In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** v. **CHRISTOPHER JAMES SATTIEWHITE,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S039894

Ventura County Superior Court Case No. CR31367
Honorable Lawrence Storch, Judge, Judge

RESPONDENT'S BRIEF

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STATEMENT OF CASE

On February 26, 1993, the 1992-1993 Ventura County Grand Jury filed an indictment against appellant. Appellant was accused of committing the crimes of murder (Pen. Code, § 187, subd. (a)), rape (Pen. Code, § 261, subd. (a) (2)), and kidnaping (Pen. Code, § 207, subd. (a)). The three crimes were alleged to be serious felonies (Pen. Code, § 1192.7, subd. (c)). Appellant was alleged to have used a firearm in the commission of the murder (Pen. Code, §§ 12022.5, subd. (a), 1203.06, subd. (a)(1)). Appellant was alleged to have committed the murder while in the commission of a rape and a kidnaping (Pen. Code, § 190.2, subd. (a)(17)). (1 CT 1-3, 5; 1 RT 198-200.)

On May 28, 1993, appellant was arraigned, pleaded not guilty, and denied the special allegations. (1 CT 23; 1 RT 209.) On August 27, 1993, appellant's trial attorney expressed a doubt about appellant's competence to stand trial. The trial court appointed a psychologist to examine appellant. (1 CT 25, 35.) The criminal proceedings were not stayed pursuant to Penal Code section 1368. (1 RT 214-215.) On November 8, 1993, the parties submitted the issue of appellant's competence based on the reports of the doctors. After reviewing the doctor's reports, the trial court found appellant competent to stand trial. (1 CT 44; 1 RT 223-224.)

Jury selection began on January 3, 1994. (1 CT 89; 2 RT 242, 253.) On January 24, 1994, the jury was empaneled. (3 CT 610; 11 RT 1982, 2011-2012.)

On February 1, 1994, the prosecution and defense made their opening statements in the guilt phase of the trial. (11 RT 2018, 2041-2062.) On February 9, 1994, the prosecution rested and the defense commenced its guilt phase case. (16 RT 2831, 2890-2891.) On February 14, 1994, the defense rested and the prosecution began its rebuttal case. That same day, the prosecution rested their rebuttal case and the defense stated it would not offer surrebuttal. (17 RT 3096, 3123, 3142, 3171.) Closing arguments for both parties were completed on February 15, 1994. (17 RT 3177-3210; 18 RT 3211-3386.) On February 16, 1994, the trial court instructed the jury and the jury deliberations began. (19 RT 3389-3429.)

On February 22, 1994, the jury reached its verdict. The jury found appellant guilty of the first degree murder of Genoveva Gonzales. The jury also found that the murder occurred during the commission of a rape and a kidnaping, within the meaning of Penal Code section 190.2, subdivision (a)(17). The jury also found that appellant personally used a firearm during the commission of the murder. Appellant also was found guilty of rape and kidnaping. (3 CT 605; 19 RT 3449-3450.)

The penalty phase of the trial began on March 8, 1994. The prosecutor and the defense made opening statements, and the prosecution commenced its case-in-chief. (20 RT 3600-3623.) On March 9, 1994, the prosecution rested its case-in-chief. (20 RT 3730, 3792.) The defense began its penalty phase case on March 10, 1994, and rested its case on March 16, 1994. (21 RT 3797; 22 RT 4273, 4355.) The prosecution presented its rebuttal case on March 17, 1994. (23 RT 4375, 4418-4488.) The defense did not present surrebuttal. (23 RT 4488-4489.) On March 21, 1994, the prosecution and defense presented their arguments to the jury. (23 RT 4501-4657.) On March 22, 1994, the trial court instructed the jury, and the jury began deliberations. (24 RT 4661-4690.)

On March 28, 1994, the jury found that the penalty should be death. (3 CT 563; 24 RT 4708-4709.)

On April 25, 1994, the trial court denied the defense motion for a new trial and the defense motion for modification of the verdict. The trial court sentenced appellant to death. A sentence of twenty-one years in state prison was imposed and stayed pursuant to Penal Code section 654. The trial court filed the judgment of death on the same day. (3 CT 584-589, 592-595; 24 RT 4714-4734.)

This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

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STATEMENT OF FACTS

I. GUILT PHASE

A. Prosecution Case-In-Chief

1. The Murder Of Genoveva Gonzalez[1]

In January 1992, appellant lived in an apartment on Rowland in Oxnard, California. He lived with Bobby Rollins.[2] Rollins was associated with the Long Beach Crips street gang and was known by the name of "Little Perm." Appellant was known as "Baby Perm." Appellant and Rollins were friends and had known each other since 1990. (13 RT 2370-2371, 2373.) Rollins's girlfriend was appellant's sister Lydia Sattiewhite. (13 RT 2372.)

On the evening of January 25, 1992, appellant, Rollins, and Fred Jackson went to the apartment of Amy Klute on Cuesta Del Mar Road. (13 RT 2314-2321, 2375.) Rollins had known Jackson since 1990. Jackson also was known as "Freeze." (13 RT 2373.) The three men met Anna Lanier who also lived in an apartment at that address. Lanier loaned her Cadillac to appellant and Rollins. (13 RT 2321-2322.)

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[1] The victim hereinafter will be referred to as "Genoveva" to not confuse her with the other witnesses named Gonzalez.

[2] At the time of his testimony in appellant's trial, Bobby Rollins had been in custody for seventeen months at the Ventura County Jail for two separate cases. In the first case, Rollins pleaded guilty to robbery of Myra and Jaime M. and rape of Myra by a foreign object. He also had pled guilty to two other counts of forcible rape as to Myra. Rollins admitted being armed with a firearm for these rape and robbery charges. (13 RT 2365-2367.)

In the second case, Rollins pleaded guilty to robbery of Manuel Lomeli, sexual battery of Lisa N., and attempted robbery of Lisa N. (13 RT 2367-2368.) Rollins admitted that during the commission of these offenses he was armed with a firearm and that he committed the offenses while on bail, awaiting trial in another case. (13 RT 2367-2368.)

Rollins faced a possible maximum sentence of fifty years and eight months. He had an agreement with the Ventura County District Attorney's Office to cooperate in the investigation of Genoveva's murder and testify truthfully in appellant's case in exchange for a sentence of no more than twenty years. (13 RT 2368-2370.)

During the evening, Jackson asked appellant and Rollins whether they wanted to "get a victim." Rollins decided to leave appellant and Jackson because they wanted to commit robberies. The three men drove to another area of Oxnard to the home of a man named Glen. When they arrived at Glen's residence, Rollins gave Glen drugs in exchange for the use of Glen's Regal. Eventually, appellant and Jackson left Glen's residence in the Cadillac. (13 RT 2378-2383; 14 RT 2624.)

At approximately 10:15 p.m. on January 25, 1992, Genoveva arrived at the Casa Del Oro Restaurant in Oxnard, California. Tillie Carrillo, the owner of the restaurant, said that Genoveva was a regular customer there. When Genoveva entered the bar, she went to a male friend who was sitting at the bar and choked him or grabbed him by the neck. Genoveva had been friends with the man for a long time. The male friend told Genoveva to leave him alone. Carrillo saw Genoveva's interaction with the man, but she did not know whether Genoveva was seriously attacking the man or simply joking around. While Genoveva held the man's neck, two Hispanic men asked her to join them. (12 RT 2208-2213.) Carrillo had not seen the Hispanic men[3] in the restaurant before this night. (12 RT 2214.) The two Hispanic men ordered beer for themselves and Genoveva. Genoveva drank only the one beer that the men ordered for her. When they finished drinking, they left the restaurant at approximately 10:30 p.m. (12 RT 2212-2214, 2236.)

After leaving appellant and Jackson, Rollins drove around for a couple of hours. Eventually, he saw appellant in front of a Buddy Burgers restaurant on Oxnard Boulevard, near 5th Street. Appellant called out to Rollins. Rollins stopped his car in front of appellant and they talked. During the conversation, Rollins heard Jackson's voice coming from the alley behind a store. Jackson called to appellant, "Come on, Chris. Come on." Appellant started walking toward Jackson. Rollins asked appellant where they were going. Appellant replied, "Just come on. Come on. Follow us. Follow

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[3] On one occasion months prior to the murder, Carrillo had seen Genoveva in the restaurant with Fred Jackson. Carrillo did not remember having seen appellant in the restaurant with Genoveva. (12 RT 2214-2218, 2237-2238.)

us." Rollins got back into the Regal. Rollins drove into the alley. He saw the Cadillac on the side of the alley. Appellant entered the driver's seat of the Cadillac. Jackson was in the back seat on the passenger's side. Rollins saw a third head in the back seat on the driver's side of the car. Appellant drove out of the alley. Rollins followed. (13 RT 2385-2393.)

They drove to an apartment complex behind a Sav-On's Drug Store in Oxnard and parked their cars in the carports of the complex. Rollins left his car and walked to the driver's door of the Cadillac. Appellant had already exited the Cadillac. Rollins looked into the back seat of the Cadillac and saw Jackson leaning over a woman, who eventually was identified as Genoveva. At one point, Jackson pushed Genoveva back down. Genoveva's head was in the corner of the backseat and she was lying down on the backseat. Jackson was sitting down to the side of her. Rollins asked appellant what has happening in the back seat. Appellant said that Jackson had "gaffled" her. Rollins knew "gaffled" to mean "snatched up." He also knew it to mean caught doing something wrong, such as the police "gaffled" you up and took you to jail. Rollins could hear Jackson telling Genoveva to shut up. She was yelling at Jackson in Spanish. Both Jackson and Genoveva had their clothes on. (13 RT 2394-2395, 2398-2399, 2401-2402; 14 RT 2546-2547, 2617.)

Rollins stayed near appellant and the Cadillac.[4] Genoveva spat on Jackson and Jackson began hitting her. Rollins said to Jackson, "Fred, that's f'd up." Jackson pushed Genoveva back down to the corner of the backseat. It appeared that she was fighting with Jackson and did not agree to what he was doing. She also appeared drunk. (14 RT 2403-2404, 2478, 2552.)

Rollins then left the Cadillac and went to the phone booth by the apartment complex's swimming pool to call appellant's sister Lydia. He told Lydia he would come to her home later. He also said that he was with appellant. Rollins did not tell Lydia

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[4] On cross-examination, Rollins admitted having falsely told the police that he also was in the car with appellant, Jackson, and Genoveva. (14 RT 2601.)

what Jackson was doing to Genoveva. When Rollins returned to the Cadillac, appellant was in the driver's seat. He and Jackson told Rollins to move his car. Appellant drove the Cadillac to another location in the apartment complex parking area. Rollins followed. After the cars were parked, Rollins got out and walked to the Cadillac. He saw Jackson having sex with Genoveva in the backseat. Rollins told appellant that Jackson was going to get him into trouble. Appellant did not reply. Appellant subsequently said that he and Jackson were going to "the dead-end," which Rollins believed was Arnold Road. (13 RT 2406-2408, 2410, 2412-2414.)

After Rollins and appellant agreed to meet at the dead-end on Arnold Road later in the evening, Rollins drove to Lydia's home and appellant drove the Cadillac away with Jackson and Genoveva in the back seat. Rollins stayed with Lydia for a while and then left to meet appellant at Arnold Road. Rollins did not tell Lydia what he saw Jackson doing to Genoveva. (13 RT 2415-2418.)

Rollins had been to Arnold Road with appellant and Jackson before. (13 RT 2414.) Rollins saw the Cadillac on the side of Arnold Road. The passenger side door of the Cadillac was open, and the car's headlights were not on. Appellant was outside the car on the passenger side. Jackson was in the back seat. Jackson pushed Genoveva out of the car. She appeared to be unconscious. Her body moved only when they pushed her. Jackson pushed Genoveva to the passenger side of the car and then pushed her into appellant. Appellant grabbed her. Rollins asked, "Whatcha doing?" Appellant and Jackson did not reply. Rollins told them to "wait up." Rollins stayed in his car, drove past them, and made a U-turn. Rollins stopped his car behind the Cadillac. Rollins heard three gunshots. When Rollins heard the shots, Jackson was in the backseat of the Cadillac and appellant was in the ditch on the side of the road. Rollins could not see Genoveva when the shots were fired. Rollins had seen appellant with a gun earlier in the evening. (13 RT 2419, 2421-2426.)

After hearing the gunshots, Rollins went to look in the ditch. Genoveva was lying face up in the ditch and her legs were "kind of jumping." Appellant was standing over her. Nobody else was in the ditch. Genoveva was wearing a blue denim jacket, but she

did not have pants on. (13 RT 2426.) Rollins said, "Let's go." When appellant got back onto the road, Rollins saw that appellant was wearing gloves and had a gun in his hand. Appellant had not been wearing gloves earlier that evening. (13 RT 2427.)

Rollins got back into his car. Appellant got into the driver's seat of the Cadillac. Jackson had moved into the front passenger's seat. Appellant gave the gun to Jackson. They drove to an alley that was behind a fire station on Pleasant Valley Road. (13 RT 2433-2434; 14 RT 2561.)

Appellant, Rollins, and Jackson exited their cars. Rollins asked appellant why he shot Genoveva. Appellant did not answer. Appellant appeared to be in shock. Eventually, appellant said that he always wanted to do something like that. Appellant also said, "I did it right here" and pointed to his forehead and cheek. Rollins did not talk to Jackson. Jackson leaned into the Cadillac and got some clothes. He wiped some blood off the handgun with a shirt. Jackson gave the handgun back to appellant. Jackson threw the clothes into the trash. Appellant's gloves also were thrown into the trash bin. Jackson said something to the effect of "No, we did it." Before that night, Rollins did not know Genoveva. They stayed in the alley only for a few minutes. (13 RT 2435-2438, 2443, 2445-2446, 2480; 14 RT 2562.) Rollins subsequently returned the Regal to Glen. Later, appellant, Rollins, and Jackson went with Lydia to a Denny's Restaurant in Oxnard. (13 RT 2440.)

While at the Denny's Restaurant, Rollins said that Genoveva was going to "haunt" them. After they left the Denny's Restaurant and went to appellant's home. Rollins told Lydia what had happened that evening and that Genoveva was killed. Lydia did not believe Rollins at first. Rollins denied telling Lydia that appellant shot Genoveva because Jackson made him. (13 RT 2441-2442; 14 RT 2563-2564.)

In the afternoon prior to the murder, Salvadore Zavala had dinner with Genoveva and her children at her home. After dinner, Genoveva asked Zavala for money so she could shop for food. Genoveva did not have money of her own. Zavala gave her approximately $70 or $80. Zavala went to sleep and was still asleep when Genoveva left the residence that evening. At approximately midnight, one of the children in the house

woke him. The child was afraid because Genoveva was not yet home. Zavala was surprised that Genoveva was not home. He went out to look for her at some bars located on Oxnard Boulevard where he knew that she liked to go dancing. Zavala later found the money he gave Genoveva in the pocket of her jacket, which had been hanging in a closet in their home. (13 RT 2335-2348.)

In the late evening of January 25, 1992, Lanier and Michael Burnett saw Lanier's Cadillac parked in front of appellant's home. They stopped at appellant's home to ask about the Cadillac. Appellant and Rollins were both at appellant's home. As Burnett and Lanier were about to leave appellant said, "Don't take the car because we had got done dirt in it." Burnett left in the Cadillac. Burnett did not know what appellant meant when he said "we had got done dirt in it." (13 RT 2323-2327.)

2. The Murder Scene

On the morning of January 26, 1992, Seong Hwan Kim and Chun Lee were fishing at the end of Arnold Road. When they finished and were leaving the area, they saw Genoveva's body in the ditch. They did not go into the ditch. They called the police, and after doing so they saw a deputy from the Ventura County Sheriff's Department. (11 RT 2085-2094.)

Ventura County Sheriff's Department Deputy Beal Whitlock, who worked for the department's search and rescue team, saw Kim and Lee near Mugu Rock on Pacific Coast Highway at approximately 7:35 a.m. on January 26, 1992. He was in his patrol K-9 unit at the time. Kim and Lee led him to Arnold Road. When he arrived at Arnold Road, the K-9 dog alerted Deputy Whitlock that Genoveva was not alive. Deputy Whitlock made sure that nobody, including Kim and Lee, went into the ditch while he was there. He signaled his dispatcher about Genoveva's body in the ditch. The dispatcher called Oxnard Police Department. (11 RT 2076-2082.)

At 8:20 a.m., on January 26, 1992, Deputy Jeffrey Nettleton of the Ventura County Sheriff's Department arrived at the murder scene on Arnold Road. Genoveva's body was in the drainage ditch. (11 RT 2063-2065, 2068.) Deputy Nettleton looked down into the ditch and saw that she was dead. He took barrier tape and cordoned off the area. He did

not walk down into the ditch and made sure that nobody else walked into the ditch. He saw a set of footprints in the ditch. (11 RT 2069.) He saw that there were footprints were around Genoveva's body. (11 RT 2069-2070.)

Deputy Michael Barnes and Detective Richard Gatling of the Ventura County Sheriff's Department arrived at the murder scene on Arnold Road at approximately 9:15 a.m. on January 26, 1992. Genoveva's body was in the ditch, but nobody else was in the ditch. Deputy Barnes directed the photographing of the crime scene from the roadway above the ditch to preserve the integrity of the crime scene. Genoveva appeared to have two gunshot wounds - one to the forehead and one to the left cheek. (11 RT 2103-2110, 2140-2141.)

Deputy Barnes noticed footprints starting from the roadway and leading to ditch. In the ditch, the footprints returned to the area around Genoveva's head, and then returning on the path of entry. It appeared that only one set of shoes made the footprints. (11 RT 2117-2118, 2120.) A mold was taken of the footprints using plaster of Paris. (11 RT 2121, 2147-2148.) The gunshot wounds appeared to be contact wounds, received from gunshots fired at very close range, possibly with the gun right against Genoveva's head when they were fired. (11 RT 2134-2135.)

Genoveva had a sock on her right foot and her left foot was bare. There was no mud on either of her feet. (11 RT 2126.) There were no signs of a struggle in the area of the ditch or the embankment. (11 RT 2137.)

Frederick Warren Lovell, Chief Medical Examiner for Ventura County, went to the crime scene on Arnold Road, on the morning of January 26, 1992. He saw Genoveva's body lying face down in the ditch. She had a gunshot wound in the head. The lower part of her body was unclothed. Her bra had been pulled up, exposing her breasts. (12 RT 2160-2163.)

An expended, brass shell casing was found near Genoveva's body. (11 RT 2126-2128.) There was a pool of blood in the mud under her body. Another shell casing was found in the pool of Genoveva's blood. (11 RT 2129.) Detective Richard Hamilton of the Ventura County Sheriff's Department took possession of the two shell casings. (11

2140-2142.) The casings found at the crime scene had .32 engraved on them. (11 RT 2132.) The casings later were determined to have been fired from a .32 caliber semi-automatic gun. (11 RT 2133.)

3. The Murder Weapon

On December 17, 1991, Arturo Burciaga,[5] the owner of B & E Guns, purchased two Davis P-32 handguns and one high power nine millimeter handgun from a wholesaler named Bumblebee. One of the Davis handguns had the serial number of P144343. On a subsequent occasion, Burciaga sold the handgun with serial number P144343 to Greg Wells. Although Burciaga did not record the sale to Wells, he identified Wells as the person to whom he sold the gun. (12 RT 2247-2250, 2253; 15 RT 2665; People's Exhibit 43.) Sometime before January 28, 1992, Burciaga reported the handgun as stolen. (12 RT 2253-2258.)

In December of 1991, appellant spoke to Gregory Wells[6] about buying a gun. Gregory's sister Adrienne Wells was appellant's girlfriend at the time. Appellant told Gregory that he wanted a "strap," meaning a gun, "to enforce protection," meaning for his personal protection. Gregory agreed to try and help appellant buy a gun. Gregory bought a handgun at Burciaga's store for appellant sometime immediately before Christmas. After Gregory obtained the handgun and brought it home, he called appellant to come and see it. He gave appellant the handgun, but appellant never paid Gregory for it. Gregory identified the handgun with serial number P144343 as the gun that he bought

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[5] At the time of his testimony, Burciaga was serving three years summary probation after pleading guilty to a misdemeanor charge of possession of a concealed weapon. He received immunity from federal prosecution and from prosecution by the Ventura County District Attorney's Office for his testimony in appellant's case. (12 RT 2242-2243.)

[6] At the time of his testimony in appellant's case, Gregory was serving three years summary probation for a misdemeanor conviction of possession of a loaded gun. He pleaded guilty to the misdemeanor and did not receive any consideration or help from the District Attorney's Office. (15 RT 2663.)

from Burciaga's store and as the one that he gave to appellant. (13 RT 2438; 15 RT 2660-2662, 2666-2672, 2786-2789.)

A week or more after giving appellant the handgun, Gregory called appellant about payment. Three days later, appellant came to see Adrienne and brought back the gun to Gregory. The handgun was in a sock. Gregory looked at the gun and saw "stuff" on it. He put the gun back in the sock, gave it back to appellant, and said, "I don't even want it." Appellant suggested that the gun be sold. (15 RT 2672-2673.)

