because this Court does not require intercase proportionality review. (*People v. Gray* (2005) 37 Cal.4th 168, 247; *People v. Bolden, supra*, 29 Cal.4th at p. 566; *People v. Lewis, supra*, 26 Cal.4th 334, 394-395; *People v. Barnett, supra*, 17 Cal.4th at p. 1182; *People v. Crittenden, supra*, 9 Cal.4th 83, 156; *People v. Mincey, supra,* 2 Cal.4th 408, 476; *People v. Hayes*, *supra*, 52 Cal.3d at p. 645.)

(6) Contrary to appellant's view (II AOB 708-709), California's death penalty law is not unconstitutional because it permits the jury to consider unadjudicated offenses as aggravating evidence (*People v. Dunkle* (2005) 36 Cal.4th 861, 940; *People v. Kraft* (2000) 23 Cal.4th 978, 1078; *People v. Bolin*, *supra*, 18 Cal.4th 297, 335; *People v. Samoyoa* (1997) 15 Cal.4th 795, 863), and does not require that this particular aggravating factor be found true by a unanimous jury (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1061; *People v. Hart*, *supra*, 20 Cal.4th 546, 649; *People v. Johnson* (1992) 3 Cal.4th 1183, 1245).

(7) Contrary to appellant's view (II AOB 709), California's death penalty law is not unconstitutional because Penal Code section 190.3, factor (c), permits the jury to consider the presence of any prior felony convictions the defendant might have. The factor is not unconstitutionally vague. (*People v. Balderas* (1985) 41 Cal.3d 144, 201.)

(8) Contrary to appellant's view (II AOB 710-711) the use of restrictive adjectives in the list of potential mitigating factors (e.g., "Whether or not the offense was committed while the defendant was under the influence of *extreme* mental or emotional disturbance" (§ 190.3, factor (d), emphasis added)), does not impermissibly act as barriers to consideration of mitigation by a penalty jury. (*People v. Ghent, supra*, 43 Cal.3d 739, 776; *People v. Morales* (1989) 48 Cal.3d 527, 567-568; *People v. Wright* (1990) 52 Cal.3d 367, 444; *People v. Turner, supra*, 8 Cal.4th at pp. 208-209; *People v. Davenport, supra*, 11 Cal.4th 1171, 1230; *People v. Jones, supra*, 15 Cal.4th 119, 190; *People v. Panah, supra* , 35 Cal.4th 395, 500.)

(9) Contrary to appellant's view (II AOB 711), California's death penalty law is not unconstitutional because section 190.3, factor (i), permits the jury to consider the capital defendant's age in its sentencing determination. The factor is not unconstitutionally vague. (*People v. Sanders, supra*, 11 Cal.4th at pp. 563-564; *People v. Medina, supra*, 11 Cal.4th 694, 780.)

(10) Contrary to appellant's view (II AOB 711-712), California's death penalty law is not unconstitutional because section 190.3, factor (k), permits the capital sentencing jury to consider, "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Factor (k) is not unconstitutionally vague. This Court correctly decided *People v. Mendoza* (2000) 24 Cal.4th 130, 192.

(11) Contrary to appellant's view (II AOB 712-715), a failure to instruct that section 190.3's statutory mitigating factors were relevant solely as potential mitigators does not constitute constitutional error. (*People v. Panah, supra,* 35 Cal.4th at pp. 499-500; *People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079; *People v. Sanders, supra*, 11 Cal.4th at p. 564; *People v. Medina, supra*, 11 Cal.4th at p. 781; *People v. Zapien* (1993) 4

Cal.4th 929, 990; *People v. Danielson* (1992) 3 Cal.4th 691, 718.)