Gregory and appellant drove to an Exxon gasoline station on West Pleasant Valley Road in Oxnard, California. En route, appellant was trying to clean the gun. Gregory asked him what the "stuff" was that was on the gun. Appellant replied, "What do you think it is?" Appellant also said, "Don't worry about it. It was blood." Gregory saw blood inside the barrel of the gun. Gregory asked appellant how the blood came to be on the gun and if it had anything to do with the murder reported in the newspaper. Appellant said, "Have you heard about any other murder?" When they arrived at the gas station, Alfred Ordaz came out to talk to appellant. Ordaz knew appellant. They spoke and then Ordaz went inside the gas station. Ordaz then returned to appellant's car. Appellant gave Ordaz the gun and Ordaz gave appellant money. Ordaz asked appellant if the gun was "dirty" or "stolen." Appellant did not say anything in response. Ordaz said that during the transaction, appellant said that he needed money. (14 RT 2590, 2596; 15 RT 2674-2676, 2679-2680.) Ordaz identified the handgun with serial number P144343 as looking like the gun that he bought from appellant. (14 RT 2590, 2596.)

In February of 1992, Alex Polo was employed at an Exxon gasoline station on Pleasant Valley Road. During that month, Polo bought a handgun from Alfred Ordaz, a former employee of the gas station. Polo brought the handgun to his home on South F Street. Shortly thereafter, Polo separated from his wife and moved out of the residence. When he returned for his belongings, the handgun was missing. Polo's ex-wife had a nephew named Hugo Hernandez, and Hernandez had access to the F Street residence. Hernandez did not have permission to take Polo's gun. Polo identified the handgun with

serial number P144343 as the one that he bought from Ordaz. (13 RT 2309-2314; 14 RT 2596.)

On May 26, 1992, Officer Stephen Lawrence of the Oxnard Police Department was called to a crime scene regarding a robbery that occurred at the 400 block of Birch Street in Oxnard. The suspect, later identified as Hugo Hernandez, was in custody when Officer Lawrence arrived at the crime scene. Hernandez suspect was believed to have been armed and was chased by officers to a backyard at that address. Office Lawrence assisted in searching for Hernandez's handgun. He found a .32 caliber semi-automatic handgun lying in the dirt at the crime scene. The serial number on the handgun was P144343. (12 RT 2259-2266; 13 RT 2303-2308.)

4. Appellant's Admission Of Guilt

In the beginning of 1992, appellant's girlfriend Adrienne spoke with appellant by telephone about a woman who had been killed. (15 RT 2789, 2800-2801.) During the conversation, appellant acted "weird." Appellant was crying as he spoke. Adrienne asked him why he was acting that way. Appellant said that he had killed a lady and not to worry about it. Adrienne insisted that appellant tell her what had happened. (15 RT 2790, 2804-2805, 2807, 2819-2820.) She asked appellant why he killed the woman. Appellant said that he killed the woman because Jackson had raped her.[7] Jackson said, "See, you said my name. Now you have – now you have to kill her."[8] (15 RT 2791, 2811-2813.)

5. Search Of Appellant's Residence

On February 7, 1992, Deputy Barnes searched appellant's residence in Oxnard on Halsey Way. The parties stipulated that the search was lawful. During the search,

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[7] On cross-examination, Adrienne admitted having told an investigator DeFazio that she did not remember whether appellant used the word "rape" when she spoke with him on the telephone. (15 RT 2808.)

[8] On cross-examination, Adrienne admitted having originally told police officers that she learned about the murder from reading about it in the newspaper and that Lydia Sattiewhite told her something about it as well. (15 RT 2793-2794.)

Deputy Barnes took possession of a pair of size 10, Nike shoes that belonged to appellant. (15 RT 2697-2700.) Shoes belonging to Rollins and Jackson were subsequently recovered in other searches. Their shoes were found to be size 7. (15 RT 2710-2712.)

6. Appellant's Statements To The Police

Detective Gatling and Deputy Barnes interviewed appellant at the Ventura County Sheriff's Department on July 20, 1993. The interview was tape recorded and a transcript was made of the interview.[9] Appellant waived his Miranda rights and agreed to speak with the officers. The interview lasted an hour. For approximately fifteen to twenty minutes of the interview, Deputy Barnes was not in the room, but Gatling remained. During the first forty-five minutes of the interview, appellant denied knowing Genoveva and denied having any knowledge of Genoveva's murder. Later in the interview, appellant admitted that he first met her somewhere near a Buddy Burgers Restaurant and near 5th Street while he and Jackson were driving around. Rollins was not with them when he met Genoveva. He did not know if Jackson knew Genoveva. Appellant and Jackson had been drinking. They had been drinking "everything" and were "[p]robably a little buzzed" although appellant was "not sure." (16 RT 2833-2836, 2843-2849, 2857.)

On cross-examination, Gatling admitted having interviewed Jackson and that Jackson said that he and Genoveva had consensual sex. (16 RT 2871-2872.)

7. The Autopsy And Subsequent Medical Evaluation

Dr. Lovell conducted the autopsy on Genoveva's body on January 26, at 3:15 p.m. There were only two entrance gunshot wounds and no exit wounds on Genoveva's body. One of the entrance wounds was in her forehead and the other was in her left cheek. Dr. Lovell opined that the gunshot wounds were contact wounds because there was no

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[9] The tape recording was played for the jury. The transcript of the tape recording was marked as People's Exhibit 72. The tape was marked as People's Exhibit 73. Defense counsel stipulated to the authentication of the tape and had no objection to admission of the transcript and the tape into evidence. (16 RT 2836-2837.)

stippling or tattooing of gunpowder around the wound. There were stellate areas, star shaped tears which are caused by the pressure of the bullet and gasses going under the skin, bursting the skin outwards. There also was searing, heat effect on the bone where the bullet went into her skull. Dr. Lovell opined that the gun used to inflict the wounds was held to her head with moderate to heavy pressure. (12 RT 2164-2176.)

Three bullets were recovered from Genoveva's body during the autopsy. (12 RT 2165, 2168, 2198.) The bullets were given to Deputy Herb Parish of the Ventura County Sheriff's Department. (12 RT 2168-2169, 2197.) Each of the bullets could have individually been a cause of Genoveva's death. The cause of death was a gunshot wound to the head and neck. (12 RT 2169.)

Genoveva also suffered a blow to the right side of her head which could have rendered her unconscious. Dr. Lovell opined that Genoveva was unconscious when she was killed. (12 RT 2169-2171, 2176.)

During the autopsy, Genoveva's blood was tested and found to have a blood alcohol content of .19 percent. Her urine was tested and found to have .21 percent blood alcohol content. Her gastric contents were tested and found to have .21 percent blood alcohol content. There were no significant drugs found other than alcohol. (12 RT 2176-2177, 2180, 2193.)

There were scratches on Genoveva's abdomen and back. There was bruising around the posterior entrance to Genoveva's vagina. (12 RT 2165, 2178.) Dr. Lovell was unable to opine whether the bruising was caused by consensual or non-consensual sexual activity. (12 RT 2180.) Dr. Lovell opined that Genoveva was not sexually assaulted at the crime scene. (12 RT 2183.)

Vaginal swabs were taken. (12 RT 2182.) The samples were given to Deputy Parish. (12 RT 2182-2183, 2198.) The parties stipulated that blood samples were taken from appellant, Bobby Rollins, and Fred Jackson and tested, and sperm samples were taken from the vagina and rectal areas of Genoveva's body and tested. The parties also stipulated that as a result of the testing, appellant and Rollins were excluded as donors of

the sperm samples, but that Fred Jackson was a possible donor of the sperm sample. (12 RT 2202-2205.)

In January 1994, Dr. Bruce Woodling was asked by the Ventura County District Attorney's Office to evaluate the autopsy conducted by Dr. Lovell. Dr. Woodling reviewed the dictated autopsy notes of Dr. Lovell, the crime scene summary, verbal information from prosecutors Patricia Murphy and Don Glynn, and several photographs of Genoveva. (15 RT 2719-2729.)

Dr. Woodling observed that Genoveva had a blunt force injury to her left eyelid. She had scratches from her belly button to her rib cage. The scratches were consistent with injuries that would be received during a struggle when the person is not clothed in those areas. She had injuries to her genital area that were consistent with forced penetration as seen in a sexual assault as well as a struggle over forced penile penetration into the vagina. The injuries would have been very painful. The injuries are not consistent with consensual sexual situations. (15 RT 2729-2730, 2734, 2738-2751.)

8. Ballistics And Other Physical Evidence

Vincent Vitale, a criminalist with the Ventura County Sheriff's Department Crime Lab, tested the bullets recovered from Genoveva's body and the handgun recovered by Officer Lawrence. He opined that the bullets were all fired from the handgun. The casings recovered from the scene of the murder were consistent with those that would be fired from the handgun. (12 RT 2267-2268, 2281-2284.)

Mr. Vitale also tested the foot impression molds taken from the scene of the murder and found them to be of a size 10 shoe. (12 RT 2284-2297.)

The parties stipulated that Rollins was five feet five inches tall and weighs 127 pounds. Appellant is five feet ten inches tall and weighs 160 pounds. Jackson is five feet seven inches tall and weighs 155 pounds. Genoveva was four feet ten inches tall and weighed 120 pounds. (16 RT 2889-2890.)

B. Defense Case

1. Defense Evidence Regarding Genoveva's Background

Appellant's trial attorney conceded during his opening statement that appellant shot and killed Genoveva. (11 RT 2065.) The defense strategy was to attack Genoveva's character and make it appear that she either was a prostitute or a drug user.

On January 30, 1990, Sergeant Timothy Combs of the Oxnard Police Department served a search warrant at 527 Meta Street in Oxnard, in Ventura County. During the search of the residence, he seized 1.6 grams of heroin and slightly less than a gram of cocaine. Sergeant Combs also found scales, a measuring spoon, lactose, and balloons that were similar to the packaging that the heroin was found in. The lactose is a cutting agent to add to the drugs. Sergeant Combs arrested Genoveva at the residence at the time of the search. (16 RT 2891-2897.)

Jessica Velasquez, an acquaintance of Lydia Sattiewhite, remembered that on three prior occasions in early or mid-1991, she saw Genoveva on Oxnard Boulevard. Each time she saw Genoveva, it was between 8:00 and 10:00 p.m. On these occasions, Genoveva wore hardly any clothes. Although Genoveva was dressed "skimpy," she wore shoes. Genoveva would approach cars and men and leave the area with different men. She also would get in the cars that she approached. Genoveva would be sweating even though she was outside in cold weather and wearing little clothing. Her eyes always were dilated. Velasquez was of the opinion that Genoveva was either a prostitute or cocaine user or both. (16 RT 2918.)

On cross-examination, however, Velasquez admitted that in April of 1992, she told Deputy Barnes that she did not remember having seen Genoveva before. Velasquez explained that she lied to Barnes because she did not want to get further involved in the case. (16 RT 2920-2921.)

Frank Richardson[10] is an acquaintance of appellant, Jackson, and Rollins. (16 RT 2921-2922.) He had met Genoveva numerous times at the Cuesta Del Mar apartments when he visited appellant and Rollins in their apartment at the complex. Richardson would sell drugs at the apartment complex. He had seen Genoveva in Rollins's apartment, but he never saw Genoveva with appellant. On a few occasions, Richardson saw Genoveva and Rollins engage in a hand-to-hand transaction where Genoveva would buy a small amount of a white substance. . (16 RT 2923-2925, 2927-2930.) On one occasion when Rollins was with Genoveva, Rollins told Richardson that "one of these days [Rollins was] going to have sex with [Genoveva] because she is not going to have any money." (16 RT 2933-2934.)

In October of 1992, Richardson told Deputy Barnes that Genoveva would "ride the rodeo." This meant that she would go to an area on Oxnard Boulevard where there were drug sales and where people would exchange sexual acts for drugs. Appellant and Rollins "ran" the "rodeo." (16 RT 2942-2945.)

Michael Black[11] was an acquaintance of Rollins. He had seen Genoveva in the vicinity of the Cuesta Del Mar apartments, but he did not know her name. He also knew Rollins. On one occasion in early January of 1991, he saw Genoveva in Rollins's apartment while appellant and Jackson were waiting outside the apartment. On that occasion, Genoveva was being beaten up by another female. In November of 1992, Black falsely told Deputy Barnes that he did not know Genoveva and he never mentioned the attack that occurred in January of 1991.[12] (16 RT 2935-2937, 2939, 2942.)

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[10] Richardson was convicted of felony burglary on December 12, 1991. (16 RT 2931.) He also had been twice convicted of armed robbery. (16 RT 2945-2946.)

[11] At the time of his testimony, Black was in custody for a robbery conviction. (16 RT 2936.)

[12] Deputy Barnes testified that during the interview, he showed Black a photograph of Genoveva. Black said that he recognized Genoveva, he had seen her in the area of Cuesta Del Mar, and that Genoveva "rides the rodeo." Black also told Deputy Barnes that Genoveva bought drugs in the area of Cuesta Del Mar. (17 RT 3115-3116.)

On cross-examination, Black admitted telling Investigator DeFazio that he did not see Genoveva buy drugs while at Rollins's apartment, but that he knew that Rollins and appellant sold drugs from their apartment. (16 RT 2940-2941.)

2. Defense Evidence Regarding The Events Following The Murder

In the early morning of January 26, 1992, Lydia Sattiewhite went with appellant, Rollins, and Jackson to a Denny's Restaurant. They drove in Anna Lanier's Cadillac. When Rollins, appellant, and Jackson picked Lydia up, Rollins was shaking his head. When Lydia asked Rollins why he was shaking his head, Rollins answered, "We just did something." He did not explain further. They stayed at the Denny's Restaurant approximately thirty to forty-five minutes, which was long enough to eat. Appellant was quiet at the restaurant. Lydia described appellant, Jackson, and Rollins as being "all just mellowed out." Afterwards, they dropped Jackson off at his residence on Hemlock and then went back to Lydia's home. (16 RT 2950-2954, 2960.)

Upon arriving at Lydia's home, Rollins told Lydia that they picked up a girl and that Jackson had intercourse with her. Lydia denied that Rollins used the word "rape" when referring to Jackson having intercourse with Genoveva. Rollins said that Jackson was "fucking a bride." Rollins also said that Genoveva appeared to have been drinking and that she was "going along" with the sex. She would push Jackson away, and then would return to having sex with Jackson. They took Genoveva to Arnold Road. Jackson told appellant to "smoke her" because appellant never participated in their criminal activities. Rollins told appellant that if he did not "smoke" Genoveva, Rollins "was going to smoke her and him." Rollins told her that appellant shot Genoveva. Lydia did not believe Rollins at first. Lydia opined that appellant was afraid of Rollins. (16 RT 2955-2959.)

Deputy Barnes interviewed Rollins on January 6, 1993. Rollins said during the interview that Jackson had a .45 caliber automatic handgun in his back pocket on the night of the murder. At the Denny's Restaurant, appellant appeared upset and said that he felt bad. Rollins had consumed alcohol on the night of the murder and was not sure

that he was in his right mind that night. Barnes did not recall Rollins saying during the interview that appellant was wearing gloves when he walked out of the ditch after having shot Genoveva. Rollins did not say during the interview that appellant said he had always wanted to shoot somebody. (17 RT 3103-3108.)

Several months after the murder, Lydia spoke with a District Attorney's Office Investigator, Beth Hamilton. Hamilton told Lydia some of the details of what Rollins had told the police about the murder. Lydia was angry because she knew that Rollins was lying about the circumstances of the murder. Lydia then told Hamilton what she knew about the case to prove that Rollins was lying. (16 RT 2966-2969.)

Lydia told Hamilton that Jackson was acting nervous at the Denny's Restaurant following the murder. She denied telling Hamilton that Rollins used the word "rape" when referring to Jackson having intercourse with Genoveva. Rollins had told Lydia that appellant shot Genoveva, and Lydia believed him. Lydia was afraid to come forward about the crime because Rollins was gang affiliated and he would have someone from his gang do something to her. She decided to testify only after the beginning of the trial, after speaking with her brother-in-law who had been sitting in the courtroom for the whole trial.[13] (16 RT 2970-2972.)

3. Medical Opinion Evidence

Dr. Werner Spitz, a medical doctor and pathologist, was retained by the defense to review the autopsy report, photographs, and other documents related to the investigation. He also received and reviewed a copy of Dr. Woodling's testimony. He disagreed with Dr. Woodling's conclusions and instead opined that the injuries in Genoveva's vaginal area could have been from vigorous consensual sex. (17 RT 3005-3032.) On cross-

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[13] Deputy Barnes interviewed Lydia on October 19, 1993. Barnes knew that Rollins was Lydia's boyfriend at the time of the murder. Appellant was a suspect in the murder at the time he interviewed Lydia. Lydia repeatedly told Deputy Barnes that she did not have any information about the murders. Deputy Barnes told Lydia that he knew that appellant murdered Genoveva and he wanted to know why. She denied that she was trying to protect Rollins or appellant. (17 RT 3112-3115.)

examination, Dr. Spitz admitted that he had never examined live rape victims. He also agreed that the injuries were also consistent with those that occur in a rape. (17 RT 3032-3039.)

C. People's Rebuttal Case

Oxnard Police Sergeant Combs reviewed the Oxnard Police Department's computer database regarding police contact with members of the public and crime suspects. The department's records in the database go back as far as 1981. Sergeant Combs found only a single listing of police contact involving Genoveva. The listing was for Genoveva's arrest by Combs on January 30, 1990, for possession of controlled substances for sale. After Genoveva's conviction for that offense, she registered as required under California Health and Safety Code section 11590. There were no other narcotics violations for Genoveva. There were no listings for arrests for being under the influence of a narcotic substance or for prostitution. (16 RT 2893-2897; 17 RT 3142-3145.)

On July 20, 1993, Ventura County Deputy District Attorney William Karr interviewed appellant. Investigator Joe Cipollini was present during the interview. The interview was tape recorded. At the time of the interview, appellant was under arrest for the homicide of Genoveva. During the interview, appellant told Karr said that he was not afraid of Jackson or Rollins. (17 RT 3149-3152.)

Beth Hamilton, an investigator for the Ventura County District Attorney's Office, unsuccessfully attempted to interview Lydia Sattiewhite on March 1, 1993. Hamilton tried repeatedly during the latter part of the summer of 1993 to interview Lydia, but also was unsuccessful. (17 RT 3155-3157.) Hamilton finally interviewed Lydia on November 3, 1993. (17 RT 3155-3157.)

By the time of the interview, Hamilton had received information from Deputy Barnes about his own interview with Lydia. Hamilton interviewed Lydia at her residence on Halsey Way in Oxnard. Nobody else was present for the interview other than some small children in the house. She did not tape record the interview. She believed that because of the difficulty in getting the opportunity to actually interview Lydia, that Lydia would refuse to be interviewed had she put a tape recorder on the table. For the same

reasons, she did not attempt to surreptitiously record the interview. Lydia was very hesitant to speak with Hamilton, but she had information about the night of Genoveva's murder. Lydia said that she had not given the information to anyone else. (17 RT 3157-3158.)

Lydia believed that Rollins had lied to the police about his involvement in Genoveva's murder, and Lydia wanted to "set the record straight." (17 RT 3158-3159.) Rollins was acting strange when he came to pick her up at Jessica Velasquez's home following the murder. (17 RT 3159.) Lydia and Rollins stood on the sidewalk at Velasquez's home while appellant and Jackson stood by the Anna Lanier's Cadillac. Lydia asked Rollins what was wrong. (17 RT 3159-3160.) Rollins said, "We just did something." Rollins did not give any additional information. (17 RT 3158-3160.)

Appellant, Rollins, Jackson, and Lydia then went to the Denny's Restaurant. Appellant was quiet at the restaurant and Jackson was nervous. After eating, Rollins and Lydia went back to her home and appellant went back to his own home. Later that evening, Rollins told Lydia that they had picked up Genoveva near the clubs on Seventh Street. Jackson raped her and she ended up dead. Lydia asked how Genoveva died. Rollins said that appellant shot her. Lydia did not believe Rollins and asked him to show her where the shooting occurred. Rollins volunteered to take Lydia to Arnold Road where he believed that Genoveva's body still was. At that point, Lydia believed Rollins and did not want to go to the location. (17 RT 3160-3162.)

Lydia used the word "rape" when she described what Jackson did to Genoveva. In her notes, Hamilton put the word "raped" in quotation marks and confirmed with Lydia that that was the word she used. Hamilton also told Lydia that "raped" would be used in her report if correct. Rollins said that the rape occurred in the apartments behind the SavOn. Lydia never stated during the interview that Rollins said he made appellant shoot Genoveva. (17 RT 3162-3163.)

The day after the interview, Lydia contacted Hamilton saying that it was urgent. Lydia called from Velasquez's home. After speaking with Velasquez, Lydia recalled several additional details about the night of the murder that she thought Hamilton should

know. None of the details involved whether Rollins used the word "rape" when describing what Jackson had done to Genoveva. After repeated attempts, Hamilton finally met Lydia again on November 30, 1993 to go over the report. Hamilton met Lydia at Lydia's home and tape recorded the interview. (17 RT 3163-3165.)

Lydia told Hamilton that she would not testify in the case and did not want to have anything to do with the case. Lydia read Hamilton's report about the interview and made several changes. She said that she mistakenly used the word "rape" in speaking with Hamilton about Jackson's conduct. Lydia could not remember whether Rollins used the word "rape." Lydia said that Rollins may have said that "Fred fucked her" or some term other than rape. Lydia also told Hamilton that the word Rollins actually used was "fucked." (17 RT 3166, 3170.)

Hamilton said that Lydia used the word "rape" in their first interview. Hamilton no longer had written notes of the interview with Lydia. Pursuant to district attorney's procedure, the notes regarding the first meeting were destroyed after the official report was prepared. The tape recordings were not destroyed. (17 RT 3167-3168.)

The defense did not present a surrebuttal case. The prosecution and the defense both rested. (17 RT 3171, 3174.)

II. PENALTY PHASE

A. Prosecution Case-In-Chief

1. Prior Rape and Robbery Committed By Petitioner, Rollins, And Jackson

On September 14, 1991, at approximately 9:15 p.m., Myra and Jaime M. went to a beach near Mandalay Beach Road in Oxnard, California. Myra was 18 years old and Jaime was 19 years old at the time. When they arrived at the beach they were alone. Fifteen to twenty minutes after they arrived, they heard voices and were approached by three Black men. One of the men approached them from the front and the other two men approached them from the back. Myra could not see their faces because she was not wearing her glasses. (20 RT 3623-3028, 3659-3666.)

One of the men asked Jaime where his "homey" was. Jaime did not know what the man was referring to. Jaime pointed in a direction and responded, "Well, he went that way." Jaime believed that the man was asking about a "skinhead" he had seen to the south of their location on the beach. (20 RT 3665-3666.)

The men asked Myra and Jaime for money and their wallets. Myra and Jaime told the men that they did not have their wallets. The men then asked for their jewelry. Jaime took off his jewelry. As she was trying to take off her jewelry, Myra saw one of the men had a gun. She eventually needed Jaime's help to remove her jewelry because she was shaking from nervousness. The man with the gun continued saying that he was going to "blow them away." Jaime handed the jewelry to one of the men. Next, the men told Myra and Jaime to lie down. The man with the gun was about an arm's distance from Myra. After Myra took off her jewelry, the man with the gun kept saying that he was going to blow them away. The men took three rings and a necklace from Myra and two gold chains from Jaime. (20 RT 3629-3632, 3667-3671.)

The men again asked for their wallets and whether they had a car. (20 RT 3630, 3666-3667.) Jaime answered, "I don't, I don't have one on me." The men saw their car keys in the sand. One of the unarmed men asked, "Well, where's your car at?" Jaime answered, "It's out there. It is a little brown one." One of the unarmed men went to the car. He returned a few minutes later. The other two men did not say anything to Jaime and Myra while the third was gone. (20 RT 3666-3668.)

Myra was lying on her back and Jaime was lying face down, with half of his body covering Myra's. Jaime was hugging Myra. The man with the gun pressed the gun to Myra's head. Jaime told the man to point the gun at him rather than at Myra. Myra was scared at this time. Jaime gave the men the keys to their car. One of the unarmed men left the group to go to the car. The other men stayed with Myra and Jaime. (20 RT 3632-3633.)

The men who stayed with Myra and Jaime asked where they were from and what gang they claimed to be in. Jaime said that they were not in gangs and that they were just students. Jaime said that they were from Oxnard High School. The men asked whether

Myra and Jaime knew about the Crips. Myra and Jaime said that they did not. (20 RT 3634, 3672.) One of the men said, "We're Crips. We're from LA. All fucking Mexicans, fucking with the Crips." (20 RT 3674.) The man with the gun again threatened to blow them away. The men also said that they should have blown them away a long time ago. (20 RT 3634.)

Eventually the third man returned. Jaime had told the men that there was a stereo in the car and that they could take whatever they wanted. The men who stayed with Myra and Jaime asked the third man whether he had gotten the stereo out of the car. The third man asked what brand of stereo was in the car. Jaime told him the brand name. The third man was ordered back to the car to get the stereo. Myra and Jaime were lying on the sand all the while this took place. (20 RT 3635-3636, 3676.)

When the third man returned again, the third man said "let's go" or "let's jam." (20 RT 3636.) One of the other two men said, "No. I feel like fucking this bitch." (20 RT 3636, 3676.) One of the other men said, "Well, just do her." (20 RT 3677.) Two of the men moved in front of Myra's feet. The man with the gun pulled Jaime off of Myra. The men covered Myra's and Jaime's faces with a blanket. Myra was able to see one of the men before her face was covered. One of the men noticed that Myra could see so they arranged the blanket so she could not see them. Myra was lying on her back and Jaime was lying face down in the sand. (20 RT 3637-3638, 3676-3678.) Myra told Jaime, "Don't do nothing." (20 RT 3678.) She began praying. (20 RT 3678.)

Myra tried to look at the man with the gun. The man with the gun pointed the gun at her and said, "Don't look at me, bitch." (20 RT 3678.) Jaime then asked, "Why don't you point the gun at me?" (20 RT 3678.) The man with the gun struck Jaime with the gun or his fist on the back of Jaime's neck. Jaime was afraid that he and Myra would be shot. (20 RT 3679-3680.)

One of the men was Myra to remove her shorts and underwear. They caressed her legs. (20 RT 3638, 3680.) One of the men said, "Open up your legs, bitch." (20 RT 3680.) Myra was praying in Spanish. She had her hand on Jaime's arm. They were inches from each other and Jaime was lying alongside of her. One of the men caressed

Myra's vagina and inserted a finger. He took out his finger and then tried to insert his penis. The man lifted Myra's legs and inserted his penis into her vagina. Myra was too afraid to struggle with the man because she believed that one of the men was armed. Jaime could feel the movement of a man who was touching Myra going up and down in the sand. The movement was going on for a couple of seconds. (20 RT 3639, 3680-3681.)

The man who had been on Myra said "ah" and then leaned over her. He whispered to Myra, "You are a sweet bitch." (20 RT 3639-3640.) Myra felt wetness. The man then closed Myra's legs. One of the other men then pulled her legs apart. (20 RT 3640, 3682.) He said, "You are not done." (20 RT 3640.) He inserted his penis into her vagina. Eventually, he pulled his penis out. Myra felt wetness after the second man finished. (20 RT 3640-3641.)

While the rape occurred, Myra held onto Jaime who was by her side. She said a prayer to God asking that she live. Jaime told her, "Shhh, be quiet, they are going to hear us." (20 RT 3641.)

After the second rape occurred, one of the men told Jaime and Myra to get up and run and not look back. Their car keys were thrown onto the sand near Jaime. Myra and Jaime got up and ran. Myra did not stop to take her glasses. Myra had only her T-shirt on. (20 RT 3641-3642, 3682-3683.)

As Myra ran to the car, she thought that the men would not let them live. She thought that the men were going to shoot them from behind. Myra had difficulty running and tripped twice on the way to the car. Jaime helped her up when she tripped. They eventually made it to the car. Myra got into the driver's seat of the car. They were not able to drive away from the beach because Myra could not see very well without her glasses. (20 RT 3642, 3683.) They drove down an alley and then stopped to trade positions in the car. Jaime then drove to the residence of a friend, Diego Pena, approximately ten to fifteen minutes away. (20 RT 3643, 3683.)

When they arrived at the Pena residence, Myra stayed in the car. Jaime went into the home and told Diego to get his gun. Jaime was hysterical. Diego's sister Angelina

went to see Myra in the car. Eventually, Myra went inside the house with Angelina. (20 RT 3643, 3683-3684, 3690-3692.) Jaime and Diego returned to the car and left for the beach where the rapes occurred. (20 RT 3644, 3684.)

Angelina gave Myra underwear and pants to wear. Jaime called shortly thereafter and said that he had called the police. Myra then went back to the beach where they met with police officers. They told the police about the rapes. Myra then went to the hospital with one of the police officers. She was examined at the hospital. (20 RT 3644-3645, 3696.)

When asked what effect the rapes had on her, Myra said as follows:

> Well, um, like now I feel like, um, I feel scared. Like I don't feel confident. Like if I go outside, 'specially at night, you know, like I feel like someone's just watching me. Or like if someone's kind of going to come off from behind and attack me. Or, like, um, I have a little girl and I seems - - I want to take her to the park and so she could enjoy herself. It's like I have tried to do it, and I, I can't even stay there that long. I stay there like 3, 10, 15 minutes because I'm afraid because it's only her and me. So it's like I get scared.

(20 RT 3653.)

When asked if the crime has had any effect on her relationship with Jaime, Myra said as follows:

> Yes, it has. First like, um like before this ever happened, um, we were always like, you know, like we would like understand each other better. We would, um, we weren't argue as much, and it's like now we're arguing or like, um, we're - - I don't know. It is just - - it is hard to communicate between us now.

(20 RT 3653.) Before the rapes, Myra and Jaime went to the beach often. Since the rapes, they did not go to the beach anymore. (20 RT 3653.)

On November 12, 1992, appellant pleaded guilty to one count of second degree robbery of Myra and admitted using a firearm in the commission of the crime. He pleaded guilty to second degree robbery of Jaime and admitted using a firearm in the commission of the crime. He pleaded guilty to rape by means of a foreign object in concert and forcible rape in concert as to Myra. He also admitted using a firearm in the

commission of the two rape counts. On March 8, 1993, Fred Jackson entered essentially the same pleas as appellant. (20 RT 3708-3712.)

The parties stipulated that Myra was examined on September 15, 1991, at 1:45 a.m.. DNA testing was done on vaginal samples and blood samples taken from Myra, and blood samples taken from Rollins, Jackson, Jaime, and appellant. The testing eliminated appellant and Jaime as donors of the vaginal samples. The vaginal samples were tested and found to have RFLP banding patterns that were similar to those found in the blood samples taken from Jackson and Rollins. (20 RT 3714-3719.)

2. Correspondence Between Appellant and Rollins

Sometime in December of 1993, Sergeant Barnes came into possession of letters written between appellant and Rollins while they were in jail. Appellant wrote to Rollins as follows:

> I got no love for you. If I don't get the DP, I am taking you out. Nigga you don't scare me. Bitch ass nigga. If you would of kept your mouth shut a nigga wouldn't have spoke on your name. But since you chose to turn snitch it's on cuz! It's on you mark. The word is out on you nigga. P.S. The OG[14] in the pin gave me the ok to take you out. Your all mines.

(20 RT 3735-3736.)

Rollins's letter back to appellant had the following passage, but the passage was crossed out with an X:[15]

> Say Nigga! I hear you speaking on a nigga's name. Nigga fuck ya now. Your punk ass should've kept your mouth shut. Then you wouldn't have nothing to swiz' it but since you chose to talk shit,

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[14] The parties stipulated that Ventura County Sheriff's Deputy Gordon Beckwith could offer opinion testimony as an expert on criminal street gangs. Deputy Beckwith opined that "OG" in gang jargon meant "original gangster," which also means a person who was originally a member of the gang or a person who is a veteran of the gang. It also could mean someone who is in charge of the gang or high in the gang's hierarchy. (20 RT 3740-3742.)

[15] Sergeant Barnes opined that the passage was written by Rollins, but appellant had been the one who crossed out this passage. (20 RT 3739.)

> it's on cuz! Nigga all love lost. Too bad you had to go out like this. P.S. Continue to talk yo bitch talk nigga! [¶] Thee Original Perm - - Perm Doggy-Dogg I-II.

(20 RT 3736-3737.) The following passage was written after the above-mentioned, crossed-out passage:

> You got 2 strikes. Number one, you're a snitch, number two rapist. [¶] Niggas don't like you kind in the pin. Your no good. [¶] Snitch, snitch. [¶] Niggas already ran Fred off the yard.

(20 RT 3737.)

Sergeant Barnes opined that appellant added the following comments on the letter written by Rollins: "Mad ass insane gang XXI" and "Sir Enemy Killa!!" There is an X written through the word "Enemy." (20 RT 3739.)

3. The Effect Genoveva's Murder Had On Her Children

At the time of the murder, Genoveva's daughter Vanessa was a first grade student at Rose Avenue Elementary School in Oxnard, California. (20 RT 3742-3744.) Vanessa's teacher, Dr. Joan Calkins, noticed that prior to the murder, Vanessa was "a shy child, but not painfully so." (20 RT 3742-3743, 3745.) Vanessa did her homework every night and was always nicely dressed, clean, neat. After the murder, Vanessa was "quite shy" and would stay next to Dr. Calkins all of the time, even during playground duty. She would not interact as much with other children. Vanessa showed signs of stress.[16] (20 RT 3746-3747.)

At the time of the murder, Genoveva's son Salvador also was a student at Rose Avenue Elementary School. He attended a fourth/fifth grade class taught by Alicia Hernandez. Ms. Hernandez described Salvador as a "very good student," "bright," and "very outgoing" before Genoveva's murder. He was a leader and popular with the other

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[16] The defense introduced into evidence one of Vanessa's report cards which showed that she received "satisfactory" as a grade for all of her subjects both before the murder and after the murder. (20 RT 3747-3751.) The report card also showed that after the murder, Dr. Calkin included a written comment that Vanessa was "very shy," "a good student," and "has good study habits." (20 RT 3751-3752.)

children. She was going to recommend him for the Gifted Students Program. He wanted to be a doctor, and Ms. Hernandez believed he had the potential to achieve that goal. (20 RT 3752-3754.) Ms. Hernandez had also seen Genoveva interact with Salvador. Genoveva was very proud of her son, and they were affectionate toward each other. Genoveva had also volunteered to help with class activities. (20 RT 3755-3756.)

On the Monday after his mother's murder, Ms. Hernandez saw Salvador at school. When Ms. Hernandez expressed her sympathy to Salvador about his mother, Salvador answered that he did not know what Ms. Hernandez was talking about, and that his mother was in Mexico. After the murder, Salvador's attendance was very sporadic. As the school year progressed, Ms. Hernandez believed that she could no longer refer Salvador to the Gifted Students Program because she did not believe that he could keep up with the program or even be present for the exam. After the murder, Salvador became very interested in police work. Salvador did not speak about his mother's murder. (20 RT 3756-3761.)

Salvador testified at the penalty phase of appellant's trial. He was 12 years old when he testified. After the murder, he lived with his aunt in Fillmore, California. Salvador's sisters also live there. Salvador remembered living in Oxnard with his mother. His family life there was fun. He would help his mother pack lunches. Genoveva worked during the day. She was home when Salvador and his sisters returned from school. Genoveva would go to the school sometimes for meetings. She would make the children do their homework. Genoveva would come to watch Salvador play baseball. (20 RT 3772-3776.) Genoveva made sure that they had a place to live and food to eat and clothes to wear. (20 RT 3778.)

Salvador was sad when he found out his mother died. He went to Mexico for a time, but when he returned to California he wanted to know as much as he could about what happened. He would read about the crime in the newspaper, but at some point he stopped because it bothered him. Salvador and his sisters did not have as much fun as they had before their mother was killed. (20 RT 3776-3778.)

Salvador and his sisters would go to visit Genoveva's grave. They brought flowers and talked to her about what was happening in their lives. After Genoveva was killed, Salvador began being afraid of somebody breaking into their house and getting him and his siblings. These thoughts sometimes would wake him in the middle of the night. He would sometimes feel like he had to take care of his siblings since Genoveva was no longer there. (20 RT 3779-3781.)

Genoveva's mother, Maria Cabrera, testified that Genoveva worked four days a week as a seamstress. She would leave her home at 6:30 a.m., get to work by 7:30 a.m., and return home at 6:00 p.m. Genoveva would prepare breakfast for her children before leaving for work and would prepare dinner after returning home from work. She would make birthday cakes for her children on their birthdays. She sewed clothes for her children. (20 RT 3789.) After Genoveva's murder, her children did not want their mother mentioned at all, and they would not talk about their mother. (20 RT 3781-3790.)

B. Defense Case

1. Evidence Of Appellant's Personal History

Several of appellant's family members and friends of appellant's family testified about appellant's childhood and personal history.

Appellant was born on August 31, 1969. (22 RT 4328.) Appellant's father is J.D. Sattiewhite and his mother is Margaret Sattiewhite. (22 RT 4318-4319.) In August of 1969, when Margaret was eight months pregnant with appellant, she was involved in two car accidents. (21 RT 3804; 22 RT 4328.) In both accidents, her car was hit from behind and Margaret was thrown into the dashboard. She received medical treatment, but she experienced bleeding from that time until appellant's birth. Margaret complained of rib pain and a headache after the accident and she was concerned that she would lose the baby. She also experienced severe pain following the second accident. (21 RT 3804-3806; 22 RT 4329-4330, 4352-5354.)

J.D. was very proud when appellant was born. (21 RT 3806; 22 RT 4330.) He had always wanted a son. (22 RT 4321.) He brought appellant to the church where he was a

minister and showed off appellant to everyone, and would hold him after services concluded. (21 RT 3807, 3880-3881.)

As a baby, appellant developed at a slow rate. (21 RT 3808, 3913; 22 RT 4198, 4332.) he did not sit up and roll over until he was approximately a year old. He did not walk until he was 2 years old because he had structural problems with his feet. (21 RT 3829; 22 RT 4332.) Appellant had to have his legs broken and reset in a cast. He also needed support bars in his shoes. (21 RT 3913.)

Appellant would talk, but it was difficult to understand what he said. (22 RT 4332-4333.) Margaret insisted that they seek special help for appellant, but J.D. refused. (22 RT 4333.) J.D. would hit appellant when appellant put his shoes on the wrong feet. (22 RT 4335.)

Appellant sucked his middle finger and his ring finger until he was approximately thirteen years old. J.D. was cruel when he saw appellant suck his fingers. He would slap appellant's hand out of his mouth or put hot sauce on his hand. (22 RT 4334-4335.)

Appellant also was a bed wetter until he was 13 or 14 years old. (21 RT 3829, 3864.) He stuttered and attended special education classes in elementary school. (21 RT 3839.) Although appellant was very obedient and polite, he was mentally slow and had learning disabilities. (21 RT 3810, 3939-3941, 3944-3946, 3883-3884, 4060, 4089.)

J.D. was a strict disciplinarian and he had difficulty accepting that appellant was a slow learner in school. (21 RT 3806-3807, 3809, 3832, 3889, 4058; 22 RT 4104, 4199.) When appellant wet the bed, his father would rip the sheets off the bed and throw them at appellant. He then would beat appellant with a long, leather belt. (21 RT 3864, 3956-3957.) He would belittle appellant or beat him for matters beyond appellant's control such as his inability to tie his shoes. He would beat appellant with his fists, belts, sticks, hard switches, and cable cords.[17] (21 RT 3914, 3956-3960; see 21 RT 3812-3813, 3833.)

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[17] Sheila Lewis, one of appellant's sisters, said that all of appellant's siblings got beatings, but that their self esteem "was never low" as a result of the beatings. (21 RT 3856, 3864.)

On one occasion, appellant's father picked up appellant and threw him into a wall and into a coffee table. J.D. did not seek medical attention for appellant after this incident. (21 RT 3833, 3915.) Appellant's father would beat appellant for having poor grades in school. (21 RT 3873-3874.)

During church services, J.D. would come down from the church pulpit to hit appellant for not sitting still during the sermon.[18] (21 RT 3811; 22 RT 4336-4337; see 21 RT 3910-3912.) J.D. would beat appellant if he did not say prayers correctly. J.D. also stopped allowing appellant to say prayers before the congregation during church services. (22 RT 4341.)

Appellant tried to constantly please J.D., but never could. J.D. never showed any affection to appellant. Appellant was frightened of J.D. (21 RT 3810, 3830, 3836, 3857-3859, 3861, 3864-3865, 3882-3883, 3913-3915, 3945-3948, 3957-3958, 4054; 22 RT 4096-4100, 4103, 4114, 4199, 4340-4341.)

Although appellant was frightened of J.D., appellant defended his sister Dora from a physical attack by J.D. This incident occurred immediately after appellant graduated high school. Margaret telephoned the police about the altercation. J.D. convinced the police to escort appellant away from their home. (22 RT 4342-4343.)

One activity that J.D. would have appellant join him in was watching pornographic and violent movies. (21 RT 3865.) Appellant began watching movies with J.D. when appellant was in tenth grade, but Margaret did not know what the movies were about. J.D. and appellant would watch these movies in the family room. The routine was that everyone else in the family was told to go to their own bedrooms. J.D. and appellant would remain in the family room and watch the movies. They watched movies every

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[18] Robert Shorts, one of the elders at J.D.'s church, attended every church service. He did not recall an instance where J.D. came down from the pulpit to hit appellant during services. (21 RT 3880-3881, 3883, 3887.) Robert's wife, Carol Shorts, saw J.D. come down from the pulpit to spank appellant's younger brother Dwight for misbehaving in church. (21RT 3944, 3947.) She never saw J.D. hit appellant during church services. (21 RT 3953-3954.)

day. While the movies played, Margaret would hear J.D. yelling, pounding on the walls, and yelling at appellant. (22 RT 4337-4339.)

Appellant attended Channel Islands High School. He was a good student who tried hard to succeed. He was a "follower," but not violent or aggressive toward other students. He attended special education classes and had a second or third grade ability in reading and math. (21 RT 3902-3905, 3921-3932; 22 RT 4339.) J.D. did not approve of appellant being enrolled in special education classes. (22 RT 4339.) Appellant successfully tried out for the school's football team. (21 RT 3907.) He also wrote songs while he was in high school. (21 RT 4068, 4077-4079, 4082.) Appellant's sister Regina would help him with his school work. She also would defend him at school if others had tried to pick on him. (21 RT 3916.)