(12) Contrary to appellant's view (II AOB 715-717), California's death penalty law does not violate equal protection because it "provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes." The statute does not deny equal protection on any ground. (*People v. Panah*, *supra*, 35 Cal. 4th at p. 500; *People v. Blair* (2005) 36 Cal.4th 686, 754; *People v. Davis*, *supra*, 36 Cal.4th 510, 571.) Capital defendants are not similarly situated with noncapital defendants, and as this Court has held, the first prerequisite to a successful equal-protection-violation claim "is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*People v. Massie*, *supra*, 19 Cal.4th 550, 570-571, and cases there cited; internal quotation marks omitted.)

C. This Court has repeatedly rejected appellant's contention (II AOB 717-723) that California's standard penalty phase jury instructions, CALJIC Nos. 8.85 and 8.88, as given in the present case, have numerous constitutional infirmities and deprive capital defendants of a fair trial, due process, and a reliable penalty determination in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as article I of the California Constitution. (E.g., appellant claims the instructions should require deletion of irrelevant sentencing factors, should define the terms "aggravating" and "mitigating," and improperly lead the jury to believe that the absence of mitigating factors is itself aggravating). (See generally *People v. Moon* (2005) 37 Cal.4th 1, 41-44 [upholding CALJIC Nos. 8.85, 8.88.].) "The jury instructions were not flawed for failure to delete inapplicable sentencing factors." (*People v. Roldan*, *supra*, 35 Cal.4th 646,

745, citing *People v. Williams*, *supra*, 16 Cal.4th 153, 268; accord, *People v. Kipp* (2001) 26 Cal.4th 1100, 1138; *People v. Stitely*, *supra*, 35 Cal.4th at p. 574.) "The jury instructions were not flawed for failure to 'delineate between the aggravating and mitigating circumstances.'" (*People v. Roldan*, *supra*, 35 Cal.4th at p. 745, quoting *People v. Boyette*, *supra*, 29 Cal.4th 381, 466.) "CALJIC No. 8.88, . . . adequately defines 'mitigation.'" (*People v. Panah*, *supra*, 35 Cal.4th at p. 500, citing *People v. Ochoa*, *supra*, 26 Cal.4th at p. 452; see also *People v. Stitely*, *supra*, 35 Cal.4th at p. 574 ["The standard instruction in CALJIC No. 8.88 adequately advised jurors on the scope of their discretion to reject death and to return an LWOP verdict."].)

D. Finally, appellant asserts that the death penalty is unconstitutional because it is currently "simply unacceptable in American society." (II AOB 723.) "Recent events and shifting public opinion prove that modern standards of decency have evolved to the point where the death penalty is now viewed as inhumane." (II AOB 724.) This is a curious and incorrect claim, in light of the fact that a January 2004 Harris Poll indicates that more than two-thirds of Americans continue to support the death penalty. (See generally, <http://www.harrisinteractive.com/harris_poll/index>.)

XXIX.

APPELLANT'S "INTERNATIONAL LAW" CONTENTION IS NOT COGNIZABLE AND OTHERWISE MERITLESS

Appellant's penultimate contention is that his convictions and death sentence resulted from state and federal constitutional violations which also contravened customary international law and international treaties to which the United States is a party. (II AOB 728-734.) More specifically, appellant asserts that he was denied his rights to due process, a fair trial, equal protection, freedom from cruel and unusual punishment, and to a reliable, individualized, and non-arbitrary penalty determination, under principles established by the International Covenant on Civil and Political Rights ("ICCPR"), and the "International Convention for the Elimination of All Forms of Racial Discrimination ("ACEAFRD"). (II AOB 728-734.) "Violation of these rights afforded by international law warrant the granting of relief without any determination of prejudice." (II AOB 734.) "International law is fully applicable and binding upon domestic courts." (II AOB 728.)

Appellant is precluded from raising this issue because he lacks standing to assert a violation of international law. Additionally, this Court has previously rejected the notion that California's death penalty statutes somehow violate international law.