Appellant would participate as much as possible in church services. He participated in a youth program for disadvantaged children and a program to help feed the homeless. (21 RT 38330-3831.)

When appellant was 16 years old, he worked for three months at a fish market that was owned and operated by Steve Otani. Appellant was assigned to help the cook in the restaurant. Appellant had a good attitude, was prompt, and was willing to work. He would do what he was told to do. He worked hard, but was a little "slower" than some of the other workers at the restaurant. Appellant left the job because he planned to join the armed services. Sometime later, appellant asked Otani if he could come back to work because he was unsuccessful in his attempt to join the armed services. (21 RT 3892-3900.)

In September of 1989, appellant worked for the City of Oxnard Parks and Facilities Department. While he worked for the department, he was positive and nice. There were instances where he was late to work. He also had one confrontation with a supervisor. He stopped working for the department in December of 1989. (21 RT 3933-3938.)

Appellant attempted to join the armed services, but was unable to pass the competency tests for math and English. (21 RT 3813-3814, 3866, 4070.) He also

attempted to enroll in a music school in Los Angeles, but he could not pass the entrance examination. (21 RT 3861-3862.)

J.D. left the family and ended his marriage to Margaret while she was in the hospital giving birth to appellant's youngest sister. (21 RT 3834, 3916.) J.D. stopped communicating with the family and did not leave a forwarding address. Appellant was very angry with J.D. for leaving the family. Appellant stopped going to church. He was no longer caring or fun. He began drinking. Appellant was violent when he drank. (21 RT 3817-3822, 3834-3835, 3867-3868, 3878, 3917, 3945-3946.)

After J.D. left the family, appellant also began hanging around Bobby Rollins and Fred Jackson. They were the only friends appellant ever had. Appellant began selling drugs to raise money for the family. (21 RT 3836-3837, 3868, 3876-3879, 3959; 22 RT 4348-4350.) Despite J.D. being a strict disciplinarian, appellant began associating with gang members for over a year before J.D. left the family. (21 RT 3827.) Appellant had a Long Beach Insane Crips tattoo on his arm. (21 RT 3853.)

2. Psychological Evaluations Of Appellant

Several psychological examinations of appellant were conducted. The experts who conducted these examinations testified as to appellant's psychological condition.

a. Dr. Francis Crinella

Dr. Francis Crinella is a clinical psychologist and professor of pediatric psychiatry and physical medicine and rehabilitation at the University of California, Irvine. (21 RT 3955-3966.) In providing an assessment of appellant's psychological condition, Dr. Crinella reviewed the grand jury transcript from appellant's instant case, a probation report, various interviews of witnesses, family members, and former teachers, and transcripts of appellant's school grades. Appellant was interviewed for approximately one hour. Dr. Crinella had appellant take a battery of neuro-psychological tests which

Dr. Crinella scored and interpreted. Dr. Crinella spent approximately fifteen hours performing the entire examination of appellant.[19] (21 RT 3968, 4006.)

Some of the information Dr. Crinella was told about appellant included that Margaret had been in two car accidents while pregnant with appellant and shortly before he was born. Appellant attended special education classes in school, and had speech therapy through the eighth grade. Appellant's physical development, including the condition of his legs and feet which required surgery to correct, indicated that he suffered from brain damage at birth. He also has had lifelong learning disabilities and continues to function somewhere between the third and fourth grade in math and spelling. (21 RT 3968-3969, 3977-3979.)

The interview of appellant was conducted by Dr. Fischer, an associate of Dr. Crinella. Dr. Crinella was not present for that interview. Dr. Crinella reviewed Dr. Fischer's notes in forming his opinions. Appellant told Dr. Fischer that he did not do his class work in school, but instead wrote rap songs. He had been suspended for fighting three or four times. He did not take the regular written driver's license test, but he took the test with a special education teacher who brought in a tape recording of the questions. He did not remember being beaten as a child, and he did not believe that his father ever used a fist on his children. He described his home life as pretty good and average. Appellant said that he had been convicted of possession of cocaine and that when he was confronted by the police, he mistakenly showed the officers where his drugs were. He started associating with gang members when he was out of school. He started using marijuana at age sixteen when his father was still at home. He also tried PCP and had used LSD since the age of eighteen. He talked about his education and said that he attended a business management program at Ventura College. He dropped out of the program before finishing and went to work at J. C. Penney. He had many jobs and could

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[19] Dr. Crinella did not obtain medical records to corroborate the car accident that occurred prior to appellant's birth, or regarding the condition of appellant's legs and feet as an infant. (21 RT 4007-4008.)

not remember them all. He never was fired, but he quit. After he quit, he just was "hanging out." (21 RT 4010-4015.)

Of his friendship with Rollins and Jackson, appellant said that neither of them was really the leader of the group. Appellant had tattoos on his arm and said that he tried to have them removed. One tattoo said "Baby Perm" and the other said "Long Beach" and "CRIPS." (21 RT 4015-4017.)

Appellant also gave Dr. Fischer an account of the current crime that was consistent with the evidence presented during the grand jury proceedings. At no time during the interview with Dr. Fischer did appellant say that anyone else made him do the shooting. At no time did he tell Dr. Fischer that it was not his choice to do the killing. (21 RT 4017.)

During appellant's interview, appellant showed an inability to relate himself to the circumstances that he was in. He knew of events that had occurred in the past, but they were historically jumbled up. Appellant had difficulty contemplating future events other than that he wanted to avoid his current criminal problems. (21 RT 3969-3970.)

On the Wechsler Assault Intelligence Scale, appellant scored a verbal IQ of 75, a performance IQ of 76, and full scale IQ of 74. Dr. Crinella opined that these results showed that appellant was borderline mentally retarded. (21 RT 3974.) On the Wide Range Achievement Test, appellant scored in the Sixth Grade Level for reading, fourth grade level for spelling, and third grade level for arithmetic. (21 RT 3975-3976.) On the Luria-Nebraska neuro-psychological battery, appellant had seven of the eleven clinical scales which were associated with brain damage.[20] (21 RT 3976-3977.)

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[20] In November 1993, defense counsel had sent Dr. Crinella authorization to have an MRI and an EEG performed on appellant at UCLA Hospital. Such tests can detect whether there is a lesion or injury to the brain. Dr. Crinella did not have appellant undergo either of those tests. A CAT scan was subsequently performed on appellant, but it showed no abnormalities in appellant's brain. Dr. Crinella said that the lack of abnormalities on the CAT scan image did not change his tentative decision that appellant received brain damage as a result of prenatal trauma. He opined that a person with

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On the Bender Visual Motor Gestalt Test, appellant made eight errors. A twelve year old child typically makes no errors on this test. Appellant's errors were consistent with individuals who have neuro-development delay related to brain damage. Dr. Crinella opined that based on the results of the Bender Test, appellant's neuro-developmental age is seven years old. He also opined that the test results show that appellant does not see relationships very well, although he would know the difference between right and wrong. For example, appellant would know that it is wrong to throw a rock through a window, but he would not necessarily understand that the owner of the broken window would have to spend money to buy another window. Dr. Crinella also opined that appellant lacks an internalized sense of morality. Rather, it is externalized, meaning his moral judgment is shaped by external forces. (21 RT 3979-3984.)

On the Minnesota Muliphasic Personality Inventory (MMPI), appellant had to have the questions read to him rather than read the questions himself. The questions are written for a person with the ability to read at a sixth grade level. Dr. Crinella opined that appellant's depression score was average, which is inconsistent with people in jail awaiting punishment for a crime. He expected appellant to have some elevated depression. He had rarely seen a depression score as low as that of appellant for a person awaiting sentencing on murder charges, unless the person was out of touch with reality. Dr. Crinella believes that appellant lacks the ability to see in the future, to visualize himself either being executed or incarcerated. (21 RT 3985-3987.)

Appellant was given "ink blot" tests. People with learning disabilities are given these tests to see whether they are able to organize the ink blot into a percept that other people see and whether the subject can use his imagination or fantasy to see a theme in the ink blot. Ten ink blots are shown. They are standardized and have been in use since 1921. Appellant only saw figures in eight of the ink blots. On the remaining two,

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(...continued)
appellant's intellectual deficiencies could have suffered brain damage. (21 RT 4039-4042, 4046-4048.)

appellant could not see anything, which Dr. Crinella opined was unusual, and in the retarded range. For the eight ink blots in which he saw a figure, he saw what most people have identified seeing such as an elephant where most people see an elephant and a butterfly where most people see a butterfly. He only saw people on two of the cards. Normally, people are seen in at least five or six of the cards. (21 RT 3987-3988.) Dr. Crinella opined that the results show appellant has "very limited imagination, limited intellectual resources, limited ability to imagine what is going to happen in the future to imagine himself in a historical context or other people in a historical context."[21] (21 RT 3989.)

Appellant also was given the Phimotic apperception test. The subject is asked to tell a story about the people in the pictures. Appellant was shown fifteen pictures and asked to tell a story about each card - who the people are, what they are doing, how they are feeling, and what is going to happen. Typically, on each card, the subject can relate a paragraph or more. Appellant's responses showed no historical context for the people in the pictures. Appellant's responses were "extremely concrete" such as "That's a man. That's a woman." He appeared unable to imagine what they were doing. Dr. Crinella opined that appellant could see what was depicted, but he could not use his imagination to create something beyond the stimulus card. Dr. Crinella opined that the results of this

[21] Dr. Crinella believed that if appellant had threatened to kill a person who had testified against him in the trial, it would show an ability to imagine what is going to happen in the future. (21 RT 4034.) Dr. Crinella also believed that an individual who uses a firearm to kill someone, and disposes of the firearm after the murder, shows a degree of knowledge of the future and the possible consequences of having a firearm in his possession. When the person wipes blood off the firearm and disposes of it, it shows the person has a degree of thinking that there is some consequence to his actions. When the person disposes of shoes that had made a distinctive shoeprint in the mud before officers can find the shoes, it shows a degree of thinking and reacting to possible future consequences. (21 RT 4037.)

test also provided further confirmation that appellant has brain damage.[22] (21 RT 3989-3990.)

Despite believing that appellant was borderline mentally retarded, Dr. Crinella believed that appellant would know the difference between right and wrong. If appellant were to put a gun to someone's head, he would know that he would be causing the victim to be in fear. He also would know that if he were to put the gun to someone's head and pull the trigger three times, that he knew that he would kill the person. He understood generally that if he killed the person that the person would no longer be alive. However, he had limitations in appreciating that death was a forever thing. (21 RT 4031-4034.)

b. Dr. Ines Monguio

Dr. Ines Monguio provided expert opinion testimony regarding neuro-deficits or psychological deficits pertaining to appellant. (22 RT 4125-4129.) Dr. Monguio gave appellant a ninety minute neuro-psychological interview. Dr. Monguio also interviewed appellant's mother for two hours to get additional data. Dr. Monguio also visited appellant twice while he was in jail.[23] (22 RT 4130.) The tests she gave appellant were designed only to ascertain whether appellant had a brain impairment. (22 RT 4189.)

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[22] Dr. Crinella stated in his letter to defense counsel that he believed appellant to be borderline mentally retarded due to chronic brain syndrome. Dr. Crinella believed that appellant did not have good adaptive behavior. He was not able to do very well in employment and turned to criminal activity early on in life. Dr. Crinella did not believe that he simply quit his various jobs. Rather, he believed that appellant was fired from his jobs due to incompetence. Dr. Crinella formed this opinion despite having read the statements of Otani and Carbajal from Otani's Market who indicated that appellant was perfectly capable of keeping his job, but that appellant quit because he was trying to do something else. (21 RT 4005, 4026-4028; People's Exhibit 13-P.) Dr. Crinella acknowledged that the term "chronic brain syndrome," which he used in describing appellant, was not found in the DSM III Manual. (21 RT 4039.)

[23] Dr. Monguio testified that her opinions regarding appellant's psychological condition were based solely on the results of the tests she conducted. The information she received from appellant's mother was to corroborate what had been observed clinically. (22 RT 4171-4172.)

During these meetings with appellant, Dr. Monguio observed that appellant's speech ability was "okay." When encouraged to use more than one sentence or verb in his responses, appellant would "very quickly get lost." Appellant could not put together more than four or five words in a sentence that would make sense before his speech would break down. His responses were simplistic, and he favored mono-syllabic words with very few modifiers. Appellant had difficulty understanding more than one sentence at a time. Dr. Monguio had to repeat questions being asked of appellant. Appellant was cooperative and not aggressive during the interviews. (22 RT 4131-4134.) Dr. Monguio asked appellant why he committed the rape-murder. Appellant answered that he was angry and he "didn't know." (22 RT 4176.)

Dr. Monguio gave appellant the Luria-Nebraska neuropsychology battery, which assesses very basic functions such as movement and complex functions such as intellectual processes or intelligence. The test is designed to measure the extent and site of communicative and behavioral deficits that may have resulted from injury to the brain tissue's ideology or origin. The patient sits across from the administrator when the test is given. The first part of the test consists of identifying the subject's motor scale. Appellant scored at a "critical" level, which suggested that he had impaired motor performance. The results showed that appellant had a chronic condition in his brain that made it difficult for him to understand and structure information that was coming into his ears and from the environment around him, so he could use the information on his own. Dr. Monguio opined that appellant would act either impulsively or passively depending on the stimulation in the environment around him. Appellant's ability to think abstractly was very impaired. Dr. Monguio opined that appellant would have difficulty taking a particular lesson and generalizing it to apply to other situations. (22 RT 4145-4134-4146.)

Dr. Monguio administered the Rey Complex figure test. The test involves copying a figure. The results of appellant's copying led Dr. Monguio to opine that appellant had either "severe" or "moderately severe" impaired attention. Appellant was unable to

organize complex information as a whole. Instead, he would have to break down the complex information into little pieces he can process. (22 RT 4148-4153.)

Dr. Monguio administered the California Category Learning Test. The test is designed to measure the ability of a person to learn a list of semantically-related words and semantically-unrelated words. In Dr. Monguio's opinion, appellant's responses showed he had definite impairment in verbal learning. (22 RT 4153-4155.)

Dr. Monguio administered the Tri-Grams Repetition test. The test measures the subject's ability for simple language processing. Dr. Monguio opined that appellant's results showed that he had a chronic condition in his brain that results in a variety of intellectual cognitive impairments ranging from moderate to moderate-severe. (22 RT 4156-4159.)

Dr. Monguio administered the Pace Auditory Sequential Addition Task test. She opined that the results showed that appellant had moderately severe to severe deficits in sustained attention and complex attention. (22 RT 4159-4161.)

In Dr. Monguio's opinion, appellant was not faking his responses on the tests. There were moments where it was clear that appellant lacked the ability to complete the task for the particular test. Dr. Monguio opined that the results of the tests showed that appellant had "basic sensory processes impairment, in paraorganization of information, in paraplanning, in paramonitoring and in paraself-correction but no craziness. He is not crazy. This is brain injur[y]."[24] (22 RT 4161-4163.)

Dr. Monguio also opined that an unimpaired brain has the malleability or plasticity to overcome abuse such as that inflicted by appellant's father. A normal brain has the capacity to form relationships outside the abusive environment and create defense mechanisms. An impaired brain, such as appellant's, does not have that ability. Dr. Monguio's opinion, based on the information she had available to her, was that appellant

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[24] Dr. Monguio was aware of other testing, such as a CAT scan and an EED, performed by Dr. Benson on appellant, and was not surprised that the tests did not reveal any brain damage. (22 RT 4163-4164.)

has a "globally impaired brain." The impairments that appellant had ranged from mild to moderately severe. She opined that the source of the impairment was traumatic head injury that was consistent with the automobile accident described that appellant's mother had while pregnant with appellant.[25] The abandonment by appellant's father resulted in appellant having "disinhibition of impulses," meaning that after appellant's father left the family, there was no longer structure or guidelines for appellant.[26] The only environment where appellant could function or perform at all was one that was completely unambiguous, and where the environment was highly structured. (22 RT 4165-4171, 4188.)

On cross-examination, Dr. Monguio testified that appellant told her that he had been associating with gang members before his father abandoned the family, and that he "[s]omehow" was able to keep his problems "at bay" so he would not get in trouble with his father. Once his father abandoned the family, there were no more restraints against associating with socially inappropriate people. Appellant was able to keep these associations secret from his mother. Appellant also told Dr. Monguio that although he had been consuming alcohol since he was seventeen or eighteen years old, he kept his alcohol consumption secret from his mother. (22 RT 4175-4176.)

Dr. Monguio had opined that appellant was able to determine the rightfulness or wrongfulness of his actions on a very basic level. (22 RT 4176-4177.) She opined that when appellant shot the victim three times in the head that he understood it to be wrong, but she was not sure that he understood why it was wrong or what was wrong about it. She did not believe that appellant would think that his conduct was morally wrong. (22 RT 4183-4184.)

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[25] Dr. Monguio never received any medical records regarding appellant or his mother to confirm that the automobile accident occurred. (22 RT 4172.)

[26] Dr. Monguio's only source of information about appellant's father's abuse was from appellant's mother. When she asked appellant what kind of father J. D. was, appellant said that he was a good father. Appellant also said that his father was strict and that "sometimes I deserved it if I got in trouble." Dr. Monguio never asked appellant if his father beat him. (22 RT 4173-4174.)

Dr. Monguio also opined that it was unlikely appellant could plan and execute a complex act, or an act that required more than one step. She said that driving a car was not a "good example" of a complex act because "when we first begin to drive a car, it is a complex act", but "[a]fter a while, it's a very automatic task. There is a subprogram at the cerebella level where you don't even have to think in order to drive." (22 RT 4176-4177.)

Dr. Monguio would consider using a particular weapon to commit a crime and then selling the weapon to get rid of it as a complex act, depending "on how difficult it was." Dr. Monguio did not believe that everyone who was abused by their father was going to become a violent individual. She opined that it was "50/50" whether a person with both the impairment appellant had, and having had an abusive father, would turn out to be a violent person. (22 RT 4178-4180.)

She opined that appellant's psycho-social development "seems to have been appropriate" within his family. Once appellant's father abandoned the family, appellant's personality did not "change," but his "situation and the circumstances change[d] and therefore his patterns of adjustment change[d]." (22 RT 4181-4182.)

c. Dr. Patrick Barker

Dr. Patrick Barker performed a mental status evaluation of appellant on behalf of the defense. (22 RT 4209-4212.) Part of the evaluation involved interviewing appellant. Dr. Barker found appellant to be cooperative, friendly, and oriented as to person, place, time, and situation. Appellant knew who Dr. Barker was and the purpose for the interview. Appellant's speech was quite limited, and he did not demonstrate an extensive vocabulary. Appellant described moderately grandiose fantasies and spoke in exaggerated ways about his ability or potential. Appellant also showed persistent aggressive and homicidal impulses. Appellant described his own mood as being sometimes fearful, anxious, depressed, and short-tempered. During the interview, Dr. Barker did not observe appellant showing feelings of depression or anxiety. (22 RT 4213-4214.)

During the interview, Dr. Barker spoke to appellant about his upbringing. Dr. Barker also spoke to appellant's mother and one of appellant's sisters about his upbringing. (22 RT 4214-4215.) Appellant told Dr. Barker that J.D. had left the family approximately four or five years earlier, and that he did not know why he had left. Appellant was angry with J.D. for leaving the family. He said that he did not remember much about his upbringing, but he did not do much together with J.D. He did not believe that he was physically, emotionally, or sexually abused as a child. He did not use of drugs or alcohol until after high school. Appellant said that J.D. would have kicked him out of the house had he done so. (22 RT 4215-4217.)

Appellant's mother and sister told Dr. Barker that appellant had been badly abused by J.D. from early on in appellant's life.[27] One reason J.D. hated appellant was for having limited intellectual abilities and physical developmental problems. He also hated that appellant had to wear braces and corrective shoes for a number of years. He hated that appellant wet the bed until he was ten to twelve years old. He also hated the fact that appellant performed poorly both in school and at church functions. J.D. had appellant watch violent and X-rated videos with him in the family's home. (22 RT 4217-4220.)

J.D. abused appellant more than his siblings. While appellant's siblings could console each other regarding their father's abuse, appellant did not have anyone to turn to. Appellant's siblings also would turn on appellant and make him the scapegoat as a way to vent their own frustrations and anger about what was happening to them. (22 RT 4233-4234.)

At a subsequent interview with appellant, Dr. Barker asked appellant whether the report from his mother and sister was true. Appellant confirmed that his mother and sister were being truthful. It made him uncomfortable to speak of J.D. in this way. Appellant said that he watched violent videos and X-rated videos with J.D. Appellant

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[27] Before J.D. left the family, appellant's mother had obtained a restraining order against J.D. and executed a declaration recounting acts of physical abuse that appellant's father committed against her and their children. (22 RT 4222-4223.)

said that he remembered seeing movies where people were being killed and cut up.[28] He was angry with J.D. for acting in a way that was contrary to the what he had been preaching all of their lives. (22 RT 4218-4220, 4224, 4234.) Dr. Barker opined that it was possible for appellant to obtain moral guidance from persons other than his father. (22 RT 4258-4259.)

When J.D. left the family, appellant had freedom to do things, such as buy weapons, that he was not allowed to do before.[29] He also was angry with his father for acting in a way that was contrary to the what he had been preaching all of their lives. Dr. Barker opined that J.D. leaving the family would have confused appellant because of his limited intelligence, and because of J.D.'s inconsistent behavior. (22 RT 4224-4225.)

Appellant told Dr. Barker that he joined the Southside Gang a few months after graduating high school in 1987, which was before J.D. left the family in early 1989. At a later date, appellant became affiliated with a Long Beach gang through his friendship with Bobby Rollins. Appellant would sell drugs to people and then rob them of the drugs that they had just bought. He then would turn around and sell the drugs to another customer. (22 RT 4248-4249.)

Dr. Barker described this gang involvement and criminal activity as a complex act and one that would take a certain amount of planning. Appellant had engaged in this

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[28] Dr. Barker opined that appellant did not have the intellectual ability to evaluate the appropriateness of the videos he watched with J.D. Because appellant both respected and feared J.D., he would be confused about the content of the movies. Watching the movies with his father gave him a sense of power. Appellant identified with the people who were doing the killing or cutting. That made him have feelings of strength and power. He indulged in these kinds of fantasies. They became part of his daydream life. (22 RT 4234-4235.)

[29] Appellant had told Dr. Barker that he began consuming alcohol sometime after he graduated high school. He also began to use drugs sometime after graduating high school. Dr. Barker understood appellant's statements to mean that while he may have engaged in some of this conduct after high school, he did not do very much of it until J.D. had left the family. Dr. Barker did not believe that appellant's mother knew he was engaging in such activity. Appellant's concealment of these activities shows his awareness that the activity was improper. (22 RT 4257-4258.)

activity on his own rather than as a result of manipulation. His participation also showed a certain amount of conscious choice on his part. Appellant told Dr. Barker that he liked being in a gang because he felt that he belonged. It gave him feelings of power and it provided him ways of making money. Appellant enjoyed telling Dr. Barker about his criminal activity. Appellant had considerable amounts of money, $600, $900 a day. Appellant spoke with pride at the money he had. (22 RT 4248-4250, 4260-4261.)

Appellant described two favorite fantasies to Dr. Barker. One was that he would develop his own type of Mafia organization and engage in all kinds of criminal activities such as selling drugs and weapons, engaging in extortion, and attacking police officers. What appealed to appellant more than the terrorizing of the police or making money, was that people would look up to him. Appellant said that he "would be the boss" and that he would "hav[e] power" and be "[i]n control." (22 RT 4241-4242, 4245-4246.)

The other fantasy was "Getting away with something like stabbing somebody or bashing something over the head just to see if I could get away with it, like on Unsolved Mysteries." Appellant had thought a lot about this fantasy and showed pleasure in discussing it. Dr. Barker believed the fantasies were influenced by watching the videos with his father. The "seeds of these fantasies" were planted by watching the videos. Dr. Barker believed that appellant must have felt a tremendous lack of power and respect while growing up. The fantasies were a way for appellant to feel better about himself. His low intelligence kept him from engaging in critical thought about the fantasies, to consider that these were thoughts that he should not be having. His lack of self monitoring made it difficult for him to evaluate his own thinking. (22 RT 4241-4242.)

Dr. Barker had two conversations with appellant about the current murder. In the first conversation, appellant said that the crime "just happened." Dr. Barker was unable to determine whether appellant was unable to discuss the crime or was refusing to discuss the crime. (22 RT 4251.)

In the second conversation, appellant said that he shot the victim because Jackson had told him to. Someone inside the car with Jackson and the victim had said Jackson's name. Because the victim knew Jackson's name, Jackson became scared because he had

other criminal charges pending. Jackson told appellant to shoot the victim, and appellant complied. Appellant did not say that he was forced to kill the victim. (22 RT 4252-4253.)

Appellant told Dr. Barker that he did not rape the woman because "[t]hat's not my style" and "I don't do that to women." Dr. Barker did not believe that appellant would rape someone, even though he is easily manipulated, and even if someone he looked up to had raped a woman. However, by stating that rape is not his "style," appellant also was demonstrating his conscious decision not to do a particular act.[30] (22 RT 4253, 4255-4256.)

Dr. Barker believed that appellant got the moral values regarding rape because he had six or seven sisters and had feelings about women based on that experience. He also was able to glean moral values from his sisters. It was possible that committing the current murder was appellant living out one of the fantasies that he had described to Dr. Barker. (22 RT 4277-4278.)

Dr. Barker also opined that appellant knew when he shot the victim that the shooting would kill her and that doing so was wrong. Dr. Barker did not know whether appellant knew that the victim would be dead for all time because he did not ask appellant about his feelings or understandings about death. (22 RT 4263.)

Dr. Barker had not been informed that the police interviewed appellant after the murder occurred. Dr. Barker opined that if appellant had denied involvement, it would have indicated an awareness of the wrongfulness of his actions. Disposing of the murder weapon and his shoes also would be consistent with an awareness of the wrongfulness of the act. (22 RT 4281.) Making a statement after the murder saying that he always

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[30] Dr. Barker had been informed that appellant, Jackson, and Rollins confronted a young couple on Oxnard Beach, and that Jackson and Rollins raped the young girl. Dr. Barker opined that appellant's lack of participation in the rape could show a conscious decision to not engage in that type of conduct. Appellant understood that participating in the robbery of the young couple at the beach was wrong. Participating in the rape/robbery at the beach also could have been a manifestation of one of his fantasies. (22 RT 4256, 4263, 4278.)

wanted to do something like that would be consistent with his homicidal fantasies. (22 RT 4282.)

Dr. Barker administered the WRAT Test, which is a test of reading ability. Appellant's reading ability was borderline sixth grade. (22 RT 4225-4226.)

Dr. Barker administered the Wechsler Adult Intelligence Scale. The test measures different cognitive and intellectual functions. Appellant's full scale IQ was 73. The score qualified as borderline mental retardation. An IQ scale of 70 is the first cutoff for mental retardation.[31] Dr. Barker opined that appellant's score indicated that his knowledge of general information, vocabulary, comprehension, abstract reasoning ability were all significantly lower than would be average for a person his age. Because of the score, Dr. Barker was concerned that appellant had brain damage.[32] (22 RT 4226-4227.) Dr. Barker also opined that appellant could easily be manipulated by someone who could perceive appellant's low intelligence and need for self esteem resulting from being a victim of abuse.[33] (22 RT 4243-4244.)

Dr. Barker administered the Luria-Nebraska Neuropsychological Screening Test. The test helps to indicate if the subject should be referred for a full evaluation of whether he or she has brain damage. Appellant's score on the Luria-Nebraska test indicated clearly that appellant should be referred for a full evaluation of possible brain damage. (22 RT 4227.)

Dr. Barker administered the Minnesota Multiphasic Personality Inventory (hereinafter "MMPI") and the Millon Clinical Multiaxial Inventory (hereinafter

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[31] Dr. Barker explained that appellant's IQ fit within the category of borderline intellectual functioning in the DSM-III. (22 RT 4279.)

[32] Dr. Barker offered examples of appellant's limited intelligence. Appellant was asked, "Where does the sun set?" Appellant replied, "I don't know." Appellant was asked, "How many weeks in the year?" Appellant replied, "84." (22 RT 4238-4239.)

[33] Dr. Barker opined that if appellant were at a store and someone he respected told him to take some beer, appellant would do so. Dr. Barker opined that appellant would not go in and take the beer if a police car were parked in front of the store. His decision to not take the beer under these circumstances would be the result of a conscious decision. (22 RT 4262-4263.)

"MCMI"). These tests measure intellectual and psychological functioning. (22 RT 4227.) Dr. Barker found that appellant's score on the MMPI was "elevated," which showed that appellant answered the test questions distinctly differently from how normal people would answer the questions. Dr. Barker believed that the elevated score could have been due to appellant's low intelligence, appellant's attempt to fake his answers to demonstrate that he was mentally ill, or appellant not giving any thought to answering the questions seriously. (22 RT 4227-4229.)

Appellant's score on the MMPI also was consistent with appellant believing he was in a stereotypical masculine role. The score on this scale was so high that it could show that he wanted to portray himself as very masculine and in a very stereotypical way. Dr. Barker opined that appellant had enough ability to understand these questions. (22 RT 4229.)

Dr. Barker opined that appellant's overall MMPI scores indicated that he was very angry, anti-social, suspicious, periodically delusional, anxious, agitated, confused, and alienated. The overall scores showed that appellant had poor judgment and very poor impulse control. (22 RT 4229-4230.)

Like appellant's responses to the MMPI, his responses to the MCMI questions also could show that he was faking his answers to magnify his mental illness. Dr. Barker opined that appellant's responses indicated a tendency to complain and be self pitying. Appellant's responses also showed that he had tremendous lack of trust, a paranoid orientation towards life, lack of identity, strong anti-social tendencies, strong aggressive tendencies, and an inability to relate to other people in normal ways. (22 RT 4230-4231.)

Dr. Barker opined that all of the tests showed that appellant's intellectual functioning was borderline mentally retarded, and that he had a mixed personality disorder, and strong elements of anti-social and schizotypal traits. The doctor also had no doubt that appellant had some brain damage. (22 RT 4213-4214, 4231, 4236-4238, 4282.)

d. Dr. David Benson

Dr. David Benson and the members of his clinic at UCLA performed a full mental status evaluation and a neuropsychiatric evaluation of appellant on behalf of the defense. The evaluation took place at UCLA on the afternoon of December 9, 1993. Records concerning appellant were reviewed[34] and appellant was interviewed by one of the individuals in training in Dr. Benson's clinic. Then, the various assessments were performed. Afterward, the entire body of information obtained about appellant was reviewed by a group of members of the clinic. Dr. Benson personally interviewed appellant before the group of clinic members. Lastly, the group of clinic members evaluated appellant's case. (22 RT 4283-4288.)

Dr. Benson observed that appellant was "slow, very definitely cooperative and was very pleasant." There was "no agitation" and "no signs of depression" during the interview. Appellant denied being depressed, but he "sometimes felt angry" at members of his gang. Appellant's sleep, flex drive, and appetite were all within normal limits. He was not concerned about his future. Dr. Benson and the group of clinic members opined that appellant had "impairment in insight and judgment." (22 RT 4288-4289, 4292-4294.)

Appellant was given the Folstein Mini Mental State Exam. This examination is usually administered to older individuals with dementia rather than persons such as appellant. The examination measures the subject's attention level and memory recall ability. Appellant scored slightly below normal (23 where 24 is a normal score). Appellant was unable to perform many of the test items regarding his memory and recall. Although appellant had a limited vocabulary and had difficulty expressing himself, Dr.

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[34] Dr. Benson did not receive any police records or other documentation about the car accidents involving appellant's mother while she was pregnant with appellant. Also, no medical records for appellant's mother were provided. (22 RT 4305-4306.) Dr. Benson reviewed Dr. Monguio's report, which described one car accident as a minor motor vehicle accident. (22 RT 4306-4307.)

Benson opined that the exam results showed that he did not have a significant language disorder. (22 RT 4290-4291.)

A neurological assessment was also done which examined the individual cranial nerves in appellant's head as well as appellant's gait, stance, coordination, motor strength, motor development, reflexes, and sensation. Dr. Benson opined that appellant had a "mild abnormality" which was a "little droop on the left side of his face." Dr. Benson further opined that the abnormality showed a weakness of brain level in the nerves for the left side of appellant's face. The group believed that their findings, as well as appellant's school history and physical development, showed that appellant was "brain abnormal." The car accident that his mother was in while pregnant with him could possibly have led to the brain abnormality. (22 RT 4294-4297.)

Appellant was given a CAT Scan. The results of the scan were considered normal. Dr. Benson, however, opined that the normal results did not eliminate the possibility that appellant had brain damage. There are abnormalities that the CAT Scan does not detect.[35] (22 RT 4297-4298.) Dr. Benson opined that appellant was suffering from significant brain damage. (22 RT 4299-4300, 4316-4317.)

Dr. Benson further opined that appellant did not have the ability to think abstractly as a normal person does. He had difficulty processing complex information due to the brain damage. Appellant could perform simple tasks, but the more complex the task, the more difficulty appellant would have in performing the task. Appellant would have

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[35] Appellant's defense attorney, Willard Wiksell, had asked Dr. Benson to perform an EEG or an MRI on appellant. Dr. Benson testified that an MRI is a more accurate test of brain damage than the CAT Scan. Dr. Benson decided to not administer the MRI due to its cost, which is three or four times the cost of the CAT Scan. The EEG is best utilized when attempting to detect seizure disorder. Because there was no evidence of such disease in appellant's history, the EEG was not given. The CAT Scan was believed the to be the most appropriate test because they were looking for "evidence of just general or diffuse abnormality." (22 RT 4301-4302.) Dr. Benson knew of appellant's medical history, including the history about one car accident involving appellant's mother, before he decided to only perform the CAT Scan. (22 RT 4303-4304.)

difficulty discerning right from wrong on a considerably less complex level. (22 RT 4298-4300.)

C. Prosecution Rebuttal

Dr. Ronald Markman testified for the prosecution on rebuttal as an expert regarding the psychiatric issues in the case. (23 RT 4418-4422, 4425-4426.) Dr. Markman reviewed the "murder book" that was prepared by the prosecution. The "murder book" included police reports, reports from independent third parties, a probation report, reports regarding interrogation of people associated with the case or people associated with appellant personally. The "murder book" included the expert's report regarding appellant's competence to stand trial. There also were reports of direct interrogation of appellant. (23 RT 4426.) Later, Dr. Markman received reports from Drs. Crinella, Monguio, Benson, and Barker. (23 RT 4426-4427.)

On March 11, 1994, Dr. Markman attempted to interview appellant pursuant to a court order. The prosecutor and appellant's trial attorney were presented when he attempted to interview appellant. Dr. Markman introduced himself, explained who had hired him to conduct the interview, and explained the purpose of the interview. He explained to appellant that he was there to perform a psychiatric evaluation which would assess his condition in relationship to the charges. He would provide a report which could help him or could hurt him depending on what his findings were. Dr. Markman also explained that although the trial judge ruled that appellant should submit to an evaluation, it was appellant's choice whether to comply with the court's order. Dr. Markman asked appellant whether he would be willing to be interviewed. Appellant looked at his attorney and then said that he refused to be interviewed. (23 RT 4427-4428.)

Dr. Markman heard the entire testimony of the defense experts with the exception of one hour's worth of Dr. Monguio's testimony due to being delayed arriving at court. He had the opportunity to review all of the reports and raw data collected by the defense experts. (23 RT 4428.)

With respect to Dr. Crinella's opinion that appellant suffered from borderline mental retardation due to a chronic brain syndrome, an opinion based on appellant's full scale IQ of 74 and that he had poor adaptive behavior, Dr. Markman opined that there was information from testimony and available reports that did not support Dr. Crinella's opinion. Appellant demonstrated an ability to adapt to his role in the Sattiewhite family within the confines of a very authoritarian father. Appellant adapted in school situations. Appellant was not a problem child in high school or elementary school, even though there were times when he was reprimanded by the school principal. (23 RT 4429-4430.) Appellant also adapted in work situations, evidenced by the testimony of Otani and Carbajal who both thought appellant was a very good worker. (23 RT 4430.) Appellant also adapted in the structure of his gang relationships to the point where he had continuous "friendship behaviors" with specific members of the gang. He did not adapt "superiorly," but he did an adequate job of adapting. (23 RT 4430.)

Dr. Markman also disagreed with the assessment that appellant was borderline mentally retarded because he had the full scale IQ of 74. There was a more specific diagnosis in the DSM-III-R. There was a range of IQ numbers that relate to mental retardation in the DSM-III-R. Mild retardation required an IQ score of 50-55 to 70. There was moderate retardation, which was 35-40 to 50-55. Severe retardation was 20-25 to 35-40. In the DSM-III-R, there was a diagnosis called borderline intellectual function. That had an IQ score of 71-84. Borderline intellectual function was not considered a mental disorder in the DSM-III-R. It was considered a "V-Code" which meant that it was a condition not attributable to a mental disorder that could be the focus of attention or treatment. Appellant was very close in the range of borderline intellectual function and mild retardation. (23 RT 4430-4434.)

With regard to Dr. Crinella's opinion that appellant was unable to project himself in the future, Dr. Markman opined that there was both written material and testimony that suggested otherwise. Appellant made an attempt to join the armed services, which showed that he was willing to undertake that obligation for the future. Appellant also discarded the murder weapon and his shoes, suggesting that he understood the potential

future criminal consequences of his behavior. Appellant participated in drug sales with a desire to obtain financial gain, suggesting he understood the future consequences of his behavior. (23 RT 4434-4436, 4439.)

Dr. Markman disagreed with Dr. Crinella's description of appellant as a "moral imbecile." Dr. Markman opined that morality was not a technical term. Imbecile was a term that was used in the DSM-I which described a level of retardation for someone who had an IQ in the 30's. Dr. Markman disagreed with the suggestion that appellant had no value structure in understanding right and wrong. There was data concerning his family relationships which showed that appellant was capable of understanding the consequences of his behavior. Appellant feared punishment from his father. His performance in his final two years of high school improved. He received positive reinforcement because of his improved performance. As a result, negative behavior was held to a minimum. This indicated a certain awareness of positive and negative reinforcement. (23 RT 4436-4438.)

Dr. Markman opined that appellant's history and other information about appellant suggested that he has a superego. The superego was the part of the individual's personality or mind that provided the internal control mechanism that allowed the individual to function successfully in society. Appellant's superego was shown in his statement that he would not participate in rapes because he had sisters and would not do that to a woman. Such a choice showed a "right/wrong phenomena way of thinking," which is "an internalized limitation on one's behavior that falls within the framework of superego development." Dr. Markman opined that there was no data suggesting appellant lacked the understanding of right and wrong. (23 RT 4440-4441.)

Dr. Markman was unable to render an opinion whether appellant had a mixed personality trait, one being schizotypal, without doing a direct examination. There was evidence that appellant had an antisocial relationship with his environment due to his repetitive criminal behavior. "Antisocial behavior" was a description that fit most criminals who ha a history of criminal repeated violent crimes. "Antisocial" suggested that the person had either an absent or defective superego so that there were not internal

limitations. The person was functioning under the "pleasure principle," where the person did what made him or her feel good at the time, notwithstanding the consequences. People with antisocial personalities needed external controls over their behavior because they lacked internal limitations or an effective superego to police themselves. (23 RT 44423-4444.)

Although Dr. Markman agreed with Dr. Barker's assessment that appellant had poor self-monitoring, poor self-correction, and poor judgment, Dr. Markman opined that there was data inconsistent with Dr. Barker's opinion that appellant was easily manipulated. Appellant's refusal to participate in raping the victim in concert with the others indicated that appellant chose some behavior, despite the pressure being put on him by Rollins and Jackson. The report of appellant selling drugs, stealing the drugs back, and then reselling the drugs showed that he actually was capable of manipulating others. Appellant also demonstrated a lack of being manipulated in his interrogation by Detective Gatling where appellant initially denied involvement in the crime. (23 RT 4444-4445.)

Contrary to Dr. Monguio's opinion, Dr. Markman opined that there was data showing appellant was capable of planning and executing a complex act. Appellant was able to drive a car. Driving is a complex act. Although it could become second nature once the activity was learned, the person still must learn to perform the complex act in the first place. Appellant's criminal activity was complex, especially his drug sales. For the drug sales, he had to plan his operation selling the drugs, retrieve them, and then resell them. He also had to handle money. Additionally, the tasks that appellant had to perform at the fish market went beyond simply sweeping and emptying waste baskets. His understanding of what he had to do for his job there, and being told what he had to do by his employer, would qualify as complex. (23 RT 4446-4447.)

Dr. Markman opined that there is no data, outside appellant's results on the MMPI, suggesting that appellant lacked or had an improper understanding of reality. However, there was data that suggested that appellant was capable of relating to others such as his sisters and other members of his family. Appellant was particularly close to one of his

sisters. He got along well with peers in school. He got along well with his fellow gang members. He got along well with supervisors in his work situations. He seemed to have gotten along well with his teachers at school. (23 RT 4448-4449.)

Dr. Markman opined that a person with a mental deficit such as appellant's was not more likely to commit violent crimes than someone without that type of mental deficit. As the individual's IQ lowers, the "frequency of violence diminishes." Dr. Markman observed that there was much more violence in the average population than there was in a hospital for the developmentally disabled. There may seem to be chaos in such hospitals because they have some profound and very retarded individuals that have to be cared for on a one-to-one or two-to-one situation. (23 RT 4455-4456.)

Dr. Markman also opined that while there were some people who abused others after having been subjected to the type of abuse that J.D. inflicted on appellant, the "overwhelming majority of people who are abused will not abuse as they get older." Also, of those with the same mental deficits that appellant had, and who were subjected to the type of abuse JD imposed on appellant, the overwhelming majority would not commit violent acts of abuse as they get older. (23 RT 4456-4457.) Dr. Markman found material in appellant's data that showed appellant was able to control his behavior. Appellant would not go along with certain types of acts in concert with others such as the Oxnard Beach rape. Appellant even left the scene of the rape, suggesting that he did not want to be involved in that type of a situation, and which clearly demonstrated the capability of controlling one's activity. (23 RT 4460.)