Initially, this Court should preclude appellant from raising violations of customary international law or treaties for the first time on appeal, since he never raised such claims in the trial court. If, as this Court has held, appellant cannot raise federal constitutional issues for the first time on appeal (*People v. Rowland* (1992) 4 Cal.4th 238, 265, fn. 4, 267, fn. 5; *People v. Carpenter*, *supra*, 15 Cal.4th 312, 385), the law should prevent him from raising international law or treaty issues for the first time on appeal.

Second, appellant's claim that the state and federal constitutional violations he suffered also comprised violations of international law fails because, as demonstrated throughout, he did not suffer violations of state or federal constitutional law. (*People v. Jenkins*, *supra*, 22 Cal.4th 900, 1055; *People v. Bolden*, *supra*, 29 Cal.4th 515, 567; *People v. Dickey*, *supra*, 35 Cal.4th 884, 932.)

Third, appellant has failed to show that he has any standing to invoke the jurisdiction of international law in this proceeding because the principles of international law apply to disputes between sovereign governments and not between individuals. (*Hanoch Tel-Oren v. Libyan Arab Republic* (D.D.C. 1981) 517 F.Supp. 542, 545-547.)

Nor does appellant have any standing to raise claims that his conviction and death sentence resulted from violations of international treaties. It is true that article VI, section 2, of the United States Constitution provides, in pertinent part, that the Constitution, the laws of the United States, and all treaties made under the authority of the United States are the supreme law of the land. However, treaties are contracts among independent nations. (*United States v. Zabaneh* (5th Cir. 1988) 837 F.2d 1249, 1261.) Under general principles of international law, individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereign involved. (*Matta-Ballesteros v. Henman* (7th Cir. 1990) 896 F.2d 255, 259; *United States ex rel. Lujan v. Gengler* (2d Cir. 1975) 510 F.2d 62, 67.)

Treaties are designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress. (*United States ex rel. Lujan v. Gengler*, *supra*, 510 F.2d at p. 67; *Matta-Ballesteros v. Henman*, *supra*, 896 F.2d at p. 259.) It is only when a treaty is self-executing, that is, when it prescribes rules by which one may determine private rights, that one may rely

on it for the enforcement of such rights. (*Dreyfus v. Von Finck* (2d Cir. 1976) 534 F.2d 24, 30.) In order for a provision of a treaty to be self-executing without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts. (*Sei Fujii v. State of California* (1952) 38 Cal.2d 718, 722.)

In determining whether a treaty is self-executing, courts look to the following factors: (1) the language and purpose of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute. (*Frolova v. Union of Soviet Socialist Republics* (7th Cir. 1985) 761 F.2d 370, 373; *American Baptist Churches v. Meese* (N.D. Cal. 1989) 712 F.Supp. 756, 771.)

Here, appellant fails to cite any authority in support of a claim that the treaties upon which he relies are self-executing. No language in any of these treaties appears to create rights in private persons. Therefore, appellant is incapable of asserting a personal cause of action under the foregoing instruments. Indeed, the articles of the ICCPR are not self-executing. (II AOB 477-478, and fn. 139, citing Senate Committee on Foreign Relations, *Report on the International Covenant on Civil and Political Rights* (1992) S.Exec.Rep. No. 23, 102nd Cong., 2nd Sess.) To the extent appellant believes that the ICCPR is a forceful source of customary international law and as such is binding upon the United States that claim does not explain how the ICCPR has the force and effect of a statute for which an individual alleging a violation of may seek redress in the courts.

Appellant's suggestions that "customary international law" is somehow

applicable to the review of constitutional issues presented here is unpersuasive. It is well recognized that courts are not substitutes for international tribunals, and international law does not create the right of an individual to pursue a private human rights suit against a sovereign government. (*Hanoch Tel-Oren v. Libyan Arab Republic, supra*, 517 F.Supp. 542.)

Appellant further claims he has a cause of action under principles of customary international law because the provisions of the ICCPR are accepted by the United States courts as customary international law. (II AOB 728-729.) The customs and usages of civilized nations have long been used as a source of international law binding upon all nations where there is no treaty and no controlling legislative, executive, or judicial decision. (*The Paquete Habana* (1900) 175 U.S. 677, 700 [44 L.Ed. 320, 20 S.Ct. 290]; *American Baptist Churches v. Meese, supra*, 712 F.Supp. at p. 770.)

However, the United States Supreme Court has held that interpretation of the United States Constitution, and by extension, its application to state statutory law, is ultimately an issue for it (the High Court) to decide. (*Stanford v. Kentucky* (1989) 492 U.S. 361, 370, fn. 1, 377 [109 S.Ct. 2969, 106 L.Ed.2d 306].) Thus, while documents or studies prepared by professional groups or other interested parties (such as the ICEAFRD) may be among the commentaries submitted to, or reviewed by, the court on a particular issue, they are neither controlling nor dispositive of the federal constitutional issue presented. (*Ibid.*) In essence, interpretation and application of the provisions of the United States Constitution to questions presented by state or federal statutory or constitutional law is ultimately an issue for the United States Supreme Court and the lower federal courts, not customary international law.

Finally, appellant's claim lacks merit because this Court has essentially

already rejected it. (*People v. Ghent, supra*, 43 Cal.3d 739, 778-779.) In *Ghent*, this Court held that international authorities similar to those now invoked by appellant do not compel elimination of the death penalty, and do not have any effect upon domestic law unless either self-executing or implemented by Congress. (*Ibid.*) As in *Ghent*, appellant cites no authorities suggesting the international resolutions on which he relies have been held effective as domestic law. *Ghent* thus compels rejection of appellant's claim. (Accord, *People v. Roldan, supra*, 35 Cal.4th 646, 744 ["The California death penalty law does not violate international law, specifically the International Covenant on Civil and Political Rights."]; *People v. Blair, supra*, 36 Cal.4th 6686, 755 [""[i]nternational law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements.""].)

In sum, appellant has waived this claim and further has no standing to invoke international law as a basis for challenging his state convictions and judgment of death. Furthermore, appellant has failed to state a cause of action under international law for the simple reason that appellant's various claims of violations of due process in connection with his prosecution, conviction and sentencing in this case are without merit. Finally, this Court is not a substitute for international tribunals. In any event, American federal courts carry the ultimate authority and responsibility for interpreting and applying the American Constitution to constitutional issues raised by federal or state statutory or judicial law. This Court's earlier conclusion in *Ghent* has equal applicability in this case.

XXX.

CALIFORNIA'S STATUTORY SCHEME GIVING PROSECUTOR'S DISCRETION TO DECIDE WHICH CASES TO CHARGE AS CAPITAL CASES DOES NOT VIOLATE THE FEDERAL CONSTITUTION

It is clear that under California law prosecutors in special-circumstance cases have discretion whether or not to seek the death penalty. Appellant submits that this defect in the state's statutory scheme introduces arbitrary and capricious elements into the decision-making process and thereby violates the Eighth Amendment to the United States Constitution, as well as the due process and equal protection clauses of the Fourteenth Amendment. (II AOB 735-744.) "Because of the prosecutorial discretion, some offenders will be chosen as candidates for the death penalty by one prosecutor, while others with similar characteristics in different counties will not be singled out for the ultimate penalty." (II AOB 735.) Appellant asks this Court to set aside the death judgment as a remedy. (II AOB 733-734.)

This Court has repeatedly rejected appellant's contention, and the People see no reason to revisit it, much less for this Court to change its mind and accept the claim. (*People v. Haskett, supra*, 30 Cal.3d 841, 859-860; *People v. Kirkpatrick, supra*, 7 Cal.4th 988, 1024; *People v. Barnett, supra*, 17 Cal.4th 1044, 1179); *People v. Maury* (2004) 30 Cal.4th 342, 438; *People v. Dickey, supra*, 35 Cal.4th 884, 932.)