Dr. Markman opined that there was every indication that appellant suffered from brain damage. He would have been more comfortable rendering an opinion after having seen EEG results which showed electrical activity. The CAT Scan showed structural abnormality. Most brain damaged people would have electrical abnormality present. Dr. Markman did not dispute the expert testimony that appellant suffered from brain damage and that the brain damage was consistent with the automobile accident appellant's mother testified about. (23 RT 4470, 4472-4473.) He agreed with the expert testimony that

appellant operated on a second grade level, had below average comprehension and judgment, and had brain dysfunction. He agreed with Dr. Barker that appellant had below average comprehension and judgment. He agreed with Dr. Monguio that appellant had brain dysfunction. (23 RT 4482-4484.)

I. APPELLANT'S COMPETENCY WAS CORRECTLY EVALUATED AT TRIAL

In Claim 1, appellant claims that his competence was not correctly evaluated at trial because he is developmentally disabled and therefore, the trial court erred in failing to have his competence evaluated by the director of the local regional center for the developmentally disabled pursuant to Penal Code section 1369. Consequently, he claims he was deprived his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations of guilty and penalty. (AOB 29-45.) Respondent submits that there was no evidence that appellant was developmentally disabled at trial and that his competence was evaluated correctly pursuant to Penal Code 1367, 1368, and 1369.

A. Relevant Proceedings

On August 10, 1993, appellant's trial counsel asked for a hearing to declare a doubt as to appellant's competence. (1 CT 25.)

On August 27, 1993, a hearing was conducted where appellant's trial counsel declared a doubt as to appellant's competence. (1 RT 214.) Kathryn M. Davis, Ph.D was appointed to examine appellant pursuant to Penal Code section 1368. (1 RT 215; CT [IA Exhibits and Jury Questionnaires] 18-24.) The trial court ordered that it would "set the matter for further proceedings" as to appellant's competence, that "1368 proceedings" would not be "instituted" yet, and that the "criminal proceedings still stand." (1 RT 215.) The trial court was "merely ordering a report in light of the doubt that [appellant's trial counsel] articulated" and that it would "order the matter on for further proceedings in that regard." (1 RT 215.) The trial court ordered that the next hearing would be held on September 24, 1993. Appellant's trial counsel agreed to the hearing date. (1 RT 215-216.)

The trial court also advised the parties as follows:

> Should criminal proceedings go forward on [September 24, 1993], we can discuss trial dates rather than have it come back the following week. On the other hand should the court suspend proceedings for further 1368 proceedings, that's another matter, and then the trial date is moot. So my suggestion is that we look into it on the 24th at eleven o'clock.

(1 RT 217.) The trial court thereafter vacated a readiness conference that had been set for October 1, 1993. (1 RT 217.)

Due to Dr. Davis's prior engagements, she informed the parties that she would not be able to examine appellant and prepare a report by the September 24, 1993, hearing date. The parties asked that the hearing be taken off calendar and said they would inform the trial court when a new hearing date could be scheduled. (1 CT 38.)

On October 18, 1993, the parties informed the trial court that Dr. Davis had examined appellant, but would need to examine him "at least one more time" and would need to review "certain documents and information." (1 RT 218.) The court ordered the parties back on November 8, 1993 for the 1368 proceeding. The parties agreed to the continuance.[36]/ (1 RT 219-220.)

Dr. Kathryn Davis's report is dated November 1, 1993. In it, she details the reason for the examination, her methods of assessment, a brief history for appellant, and the test results and assessment. She concluded that appellant appeared to understand the nature and the purpose of the proceedings at trial, that appellant is capable of cooperating in a rational manner with his trial counsel, and that he "does not demonstrate a formal thought disorder" or "mental illness which would make him incapable of presenting himself in a rational manner without counsel. However, he is not interested in doing so." (CT [IA Exhibits and Jury Questionnaires] 18-24.)

On November 8, 1993, the trial court conducted a hearing where it informed the parties that it had received a copy of Dr. Davis' report. Counsel for the prosecution and

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[36] Proceedings were not suspended. On October 19, 1993, at the request of the prosecution, the trial court issued a warrant for Anna Lanier. The trial court also ordered that the warrant be held until the trial date of November 29, 1993. (1 RT 221-222.)

appellant also had reviewed the report. The parties submitted the issue of appellant's competence without argument. (1 RT 223.) The trial court found appellant competent within the meaning of Penal Code section 1368, et seq.

B. Relevant Legal Principles

Under the due process clause of the Fourteenth Amendment and state law, a criminal defendant cannot be tried while mentally incompetent. (*People v. Rogers* (2006) 39 Cal.4th 826, 846-847; Pen. Code, § 1367, subd. (a); *Drope v. Missouri* (1975) 420 U.S. 162, 181 [95 S.Ct. 896, 43 L. Ed.2d 103].) A defendant is mentally incompetent if, due to a mental disorder, he or she is unable to understand that nature of the proceedings or assist counsel in the conduct of the defense. (Pen. Code, § 1367, subd. (a); see *Dusky v. United States* (1960) 362 U.S. 402, 402 [80 S.Ct. 788, 4 L.Ed.2d 824].)

Whenever a trial court becomes aware of substantial evidence which raises a reasonable doubt regarding a defendant's competence to stand trial, the court must suspend criminal proceedings and order a mental competency hearing. (*People v. Rogers, supra*, 39 Cal.4th at pp. 847-848; *People v. Alvarez* (1996) 14 Cal.4th 155, 211; Pen. Code, § 1368.) In determining whether there is substantial evidence of a defendant's mental incompetence, a trial court must consider all of the relevant circumstances, including the defendant's demeanor and behavior. (*People v. Rogers, supra*, 39 Cal.4th at p. 847.) Where a defendant produces evidence regarding his present mental competence which is less than substantial, a trial court exercises its discretion whether to order a competence hearing. (*People v. Welch* (1999) 20 Cal.4th 701, 742.) A defendant is presumed to be competent to stand trial, which may be rebutted by a preponderance of the evidence. (*People v. Castro* (2000) 78 Cal.App.4th 1402, 1418.)

If a court orders a hearing into a defendant's mental competence, Penal Code section 1369 sets forth the procedure by which the court appoints psychiatrists to evaluate a defendant's competency. That section requires that the trial court appoint the director of the regional center for the developmentally disabled to examine the defendant if it suspects that the defendant is developmentally disabled. (Pen. Code, § 1369.) Developmental disability that may result in mental incompetence is defined as,

> a disability that originates before an individual attains age 18, continues, or can be expected to continue, indefinitely and constitutes a substantial handicap for the individual, and shall not include other handicapping conditions that are solely physical in nature. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include handicapping conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

(Pen. Code, § 1370.1(a)(1)(H); *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478, 487.)

C. The Trial Court Was Not Obligated To Appoint The Director Of The Regional Center For The Developmentally Disabled To Examine Appellant's Competence Because No Evidence Presented Prior To, Or During, Trial Shows That Appellant Has A Developmental Disability

Appellant mistakenly argues that the record shows that he had a developmental disability. In support of the claim, appellant relies on trial counsel's declaration of a doubt of his competence and evidence presented at the penalty phase of the trial regarding his mental health. (AOB 37-38, 41-45.) The record is clear that the trial court had not expressed a doubt about appellant's mental competency. He appointed Dr. Davis to provide an opinion as a preliminary matter. (See *People v. Visciotti* (1992) 2 Cal.4th 1, 35-36.) Counsel's opinion or concern about appellant's mental competency was not substantial evidence requiring the initiation of a mental competency hearing. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1111-1112.) Appellant also may not rely on penalty phase evidence, for such evidence was not before the trial court when it found him competent. (See *People v. Welch, supra*, 20 Cal.4th at p. 739 [trial court's ruling is reviewed for correctness when it was made without reference to evidence produced later].) As explained earlier, Dr. Davis's report stated that appellant was capable of cooperating in a rational manner with his trial attorney, did not demonstrate a formal

thought disorder, and did not have a mental illness that would make him incapable of presenting himself in a rational manner without counsel. (CT [IA Exhibits and Jury Questionnaires] 18-24.) No evidence of incompetence was presented. Consequently, the trial court was not required to order Penal Code section 1368 hearings, suspend criminal proceedings, or appoint any psychiatrist or director of the regional center for the developmentally disabled to examine appellant.

Insofar as he further argues that the evidence is similar to that presented in *People v. Castro*, 78 Cal.App.4th 1402, where the court found that the director of the regional center for the developmentally disabled should have been appointed to evaluate the defendant's competence, respondent disagrees.

In *Castro*, the defense requested that the defendant be examined by a psychiatrist to determine the appropriateness of pleading not guilty by reason of insanity. (*People v. Castro, supra*, 78 Cal.App.4th. at p. 1410.) The psychiatrist's report indicated, among other things, that the defendant was developmentally disabled. (*Id.* at p. 1410-1411.) The defense then requested that the director for the regional center for the developmentally disabled examine the defendant. The court denied that request without prejudice on the basis that the defendant seemed "perfectly normal" in its own observation. (*Id.* at p. 1411.) Subsequently, the defense filed a declaration with the court along with records from the Department of Rehabilitation reflecting that the defendant had a developmental disability which had been classified as "most severe." (*Ibid.*) The court suspended the criminal proceedings pursuant to Penal Code section 1368, but refused to refer the defendant to a regional center and instead appointed a psychiatrist. (*Ibid.*) The report of that psychiatrist found that the defendant had a learning disability, but no psychiatric disorder. Criminal proceedings were reinstated. Later, the court suspended the proceedings again to examine competence, but still did not appoint the director of the regional center. (*Id.* at p. 1412.)

The Court of Appeal in Castro reversed because it found the trial court's failure to appoint the director of the regional center for the developmentally disabled deprived the

court of the jurisdiction to proceed. (*People v. Castro, supra*, 78 Cal.App.4th at p. 1413.) The Court of Appeal stated that the trial court:

> ignored the substantial, objective evidence that [the defendant] had a developmental disability, impermissibly substituted its own subjective observations for the requirements of the statute and declined to appoint the regional center director to conduct an evaluation as specifically requested by the defense.

(*People v. Castro, supra*, 78 Cal.App.4th at p. 1417.)

Because the court was required under section 1369 to consider a report from the regional center director when there was substantial evidence that raised a suspicion that the defendant was developmentally disabled, it acted in excess of its jurisdiction because the competency question had not been properly addressed. (*People v. Castro, supra*, 78 Cal.App.4th at p. 1417.)

The differences between this case and Castro are significant. First, as previously noted, the trial court here was not presented with substantial evidence that appellant was either mentally incompetent or developmentally disabled, so it was not required, as was the trial court in *Castro*, that was presented with such evidence, to suspend criminal proceedings and appoint experts to examine appellant. Moreover, appellant's trial counsel never made a request to have appellant examined by the regional center for developmental disability. (1 CT 25, 38; 1 RT 214-223.) Appellant has failed to identify any indication in Dr. Davis's report that she believed appellant had a developmental disability or any other information that should have raised a doubt as to whether appellant had a developmental disability, or was otherwise mentally incompetent. (AOB 43-44.) The following observations from Dr. Davis's report indicates a lack of developmental disability:

> [Appellant] states he was born August 31, 1969 in Oxnard, California. . . . His father worked as a psychiatric technician at Camarillo State Hospital and as a minister of a church until he suddenly left the family at the time [] [appellant's] youngest sister was born. He states he does not know the current whereabouts of his father. He was devastated by his father's disappearance and the

> abandonment it meant. He describes his problems as beginning shortly thereafter. He describes his mother as a homemaker.
>
> [Appellant] stated he did not remember much about his early school experience. He states he was in special education "something to do with a learning disability". He did not elaborate on this. As he progressed in school he was mainstreamed for physical education, reading, and some English classes (he continued in special classes for math, science and history). He states he earned mostly C's. At one time he participated in track. His real interest was music. He wrote and performed songs, mostly rap but also regular songs. He graduated from high school in 1987.

(CT [IA Exhibits and Jury Questionnaires] 19.)

In stating her test results and assessment, Dr. Davis observed that appellant "appears to function within a Low Average to Borderline level of intelligence. He states that he has learning disabilities but was unable to elaborate. He was generally able to express himself adequately both verbally and in writing." (CT [IA Exhibits and Jury Questionnaires] 20.) Dr. Davis observed that "[t]here was no evidence of thought disorder throughout the interview process." (CT [IA Exhibits and Jury Questionnaires] 20.) Appellant said that any "abnormal perceptual experiences" he had "occurred only during periods of substance abuse or during flashbacks to periods of substance abuse." (CT [IA Exhibits and Jury Questionnaires] 20.) Appellant's reading level was "generally adequate." (CT [IA Exhibits and Jury Questionnaires] 20.) With respect to appellant's responses to the Rorschach Inkblot Technique, "[t]here is no evidence of thought disorder or impaired reality testing. [Appellant] demonstrates little interest in or effort to organize or integrate data, to relate parts to a whole, or to formulate a global view. However, when he chooses to do so he is able to discriminate essential from non-essential information in an effective manner." (CT [IA Exhibits and Jury Questionnaires] 22.)

With respect to appellant's understanding of the charges and the court proceedings, Dr. Davis observed as follows:

> [Appellant] was interviewed regarding his understanding of the charges against him. He was able to describe the allegations against him. He was clear about the difference between a felony

> and a misdemeanor. He knows that the charges against him are felony charges. He explained the possible sentence alternatives should he be found guilty. He discussed some plea bargaining proposals suggested and his thoughts about these proposals. He was able to describe the roles of the jury, the district attorney, his (defense) attorney, the bailiff, the judge, and witnesses. He was able to discriminate appropriate from inappropriate behavior in the courtroom. He was able to define several terms/words used in a courtroom situation. When discussing the role of his attorney he was able to discuss working with his attorney and what he can do if he does not feel comfortable with his attorney. He expressed a preference to rely upon his attorney's expertise and lack of interest in representing himself or presenting his own case. He knows who his attorney is and expressed confidence in him. He understood the principle of confidentiality with his attorney.

(CT [IA Exhibits and Jury Questionnaires] 23.) None of Dr. Davis's observations or her opinion would even establish a doubt that appellant had a developmental disability within the meaning of Penal Code section 1370.1, subdivision (a)(1)(H).

As previously noted, appellant may not rely on penalty phase evidence to attack the trial court's earlier ruling. (See *People v. Welch, supra*, 20 Cal.4th at p. 729.) Moreover, the penalty phase testimony of the psychological experts who examined appellant was insufficient to create a doubt as to whether appellant had a developmental disability within the meaning of Penal Code section 1370.1(a)(1)(H). (21 RT 3955-3966.) Dr. Crinella reviewed information about appellant's education (which included information that appellant had learning disabilities), criminal history, and family history (which included information that appellant suffered brain damage at birth). He also gave appellant a battery of neuro-psychological tests. (21 RT 3968-3970, 3975-3990, 4006, 4010-4017.) Dr. Crinella opined that the results of the Wechsler Assault Intelligence Scale showed that appellant was borderline mentally retarded. (21 RT 3974.) He opined that the results of the Bender Visual Motor Gestalt Test showed appellant's neuro-developmental age is seven years old. (21 RT 3979-3984.) He opined that the results of the "ink blot" tests showed that appellant has "very limited imagination, limited intellectual resources, limited ability to imagine what is going to happen in the future to

imagine himself in a historical context or other people in a historical context." (21 RT 3987-3989.) Dr. Crinella stated in his letter to defense counsel that he believed appellant to be borderline mentally retarded due to chronic brain syndrome. (21 RT 4005, 4026-4028, 4039; People's Exhibit 13-P.) He acknowledged that the term "chronic brain syndrome" is not found in the DSM III Manual. (21 RT 4039.) Dr. Crinella's opinion was that appellant was borderline mentally retarded. (21 RT 4031-4034.)

Dr. Ines Monguio interviewed appellant and appellant's mother. She administered tests designed to ascertain whether appellant suffered from a brain impairment. (22 RT 4125-4130, 4189.) She observed that appellant's speech ability was "okay," but gave simplistic responses. (22 RT 4131-4134.) Dr. Monguio opined that appellant's results from the Luria-Nebraska neuropsychology battery showed that he had impaired motor performance and a chronic condition in his brain that made it difficult for him to understand and structure information that was coming into his ears and from the environment around him, so he could use the information on his own. (22 RT 4145-4134-4146.) Dr. Monguio opined that appellant's results from the Rey Complex figure test showed that he had either "severe" or "moderately severe" impaired attention. (22 RT 4148-4153.) She opined that appellant's results from the California Category Learning Test showed he had definite impairment in verbal learning. (22 RT 4153-4155.) She opined that appellant's results from the Tri-Grams Repetition test showed that he had a chronic condition in his brain that results in a variety of intellectual cognitive impairments ranging from moderate to moderate-severe. (22 RT 4156-4159.) Dr. Monguio opined that appellant's results from the Pace Auditory Sequential Addition Task test showed that he had moderately severe to severe deficits in sustained attention and complex attention. (22 RT 4159-4161.) Dr. Monguio's opinion, based on the information she had available to her, is that appellant had a "globally impaired brain." The impairments that appellant had range from mild to moderately severe. The source of the impairment was traumatic head injury which could have been caused during the automobile accident appellant's mother was in while pregnant with appellant. The only environment where appellant could function or perform at all was one that was

completely unambiguous, and where the environment is highly structured. (22 RT 4165-4171, 4188.)

Dr. Patrick Barker performed a mental status evaluation of appellant on behalf of the defense. (22 RT 4209-4212.) Dr. Barker opined that appellant's results for the WRAT Test, which is a test of reading ability, showed that his reading ability was borderline sixth grade. (22 RT 4225-4226.) He administered the Wechsler Adult Intelligence Scale on appellant and opined that appellant's results showed that his full scale IQ was 73. The score would qualify as borderline mental retardation, and a score of 70 is the first cutoff for mental retardation. Because of the score, Dr. Barker was concerned that appellant had brain damage. (22 RT 4226-4227.) He opined that appellant's results for the Luria-Nebraska Neuropsychological Screening Test indicated that appellant may have brain damage. (22 RT 4227.) Dr. Barker opined that all of the tests he administered showed that appellant's intellectual functioning is borderline mentally retarded, and that he had a mixed personality disorder, and strong elements of anti-social and schizotypal traits. He also opined that appellant had some brain damage. (22 RT 4213-4214, 4231, 4236-4238, 4282.)

Dr. David Benson and the members of his clinic at UCLA performed a full mental status evaluation and a neuropsychiatric evaluation of appellant on behalf of the defense. (22 RT 4283-4288.) Dr. Benson opined that appellant's results for the Folstein Mini Mental State Exam showed that while appellant had a limited vocabulary and had difficulty expressing himself, he did not have a significant language disorder. (22 RT 4290-4291.) A neurological assessment that examined the individual cranial nerves in appellant's head as well as his gait, stance, coordination, motor strength, motor development, reflexes, and sensation. Dr. Benson opined that appellant was "brain abnormal." The car accident that his mother was in while pregnant with him could possibly have led to the brain abnormality. (22 RT 4294-4297.) Appellant was given a CAT Scan and the results were considered normal. Dr. Benson, however, opined that appellant could have a brain abnormality that the CAT Scan did not detect. (22 RT 4297-4300, 4316-4317.)

Dr. Ronald Markman testified for the prosecution on rebuttal at the penalty phase. as an expert regarding the psychiatric issues in the case. Dr. Markman attempted to perform a psychiatric evaluation on appellant. Appellant, however, refused to be evaluated by Dr. Markman. Dr. Markman reviewed the "murder book," the report of Dr. Davis regarding appellant's competence to stand trial, and the reports of Drs. Crinella, Monguio, Benson, and Barker. Dr. Markman also heard the entire testimony of the defense experts with the exception of one hour's worth of Dr. Monguio's testimony due to being delayed arriving at court. (23 RT 4418-4422, 4425-4428.)

Dr. Markman disagreed with Dr. Crinella's opinion that appellant suffered from borderline mental retardation due to a chronic brain syndrome. Dr. Markman opined that there was evidence appellant was able to adapt to his role in the Sattiewhite family, adapted in school situations, adapted in work situations, and adapted to relationships he had with friends. (23 RT 4429-4430.) Dr. Markman disagreed with the assessment that appellant's IQ of 74 showed that he was borderline mentally retarded. The specific diagnosis in the DSM-III-R for someone with appellant's IQ is borderline intellectual function. Borderline intellectual function was not considered a mental disorder in the DSM-III-R. It is considered a "V-Code," which means that it was a condition not attributable to a mental disorder that can be the focus of attention or treatment. Appellant was very close in the range of borderline intellectual function and mild retardation.[37]/ (23 RT 4430-4434.)

Dr. Markman opined that there was every indication that appellant suffered from brain damage and that the brain damage was consistent with the automobile accident appellant's mother testified about. (23 RT 4470, 4472-4473.) He agreed with the expert testimony that appellant operated on a second grade level, had below average comprehension and judgment, and had brain dysfunction. He agreed with Dr. Barker that

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[37] Dr. Markman disagreed with Dr. Crinella's description of appellant as a "moral imbecile." Dr. Markman opined that morality is not a technical term. Imbecile is a term that was used in the DSM-I which described a level of retardation for someone who had an IQ in the 30's. (23 RT 4436-4438.)

appellant had below average comprehension and judgment. He agreed with Dr. Monguio that appellant had brain dysfunction. (23 RT 4482-4484.)