The law permits—indeed demands—that prosecutors treat different defendants differently. Various cases involve various witnesses, victims, and facts. (*People v. Haskett, supra*, 30 Cal.2d at p. 860.) As this Court has explained, "prosecutorial discretion to select those eligible cases in which the death penalty will actually be sought does not in and of itself evidence an arbitrary and capricious capital punishment system or offend principles of equal protection, due process, or cruel and/or unusual punishment." (*People*

v. Kirkpatrick, *supra*, 7 Cal.4th at p. 1024, quoting *People v. Keenan*, *supra*, 46 Cal.3d 478, 505.) "Absent a persuasive showing to the contrary, we must presume that the district attorney's decisions were legitimately founded on the complex considerations necessary for the effective and efficient administration of law enforcement." (*People v. Haskett*, *supra*, 30 Cal.3d at p. 860.)

Appellant's reliance on *Bush v. Gore*, *supra*, 531 U.S. 98, is unavailing. According to appellant, *Bush v. Gore* makes clear "that fundamental rights cannot be denied based upon arbitrary and disparate statewide 'standards.' The Court held that, where a single state entity has the power to assure uniformity in implementing a fundamental right, there must be at least *some* assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisified." (II AOB 737.)

In *Bush v. Gore*, a Florida Supreme Court order to recount votes cast in the 2000 presidential election by applying an "'intent of the voter'" test was reversed by the nation's High Court. (531 U.S. at pp. 1-2-103.) The Court found the "recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right." (*Id.* at p. 105.) The Court further concluded the "problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and . . . necessary." (*Id.* at p. 106.) In *Bush*, the Court did not purport to offer any views on the criminal law, and it is fundamental that a case is not authority for a proposition neither raised nor considered therein. (*People v. Wells* (1996) 12 Cal.4th 979, 984, fn. 4.) Indeed the *Bush* court expressly limited its analysis to the unique circumstances of the 2000 presidential election process in Florida and the recount procedures. (531 U.S. at p. 109.) The Court's statement that its "consideration is limited to the

present circumstances, for the problem of equal protection in election processes generally presents many complexities" (531 U.S. at p. 109), reveals the futility of appellant's reliance upon the *Bush* opinion. Indeed, the issue in *Bush* concerned standards for interpreting physical marks on a physical object, not anything as intangible as a prosecutor's thought processes or the considerations that properly influence a death penalty decision (e.g., the evaluation of evidence and credibility; the background of the defendant; the views of the victim's family).

CONCLUSION

Accordingly, for all of the foregoing reasons the People respectfully ask this Court to affirm the judgment.

Dated: December 8, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

MARY JO GRAVES
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

RONALD S. MATTHIAS
Supervising Deputy Attorney General

MARGO J. YU
Deputy Attorney General

Attorneys for Respondent

MJY:bw
SF1993XS0001

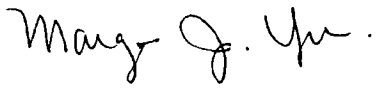
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 118,139 words.

Dated: December 8, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



MARGO J. YU
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Tully**

No.: **S030402**

I declare:

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

On December 11, 2006, I served the attached **(1)** RESPONDENT'S BRIEF AND **(2)** MOTION AND DECLARATION OF GOOD CAUSE TO FILE OVERSIZED RESPONDENT'S BRIEF by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

James S. Thomson
Attorney at Law
Thomson & Stetler
Saor E. Stetler
819 Delaware Street
Berkeley, CA 94710
(two copies)

Jolie Lipsig
Attorney at Law
1006 Fourth Street, Suite 301
Sacramento, CA 95814
(two copies)

The Honorable Thomas Orloff
District Attorney
Alameda County District Attorney's Office
1225 Fallon Street, Room 900
Oakland, CA 94612-4203

County of Alameda
Rene C. Davidson Courthouse
Superior Court of California
1225 Fallon Street
Oakland, CA 94612-4293

Michael G. Millman
Executive Director
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105

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 December 11, 2006, at San Francisco, California.

B. Wong
Declarant

B. Wong
Signature

20070535.wpd