Thus, unlike Castro, there was no substantial evidence which would raise a suspicion that appellant was developmentally disabled. In *Castro*, the court had before it three different reports asserting the defendant had a developmental disability. (*People v. Castro, supra*, 78 Cal.App.4th. at pp. 1410-1412.) Here, on the other hand, there was no indication that appellant had any of the conditions referenced in Penal Code section 1370.1, subdivision (a)(1)(H).

Because no request was made to the court, nor did any expert raise the possibility that appellant had a developmental disability within the meaning of Penal Code section 1370.1, subdivision (a)(1)(H), the trial court was under no obligation to appoint the director the regional center for developmentally disabled to examine appellant's competence at trial.

D. No Reversal Is Required Due To The Trial Court's Failure To Suspend Proceedings Upon The Declaration Of Doubt Of Appellant's Competence By Appellant's Trial Counsel

Appellant complains that the trial court erred by failing to suspend the criminal proceedings once appellant's trial attorney declared a doubt about his competence.[38]/ (AOB 39-40.) This claim is meritless. As mentioned earlier, counsel's opinion or concern about appellant's mental competency alone is insufficient to require suspension of criminal proceedings and initiation of a mental competency hearing. (*People v. Rodrigues, supra*, 8 Cal.4th at pp. 1111-1112.)

Moreover, in the present case, no material matters were considered by the trial court from the August 27, 1993, hearing when appellant's trial counsel declared a doubt as to appellant's competence, until the November 8, 1993, hearing where the parties submitted

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[38] Although appellant also complains that the November 8, 1993 hearing regarding appellant's competence to be "abbreviated," he has failed to articulate what additional procedures should have been performed. (AOB 40.)

the matter of appellant's competence on Dr. Davis' report.[39]/ (1 RT 214-223.) Appellant has identified no proceedings that occurred from the declaration of doubt by trial counsel until the time the matter was resolved. Thus, this claim fails.

II. THE PROSECUTION PROPERLY EXERCISED ITS PEREMPTORY CHALLENGE AS TO PROSPECTIVE JUROR PAUL M. DURING JURY SELECTION

In Claim 2, appellant contends that the prosecution exercised a peremptory challenge as to prospective juror Paul M., an African-American, on the basis of race. During jury selection, appellant claimed the prosecution exercised a peremptory challenge as to prospective juror Paul M. on the sole basis of group bias, in violation of the federal and state constitutions. (6 RT 1081-1082, 1144-1148, 1170-1171, 1235-1244; see *Batson v. Kentucky* (1986) 476 U.S. 79, 84-89 [106 S.Ct. 1712, 90 L.Ed.2d 69]; *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277.) Appellant argues that the trial court erroneously denied his motion for a mistrial due to the prosecutor's conduct. He further contends that because of these errors, he was denied his federal constitutional rights to a fair trial, due process, and equal protection pursuant to the Sixth and Fourteenth Amendments, as well as his state constitutional right to a trial by a jury drawn from a representative cross-section of the community pursuant to article I, section 16, of the California Constitution. (AOB 46-57.) Respondent submits that the record shows that the peremptory challenge was properly exercised for reasons other than racial bias.

A. Relevant Proceedings

1. Prospective Juror Paul M.'s Jury Questionnaire

Prospective juror Paul M. was a 42-year-old teacher at the time of trial. (CT [IV Exhibits and Jury Questionnaires] 859-862; see 859-870.) He indicated he had a "sight" problem. However, when asked to describe the problem, he said, "cannot hear from left."

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[39] On October 19, 1993, at the request of the prosecution, the trial court issued a warrant for Anna Lanier. The trial court, however, ordered that the warrant be held until the trial date of November 29, 1993. (1 RT 221-222.)

(CT [IV Exhibits and Jury Questionnaires] 861.) He was a college graduate who received a BA degree. (CT [IV Exhibits and Jury Questionnaires] 862.) He did not have any relatives or friends in law enforcement or who had applied for employment with a law enforcement agency. (CT [IV Exhibits and Jury Questionnaires] 865.) In response to the question "What are your general feelings regarding the death penalty?" the prospective juror answered, "If someone takes someone [sic] life then they should die." (CT [IV Exhibits and Jury Questionnaires] 866.) In response to the question "Do you feel that the death penalty is used too often? Too seldom? Randomly?" the prospective juror answered, "Too Seldom - so many people are killing thousands of people - and continue - that person should received [sic] the death penalty." (CT [IV Exhibits and Jury Questionnaires] 866.)

The prospective juror did not belong to a group that advocated the increased use or the abolition of the death penalty. However, in response to the questions "Do you share the views of this group? How strongly do you hold these views?" the prospective juror answered, "Before the the [sic] stats [sic] to be born - I believe in abolition." (CT [IV Exhibits and Jury Questionnaires] 866.)

The prospective juror belonged to an organized religion, but the religion did not take a position regarding the death penalty. He had no religious or other beliefs that would make it difficult for him to hold judgment over another person. His religious or moral beliefs would not make it difficult for him to sit as a juror on a death penalty case. On a scale of 1-10, with 10 being strongly in favor of having a death penalty law, 5 having no opinion, and 1 being strongly against having a death penalty law, the prospective juror rated himself an 8. (CT [IV Exhibits and Jury Questionnaires] 866-867.)

The prospective juror, his relatives, and his friends have not been victims of crime or have had a bad experience with a law enforcement officer or the criminal justice system. (CT [IV Exhibits and Jury Questionnaires] 868.)

2. Voir Dire Of Prospective Juror Paul M.

During oral voir dire, Paul M.[40]/ was asked if he would automatically find appellant not guilty of first degree murder or find the special circumstance false to avoid a penalty phase of the trial. The prospective juror answered, "If they are proven to be guilty, that they have the evidence to prove that, I would go along with the law already about death penalty." (3 RT 476.) The prospective juror said that he would reach a verdict consistent with the evidence that he found. (3 RT 476.) When asked if he would disregard the evidence to avoid a penalty phase of the trial, the prospective juror answered, "No. Somewhere I believe there should be some evidence to prove that before I make a decision." (3 RT 476.) When asked if he would always vote for the death penalty rather than life without parole, the prospective juror answered, "Well, because, see, I would go along with both of them as options." (3 RT 476-477.)

The prospective juror was asked whether he had given the death penalty much thought prior to coming to court. He answered, "Not really because, see, I had to catch up with so much of my schoolwork because I am a teacher and I am so busy with the children I try to clear that first. I don't think too much about it." (3 RT 477-478.) When asked what he thought about the death penalty and whether it is useful for society to decree that we should have the death penalty, the prospective juror answered, "As I said, if there are some facts to prove that somebody is guilty, then I think they should have one of the options that they can stay in jail for years or make some other kind of decision, but I really don't know what would be after that." (3 RT 478.)

When asked to further elaborate on his questionnaire response that the death penalty was used too seldom, the prospective juror said, "Oh, okay. I be – this if someone can be

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[40] Appellant states that prospective juror Paul M. was the "only African-American on the jury panel." (AOB 47.) Appellant's trial counsel, however, observed during the hearing regarding the Wheeler motion that there were two other African-Americans in the jury pool. One prospective juror was excused for hardship and the other was excused during voir dire conducted pursuant to *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 69-81. Following the prosecutor's use of the peremptory challenge as to Paul M., no other African-Americans were in the remaining jury pool. (6 RT 1147.)

proven that they have evidence to prove that the persons are guilty and some other people have died because of this, that I think the person should also receive – should – death penalty also." (3 RT 478.) He did not believe that the death penalty should be imposed in every case where there was a killing. (3 RT 478-479.)

The prospective juror was asked whether he had "some set of circumstances" in his mind that would "merit life without parole." He answered, "Not really. I really don't have any exactly. I just thought about what – if people lose their lives and young children or someone else, that – I think that really crossed my mind." (3 RT 479.)

During questioning by appellant's trial counsel, the following exchange occurred with the prospective juror:

> Q: Well, excluding children for a moment, let's say that a killing that was the result or pursuant to a rape or a kidnapping. [¶] Do you think you could remain open in a situation like that or do you think you might come back or would come back with a verdict of voting for the death penalty?
>
> A: No, I don't think I can just put that person to death penalty for that. I don't think I can do that.
>
> Q: Okay.
>
> A: I'd have to listen with a wide open mind before I make a decision about that.
>
> Q: What purpose do you think the death penalty serves to society?
>
> A: Well, in some way it protect the – the United States so nobody else could be – it will not happen to nobody else. This is what cross my mind, you know. The death penalty means that in some way we will be free of somebody escaping and won't kill anybody else, you know.
>
> Q: So –
>
> A: In case that person can stay in jail for a while, you know, and maybe they wouldn't have an opportunity to killing somebody else.

(3 RT 479-480.)

The prospective juror said that both the death penalty and life without parole accomplish the same goal of removing a threat from society. He did not place one penalty "in a higher regard than the other." He also said that he would remain open in all situations. (3 RT 480.)

The prosecutor asked the prospective juror to clarify his answer that while he did not belong to a group that advocated the increased use of the death penalty, he also said that he shared the views of this group. (3 RT 481.) The prospective juror answered as follows:

> I hold this view. I say before – my mind went back to they are talking about if somebody is pregnant and they are talking about abortions, about killing – a lot of people give me the opinion that if somebody is pregnant, that the baby will be killed before that time and I told them I somewhere was against abortion. That's what I was trying to put in that statement, that I do not believe in abortion during this time. That's what I meant to that statement.

(3 RT 482.) The prospective juror said that in certain situations, he would probably find imposing the death penalty to be a problem. (3 RT 483.)

When asked if he could impose the death penalty if the evidence warranted such a penalty in this case, the prospective juror answered, "I think in some way, because even whoever the person is, I will have to set up my mind first at the beginning with a mind witness open first . . . until I get all the information." (3 RT 484.) He believed that he could admit in open court that he voted for the death penalty. (3 RT 484.) When asked if he believed the death penalty was "uncivilized," the prospective juror answered as follows:

> That's a big question sometimes. Because sometimes I think it should be done, and if it's proven – in the United States. If somebody has actually done a lot of things and I think there is some point to it should be done sometimes if something does cross my mind, and then sometimes I believe that some persons should spend the rest of their time in jail. [¶] These are things I have been listening to sometimes, you know, but I have never actually sit [sic] around and listened to any facts about any person that somebody – you know, media information because I am not able to make a decision before that. Because if I have to, this will be the only first

> time I have had to do that. These are things that cross my mind, things you see on television and those things you listen to. And that's where my decision come from.

(3 RT 485.)

The prospective juror said that this was the first time he ever had to think about the death penalty. (3 RT 485-486.) He never discussed the death penalty with anyone before the trial. (3 RT 486.)

During voir dire conducted by the trial court, the prospective juror said that he had not been the victim of a crime of violence, no friends or relatives of his had been the victims of crimes of violence, and that he could serve as a fair and impartial juror. (6 RT 999-1000.) He believed that "everyone is innocent until prove to be guilty by facts." (6 RT 1000.) When asked if he believed that issues should be decided by a judge or a jury, he answered, "Well, at different times I think it should be the Judge and sometimes I think it should be the jury." (6 RT 1000.) He also said that he would not make up his mind until he "heard everything" and he would follow the law as instructed by the trial court regardless of any personal feelings he may have about the law. (6 RT 1000.) He said that he is not related to anyone in law enforcement and is not close friends with anyone in law enforcement. (6 RT 1000-1001.)

Later during the voir dire, the prosecutor asked the prospective juror whether he had previously heard about the law regarding aiding and abetting. The prospective juror answered, "Um, I was – I went to a library once and they had some things printed, but I was just reading a little about it, but I need – I didn't get all of [sic] details about it." (6 RT 1044.) When asked if he could apply the law regarding aiding and abetting, the prospective juror answered, "Um, in some way, yes. I think, yes, I think so." (6 RT 1044.)

During argument on the Wheeler motion, the trial court observed as follows:

> The problem is, as I understand the Wheeler requirements, not only must you show the fact that the person excluded is a member of a cognizable group, which, of course, he is, but you have to make a showing that there's a strong likelihood that he was excused or challenged because of his group association; because he was

> [B]lack rather than because of any specific bias. If you make that showing, then I think the [p]rosecution is compelled to reply. [¶] The problem that I have got with it is simply that my recollection of his Hovey examination is that his thinking on the subject of the death penalty was at best described as equivocal. And it would seem to me that excusing him through the exercise of a peremptory challenge is a legitimate exercise of a peremptory challenge, regardless of his color. [¶] That's my recollection of the Hovey examination. I don't have it before me, but I suspect if you are wishing to pursue the matter further, since we have a transcript which we can get ahold of –

(6 RT 1146.) The hearing was continued until the trial court and the parties were given an opportunity to review the reporter's transcript of the voir dire of the prospective juror. (6 RT 1146-1148.)

During a break in the voir dire, the trial court informed the parties as follows:

> I read . . . the *Hovey* examination of [prospective juror Paul M.]. It is relatively brief, and after reading it I come away with the same thought that I had which I expressed earlier, and that is that his thinking in the responses were equivocal. By that I mean one really couldn't really ascertain how he felt, even after the examination was over, and because of that I think that the exercise of a peremptory challenge is a legitimate exercise. That's my preliminary thinking. Perhaps [] you can convince me otherwise.

(6 RT 1170-1171.)

At the hearing on the Wheeler motion, appellant's trial counsel conceded that "there were some . . . passages . . . where [prospective juror Paul M.] appeared to be confused and . . . appeared to equivocate in some areas." (6 RT 1235-1236.) However, appellant's trial counsel argued that "[t]he vast majority of the [prospective jurors] are confused, they don't understand the . . . bifurcated system, they don't understand that there is evidence presented at a penalty phase." (6 RT 1236.)

In denying the *Wheeler* motion, the trial court found as follows:

> I indicated yesterday that I didn't feel that a prima facie showing was made out. And because I felt that the answers were equivocal at best - - and I direct your attention in particular to [3 RT 479-480].

In response to a question whether he would vote for the death penalty for a killing pursuant to a rape or kidnapping, the prospective juror says, "Well, I don't think I can do that," and then later says that well, perhaps he could.

It doesn't in my view warrant a challenge for cause, and any challenge for cause in that context would be overruled. But I think that it's within the purview of Counsel, notwithstanding the fact that a prospective juror is the only Black in the panel, to challenge peremptorily on that type of equivocation.

True, the prospective juror indicated that in a circumstance, you know, he could invoke a death penalty, but I think one can glean from the overall evaluation of that prospective juror's examination that as a general proposition he wouldn't or he disfavored it. And I think in that context Counsel would be certainly within his or her prerogative of excusing peremptorily.

For that reason I conclude that you have not made the prima facie showing. Contrasted with the situation where the juror says I am open minded on the subject, I can consider all of the evidence, I don't have any leanings one way or the other. I think there you have a neutral type person, generally speaking, and I think in that context that would present a closer question on whether or not you have made out of the prima facie case.

I think there is a broad discretion that the Court's given in making that determination. The guidelines and the rules aren't laid out in stone. But I - - if I were the prosecutor and I let that person sit, I think that I could be criticized. On the other hand, if I am defense counsel and I would allow some of the people who you challenged yesterday to sit, I certainly would be criticized for that as well.

I think your peremptories were properly challenged on people who expressed their support for the death penalty and indicated that sure, I will listen to it, but in large part I would favor the death penalty. That's what I am getting at, Mr. Wisksell.

. . .

. . .

I think you can systematically exclude with only one where it's obvious that that person was excluded because he was Black or

> Hispanic or - - or some member of some other identifiable group. And I don't think that in this case with this particular juror it comes to that because this particular juror was, from my evaluation of his testimony, in most instances favoring life without parole as contrasted with the death penalty.

(6 RT 1237-1239.)

After the trial court found that no prima facie case of discrimination had been made out, and after expressly asserting that it was not waiving the trial court's finding, the prosecutor explained why the peremptory challenge was exercised as to prospective juror Paul M. (6 RT 1239-1240.) Prosecutor Glynn explained as follows:

> Okay. I wrote on - - on my notes on the questionnaire his answers don't make sense. He is a loose cannon. And now I wrote - - after having face to face conversation with [prospective juror Paul M.], I wrote face to face, bracket, he doesn't understand the questions, he gives nonresponsive answers.
>
> And then on the back of the questionnaire, I wrote he doesn't understand a lot of the questions. His answers are nonresponsive. This is a man who supposedly has a college degree and is teaching high school, and on page seven - - and I will also point out a passage in the - - in the transcript. But he doesn't understand simple English and doesn't respond appropriately.
>
> And it was my feeling that he would not understand the complexity of the case, and the instructions that the Court would be giving just based on his lack of understanding of certain common English words.
>
> On question number 53 in the questionnaire, the question is, "Do you belong to any group that advocates the increased use or abolition of the death penalty?" And he checked no, and then underneath that there is sub question b, "Do you share the views of this group, how strongly do you hold these views?"
>
> And he wrote, "Before the the starts to be born I believe in abolition," a-b-o-l-i-t-i-o-n. I think that he means abortion. But the - - the answer is incomprehensible. And I asked him about that on page 149 of the transcript. This is my question. It breaks into a series of questions.

"But yeah. And then on b you wrote you share the views of this group and then you wrote something that I - -"

"A. I hold this view. I say before, my mind went back to - - they are talking about if somebody is pregnant and they are talking about abortions, about killing. A lot of people give me the opinion that if somebody is pregnant that the baby will be killed before that time and I told them I somewhere was against abortion. That's what I was trying to put in that answer, that I do not believe in abortion during this time. That's what I meant to that statement."

Well, if you read that statement, it says he does believe in abortion. So you have first a total misunderstanding of what we are talking about and then, in his written questionnaire, he talks about being in favor of abortion and in the transcript he talks about being against abortion. So I really didn't feel that this man could understand the Court's instructions in a case involving aiding and abetting, the felony murder rule and then all of the many requirements of analyzing factors for and against the death penalty in the penalty phase.

And it was for that reason, in addition to the Court's observations of his ambivalent feelings about the death penalty.

(6 RT 1240-1242.)

Prosecutor Patricia Murphy also offered reasons for why she wanted to exercise a peremptory challenge as to prospective juror Paul M. She explained as follows:

Your Honor, in addition to your comments with regard to the juror's equivocal answers on the death penalty questions, I noted in my notes, and looking back through the transcript, not only were his answers equivocal, but he was only - - he only managed to actually say the words death penalty one time. Other - - in the rest of the questions, he just referred to it or that other option which signaled me that if you can't say it, you certainly aren't going to be able to impose it.

Also, a little less legal in nature, he couldn't understand the even most simple questions. For instance, number 12 in the questionnaire on page two, "Do you have any health problems?" He circles sight and yes and then he goes on to explain a hearing problem.

> So I just think it - - the record is abundantly clear that he just could not understand even the most simple nonlegal concepts. And it would just be impossible for him to understand the legal concepts.

(6 RT 1243.)

B. Relevant Legal Principles

Both the federal and state constitutions prohibit the use of peremptory challenges based solely on group bias. (*Batson v. Kentucky, supra*, 476 U.S. at p. 89; *People v. Wheeler, supra*, 22 Cal.3d at pp. 276-277; *People v. Cornwell* (2005) 37 Cal.4th 50, 66.) This Court, in *People v. Cruz* (2008) 44 Cal.4th 636, 655-656, recently restated the procedure for determining whether prospective jurors have been removed solely for group bias. First, the defendant must make out a prima facie case by showing that under the totality of the relevant facts, there is an inference of discriminatory purpose. Second, if the defendant has made out a prima facie case, the prosecution then has the burden to offer a permissible, race-neutral justification for the peremptory challenge. Third, if the prosecution offers a race-neutral justification, the trial court must then decide whether the defendant has proved purposeful racial discrimination. (*Ibid.*, quoting *People v. Cornwell, supra*, 37 Cal.4th at pp. 66-67 (other citations omitted).)

"The trial court's determination that no prima facie showing of group bias has been made is subject to review to determine whether it is supported by substantial evidence. (*People v. Jenkins* (2000) 22 Cal.4th 900, 993-994.) The reviewing court examines "the record of the voir dire and accord[s] particular deference to the trial court as fact finder, because of its opportunity to observe the participants at first hand." (*Ibid.*)

In the present case, the trial court applied the then-correct standard set forth in *Wheeler*, that a defendant needed to establish a strong likelihood that the prosecution had used a peremptory challenge because of group bias, in concluding appellant failed to establish a prima facie case of discriminatory purpose.. (6 RT 1146; *People v. Wheeler, supra,* 22 Cal.3d at p. 280.) Appellant's trial was held well before the United States Supreme Court clarified that a criminal defendant need only "produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson*

v. California, supra, 545 U.S. at p. 170.) In this situation, this Court gives no deference to the trial court's finding that no prima facie case of discrimination was established. Instead, this Court reviews the record, applies the Johnson standard, and "resolve[s] the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race." (*People v. Cornwell, supra*, 37 Cal.4th at p. 73; see also *People v. Gray* (2005) 37 Cal.4th 168, 187; *People v. Avila* (2006) 38 Cal.4th 491, 554.) Applying that standard of review, appellant's claim fails as the record suggests grounds upon which the prosecutor could have, and apparently did, challenge prospective juror Paul M. (*People v. Box* (2000) 23 Cal.4th 1153, 1188.)

C. The Record On Appeal Suggests That The Prosecution Had Adequate Non-Racially Biased Grounds For Exercising A Peremptory Challenge As To Prospective Juror Paul M.

Concern regarding a juror's ability to understand the nature of the legal proceedings is a proper, non-racially motivated basis for the exercise of a peremptory challenge. (*People v. Turner* (1994) 8 Cal.4th 137, 169; *People v. Barber* (1988) 200 Cal.App.3d 378, 397-399.) After the trial court found that no prima facie case of discrimination had been established, the prosecutors explained that they exercised the peremptory challenge as to prospective juror Paul M. because they were concerned he was unable to understand the complexity of the case. (6 RT 1239-1243.) Even appellant's trial attorney conceded that prospective juror Paul M. "appeared to be confused." (6 RT 1235-1236.) The record supports these concerns.

Despite claiming to be a school teacher and a college graduate (CT [IV Exhibits and Jury Questionnaires] 859-862), prospective juror Paul M. did not appear to understand some of the simple inquiries on the juror questionnaire. In response to the question whether he belonged to a group that advocated the increased use or abolition of the death penalty, he placed a checkmark on the "NO" response. He left blank the space where he was asked to identify "What group." Yet, when asked "Do you share the views of this group? How strongly do you hold these views?" he answered "Before the the [sic] stats [sic] to be born - I believe in abolition." (CT [IV Exhibits and Jury Questionnaires] 866.)

The prosecutor asked the prospective juror to clarify his answer regarding whether he belonged to a group that took a strong position as to the application death penalty, but the prospective juror's explanation demonstrated that he was not responding to the written question at all. Rather, the prospective juror was explaining his views regarding abortion. (3 RT 481-482.) He answered the prosecutor's question as follows:

> I hold this view. I say before – my mind went back to they are talking about if somebody is pregnant and they are talking about abortions, about killing – a lot of people give me the opinion that if somebody is pregnant, that the baby will be killed before that time and I told them I somewhere was against abortion. That's what I was trying to put in that statement, that I do not believe in abortion during this time. That's what I meant to that statement.

(3 RT 482.) The record shows that rather than provide information about a group who has taken a strong position regarding the use of the death penalty, as he was asked, the prospective juror provided his viewpoint regarding "abolition," but in reality meant "abortion." (CT [IV Exhibits and Jury Questionnaires] 866.)

Another example of the prospective juror apparently not understanding the simple inquiries on the questionnaire, is that the questionnaire asked, "DO YOU HAVE ANY HEALTH PROBLEMS (i.e. sight, hearing, inability or difficulty in sitting for long periods of time, significant nervous condition, etc.) WHICH SHOULD BE DISCUSSED BECAUSE THEY COULD AFFECT OR RENDER MAKE DIFFICULT YOUR SERVICE AS A JUROR?" He circled the word "sight," and placed a checkmark indicating "Yes." When asked "IF SO, PLEASE DESCRIBE BRIEFLY," he wrote "cannot hear from left." (CT [IV Exhibits and Jury Questionnaires] 861 (capitalization in original).)

A third example of the prospective juror's apparent inability to understand the proceedings was when asked whether he had heard of the law regarding aiding and abetting, the prospective juror answered, "Um, I was – I went to a library once and they had some things printed, but I was just reading a little about it, but I need – I didn't get all of [sic] details about it." (6 RT 1044.) When asked if he could apply the law regarding aiding and abetting, the prospective juror answered, "Um, in some way, yes. I think, yes,

I think so." (6 RT 1044.) Here, the prospective juror apparently was not sure of his ability to apply the law regarding this particular criminal law concept that would be at issue in the case.

Moreover, the prosecutor believed that the answers given by the prospective juror were inconsistent with one who claimed to be a school teacher and college graduate. (6 RT 1240-1242.) Certainly, the prospective juror's answer were not models of clarity. (3 RT 476 ("If they are proven to be guilty, that they have the evidence to prove that, I would go along with the law already about death penalty"); 3 RT 477-478 (when asked if he had given the death penalty much thought, he answered, "Not really because, see, I had to catch up with so much of my schoolwork because I am a teacher and I am so busy with the children I try to clear that first. I don't think too much about it"); 3 RT 478 (when asked whether it is useful to have the death penalty, he answered, "As I said, if there are some facts to prove that somebody is guilty, then I think they should have one of the options that they can stay in jail for years or make some other kind of decision, but I really don't know what would be after that"); 3 RT 479 (when asked if he had "some set of circumstances" in his mind that would "merit life without parole," he answered, "Not really. I really don't have any exactly. I just thought about what – if people lose their lives and young children or someone else, that – I think that really crossed my mind"); 3 RT 484 (when asked if he could impose the death penalty if the evidence warranted such a penalty in this case, he answered, "I think in some way, because even whoever the person is, I will have to set up my mind first at the beginning with a mind witness open first . . . until I get all the information").) When asked whether he considered the death penalty to be "uncivilized," he answered as follows:

> That's a big question sometimes. Because sometimes I think it should be done, and if it's proven – in the United States. If somebody has actually done a lot of things and I think there is some point to it should be done sometimes if something does cross my mind, and then sometimes I believe that some persons should spend the rest of their time in jail. [¶] These are things I have been listening to sometimes, you know, but I have never actually sit [sic] around and listened to any facts about any person that somebody –

> you know, media information because I am not able to make a decision before that. Because if I have to, this will be the only first time I have had to do that. These are things that cross my mind, things you see on television and those things you listen to. And that's where my decision come from.

(3 RT 485.)

Additionally, there also was substantial support for the trial court's concern, a concern that was shared by the prosecution, that prospective juror Paul M. was equivocal about imposition of the death penalty. (6 RT 1146-1148, 1170-1171, 1237-1243.) Even appellant's trial attorney conceded that the prospective juror "appeared to equivocate." (6 RT 1235-1236.)

Even though appellant has identified several statements of prospective juror Paul M.'s claiming that he would keep an open mind during deliberations (AOB 47-50, 53-596), the equivocation of prospective juror Paul M. was clearly shown in the record of voir dire. Appellant's trial counsel asked the prospective juror the following question, "Well, excluding children for a moment, let's say that a killing that was the result or pursuant to a rape or a kidnapping. [¶] Do you think you could remain open in a situation like that or do you think you might come back or would come back with a verdict of voting for the death penalty?" The prospective juror first answered, "No, I don't think I can just put that person to death penalty for that. I don't think I can do that." Later, the prospective juror gave a different answer. He said, "I'd have to listen with a wide open mind before I make a decision about that." (3 RT 479-480.)

"A prosecutor legitimately may exercise a peremptory challenge against a juror who is skeptical about imposing the death penalty." (*People v. Burgener* (2003) 29 Cal.4th 833, 864; see *People v. Ward* (2005) 36 Cal.4th 186, 202; *People v. Edwards* (1991) 54 Cal.3d 787, 831 [prosecutor's use of peremptory challenges to exclude prospective jurors who express any reservations about the death penalty not improper].) Thus, the

prospective juror's equivocation also establishes a non-racially motivated basis for the exercise of the peremptory challenge. Accordingly, this claim fails.[41]

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PERMITTED AUTOPSY AND CRIME SCENE PHOTOGRAPHS TO BE INTRODUCED INTO EVIDENCE AT THE GUILT AND PENALTY PHASES OF THE TRIAL

In Claim 3, appellant argues that the trial court erroneously admitted autopsy and crime scene photographs at both the guilt and penalty phases. He claims that admission of the photographs violated Evidence Code section 352, as well as his state and federal constitutional rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations regarding guilt, the truth of the special circumstances, and penalty. (AOB 58-70.) Respondent again disagrees.

A. The Relevant Proceedings At Trial

In the instant claim, appellant is claiming that specific photographs should have been excluded from evidence.

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[41] In *People v. Lenix* (2008) 44 Cal.4th 602, this Court held "[E]vidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*Id.* at p. 622.) "Defendants who wait until appeal to argue comparative juror analysis must be mindful that such evidence will be considered in view of the deference accorded the trial court's ultimate finding of no discriminatory intent." (*Ibid.*) "Additionally, appellate review is necessarily circumscribed. The reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment." (*Id.* at p. 624.) In *People v. Bell* (2007) 40 Cal.4th 582, however, this Court also held that comparative analysis is inappropriate where a prima facie showing has not been made, because, without any reasons having been posited for the peremptory challenges, there is "no fit subject for comparison." (*Id.* at p. 601.)

In the present case, comparative analysis is not appropriate because the trial court found that no prima facie case of discrimination was made out, and appellant has not identified any other juror, prospective or otherwise, to support a claim of disparate treatment. (AOB 46-57.)

1. People's Exhibits 5, 6, 7.

People's Exhibit 5 was a photograph that showed Genoveva's body in the ditch where appellant had killed her. Two black and white police vehicles also are seen in the photograph. (11 RT 2068, 2109.) Seong Kim and Deputy Nettleton testified that the photograph accurately depicted the ditch on the morning when they saw Genoveva's body there. (11 RT 2069, 2090-2091.) People's Exhibit 6 showed several police vehicles as well as Genoveva's body, but showed the ditch area from a different direction than that depicted in People's Exhibit 5. (11 RT 2068-2069, 2091, 2109.) People Exhibit 7 was another photograph of Genoveva's body in the ditch. This photograph also depicted footprints and a beer can. (11 RT 2070, 2091-2092, 2109.)

When the prosecution subsequently moved People's Exhibits 5, 6, and 7 into evidence, appellant's trial attorney objected to the photographs for the first time stating only "352." (11 RT 2155-2156.) The trial court overruled the objection.

2. Additional Photographs Of The Victim And The Ditch Where Genoveva's Body Was Found

Prior to opening statements, the prosecutor informed appellant's trial attorney that he intended to refer to People's Exhibit 28 during his opening statement. The prosecutor explained that the photograph demonstrated the contact wounds on Genoveva's face. He further explained that "[i]t is imperative that we establish that to show the person with the size 10 shoes was the person that killed Genoveva Gonzales[.]" (11 RT 2030-2031.) Appellant's trial attorney objected that admission of the photograph would violate Evidence Code section 352 and that the photograph was "highly inflammatory and prejudicial." (11 RT 2031.) Appellant's trial counsel further explained that "[t]here is not going to be any dispute that the wounds are contact wounds" and that the jury does not "need a graphic photograph with as much blood as that one contains." (11 RT 2031.) The trial court overruled the objection. (11 RT 2031.)

During the testimony of Deputy Barnes, the prosecutor asked the deputy to identify People's Exhibits 5, 6, and 7. (11 RT 2103, 2109-2111.) Appellant's trial attorney then objected to the introduction of any additional photographs of Genoveva's body in the

ditch. (11 RT 2111.) He argued that additional photographs would be "cumulative" and that the prosecution's "goal" was to "do nothing but inflame." (11 RT 2111.)

The prosecutor argued that the additional photographs were relevant to the issues of appellant's footprints in the ditch and the shell casings that were also found in the ditch. The footprint evidence showed that appellant carried Genoveva into the ditch, and she did not struggle. The casings showed that she suffered a contact wound when appellant shot her. Appellant's trial attorney argued that these issues were not in dispute. The prosecution argued that the photographs helped to establish premeditation and deliberation. (11 RT 2111-2114.) The trial court found that the photographs were not lacking in evidentiary value, were not cumulative, and any prejudice did not outweigh the probative value of the photographs. (11 RT 2114.)

Appellant's trial attorney asked the trial court to "reconsider" its ruling admitting People's Exhibit 18, a photograph of the ditch after Genoveva's body had been removed, because it depicted "a lot of blood." The trial court denied the request. (11 RT 2115, 2131.)

People's Exhibits 8, 9, 10, 11, 12, and 13 all depicted Genoveva's body as it was found in the ditch. People's Exhibit 10 was a reduced-size depiction of the same image in People's Exhibit 8. (11 RT 2116-2117, 2122-2123, 2156.) People's Exhibits 14 and 15 were photographs of a casing that was found in the ditch. (11 RT 2128.) People's Exhibit 16 was a photograph showing Genoveva's body lying in the ditch as well as the footprints. (11 RT 2130-2131.) People's Exhibit 17 was a photograph of the blood that remained on the ground in the ditch after Genoveva's body had been removed. (11 RT 2129.)

Appellant's trial counsel subsequently objected to admission of People's Exhibit 8 into evidence, arguing that it was cumulative to People's Exhibit 10 and failed to satisfy Evidence Code section 352. At the prosecution's request, the trial court excluded People's Exhibit 10 and admitted People's Exhibit 8. (11 RT 2156-2158.)

3. Autopsy Photographs Of Genoveva's Body

People's Exhibit 23 was a photograph of the gunshot entry wound on Genoveva's forehead as well as a wound on her left cheek. The photograph showed the stellate configuration around the wound. (12 RT 2167.) People's Exhibit 24 was a photograph of the same wounds shown in People's Exhibit 23, except that the camera had been moved to provide more "emphasis" on the wound on Genoveva's left cheek. The wound on her cheek has a triangular-shaped tear. (12 RT 2167-2168.)

People's Exhibit 25 was a photograph that was described by Dr. Lovelle as follows:

> That's a picture of the skull with the scalp reflected to - - make a cut over the top of the head so the scalp's reflected forward and backward. And it shows the fresh bruise area on the right side of the head which would be at the bottom of the picture. The back of the head is at the left and there is a slight mark on the covering of the skull there which turned out to be due to the effect of the bullet lodging back there. But this large lesion on the right lower side is the bruise area or the fresh area.

(12 RT 2171.)

Appellant's trial counsel objected to People's Exhibits 23, 24, and 25 collectively as being cumulative of the coroner's testimony about Genoveva's wounds and in violation of Evidence Code section 352. The prosecutor argued that the photographs were relevant to illustrate the coroner's testimony and that they were relevant to the issues of premeditation and deliberation. (12 RT 2172-2174.)

B. Relevant Legal Principles

The admission of allegedly gruesome photographs is basically a question of relevance over which the trial court has broad discretion. (*People v. Roldan* (2005) 35 Cal.4th 646, 713; *People v. Scheid* (1997) 16 Cal.4th 1, 13-14.) As this Court has often noted, murder is "seldom pretty," and pictures, testimony, and physical evidence in such a case are "always unpleasant." (*People v. Perry* (2006) 38 Cal.4th 302, 318; *People v. Riel* (2000) 22 Cal.4th 1153, 1194; *People v. Pierce* (1979) 24 Cal.3d 199, 211.) Prosecutors are not obliged to prove their cases with evidence solely from live witnesses;

the jury is entitled to see details of a murder victim's body to determine if the evidence supports the prosecution's theory of the case. (*People v. Roldan, supra*, 35 Cal.4th at p. 713; *People v. Gurule* (2002) 28 Cal.4th 557, 624.)

A trial court has broad discretion in determining the admissibility of murder victim photographs against a claim that the photographs will arouse in the jurors an excessively emotional response. (*People v. Perry, supra*, 38 Cal.4th at p. 318; *People v. Price* (1991) 1 Cal.4th 324, 441.) A trial court's decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial value of such photographs clearly outweighs their probative value. (*People v. Gurule, supra*, 28 Cal.4th at p. 624; *People v. Allen* (1986) 42 Cal.3d 1222, 1256.)

C. Appellant Has Waived His Entire Claim As It Pertains To People's Exhibits 5, 6, 7, 23, 24, and 25 Due To Trial Counsel's Failure To Object Prior To The Witnesses Testifying About The Photographs Before The Jury; Appellant Has Waived All Claims Of Federal Constitutional Error Due To His Lack Of Objection

Appellant's trial counsel waived any claim regarding admission of People's Exhibits 5, 6, 7, 23, 24, and 25 because he failed to object to admission of the photographs before the witnesses actually testified before the jury. (11 RT 2068-2070, 2090-2092, 2109, 2155-2156; 12 RT 2167-2168, 2171-2174; see *People v. Stansbury* (1993) 4 Cal.4th 1017, 1049; *People v. Morris* (1991) 53 Cal.3d 152, 189.)

Appellant has waived all of his claims of federal constitutional violation as to each of the photographs at issue in the instant claim because he did not object to this evidence on federal constitutional grounds at any time. Although he raises a federal constitutional claim in this regard for the first time on appeal (AOB 58), it lacks merit for the same reason his state law claim does, to the extent it is cognizable at all. (See generally *People v. Partida* (2005) 37 Cal.4th 428, 433-439; *People v. Cole* (2004) 33 Cal.4th 1158, 1187, fn. 1.) To the extent that other federal constitutional claims are raised for the first time on appeal, they lack merit for the same reason, i.e., the claim in question fails under state law.

D. The Photographs The Court Allowed Into Evidence Were Not Unduly Gruesome And Were Highly Probative Of Critical Issues In This Case Such Appellant Premeditating And Deliberating Prior To The Murder

Even had all of appellant's instant claims been preserved, appellant has failed to show that the trial court abused its discretion in this case. The thrust of appellant's argument is that there was little probative value for the photographs because his trial counsel conceded appellant was the shooter and there was ample testimony regarding the location of Genoveva's body and description of the gunshot wounds. The inflammatory quality of the photographs was that they showed Genoveva lying in a pool of her own blood. (AOB 60-70.) Respondent disagrees.

Although appellant argues that the photographs were cumulative to the live testimony of the coroner and not necessary in light of trial counsel's concession that appellant was the shooter, the trial court still acted within its discretion in admitting the photographs into evidence. Prosecutors "'are not obliged to prove their case with evidence solely from live witnesses; the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case.'" (*People v. Roldan, supra*, 35 Cal.4th at p. 713, quoting *People v. Gurule, supra*, 28 Cal.4th at p. 624.)

Additionally, the photographs were relevant to illustrate for the jury the manner in which Genoveva was killed, as well as to corroborate and illustrate the testimony of the coroner concerning the nature of Genoveva's fatal injuries. (See *People v. Cain* (1995) 10 Cal.4th 1, 29; *People v. Allen, supra*, 42 Cal.3d at p. 1256.) Due to the lack of stippling and lack of gunpowder around the gunshot wounds, as well as the presence of stellate areas in the wounds, they appeared to be contact wounds, received from gunshots fired at very close range, possibly with the gun right against Genoveva's head when they were fired. Dr. Lovell also opined that the gun used to inflict the wounds was held to her head with moderate to heavy pressure. (11 RT 2134-2135, 12 RT 2164-2176.) The head injury that Genoveva suffered came from a blow to the right side of her head which could have rendered her unconscious, and Dr. Lovell opined that Genoveva was unconscious

when she was killed. (12 RT 2169-2171, 2176.) These facts were highly relevant to support the prosecution's theory that the murder was deliberate and premeditated.

As for appellant's claim that the photographs should have been excluded pursuant to Evidence Code section 352, while photographs depicting a murder victim lying in her own blood and from the autopsy conducted on her body are obviously somewhat disturbing, the photographs which the trial court allowed to be admitted at appellant's trial were not excessively bloody or gruesome. For example, there was no "revolting portraiture displaying horribly contorted facial expressions that conceivably could inflame a jury." (*People v. Scheid, supra*, 16 Cal.4th at p. 19.)

Indeed, numerous published decisions have upheld the admission of similar photographs against claims of undue prejudice under Evidence Code section 352. (See, e.g., *People v. Perry, supra*, 38 Cal.4th at p. 318 [no abuse of discretion regarding admission of photograph showing the mortally wounded victim lying unconscious with blood on his head and chest, as even though it would undoubtedly unsettle some jurors, it and other photos of the victims were less gruesome than many this Court had seen in other cases]; *People v. Roldan, supra*, 35 Cal.4th at pp. 712-713 [four photographs, including one showing the nude body of the victim lying on the coroner's table, covered by a towel, and three others depicting close-up views of the wounds the victim suffered, were not unduly bloody or gruesome]; *People v. Navarette* (2003) 30 Cal.4th 458, 495 [no abuse of discretion in admitting photograph of murder victim's naked chest, showing several stab wounds concentrated in the area between her breasts, and another photo depicting her body, facedown, pants and underwear around her ankles, and hands and feet tied together, where the photographs were "certainly gruesome" but trial court found them not unduly prejudicial]; *People v. Farnam* (2002) 28 Cal.4th 107, 184-185 [32 photographs of victim in prior murder case not impermissibly cumulative or inflammatory, were clearly relevant to the prosecution's penalty phase case under factor (b) of section 190.3, and also highly probative of the prosecution's theory that the victim was the victim of a torture murder]; *People v. Gurule, supra*, 28 Cal.4th at p. 624 [three color photographs of victim's head and neck, taken before the autopsy but after the body

had been cleansed of blood, not of such a nature as to overcome the jury's rationality]; *People v. Earp* (1999) 20 Cal.4th 826, 881 [in a prosecution for the murder, rape, and sodomy of an 18-month-old child, the trial court did not abuse its discretion by admitting two autopsy photographs of the victim's anal area and buttocks, which depicted bruises]; *People v. Scheid, supra*, 16 Cal.4th at p. 19 [photograph of murder victim unpleasant but not unduly gory or inflammatory]; *People v. Lucas* (1995) 12 Cal.4th 415, 449-450 [21 photographs of victims' bodies not unduly gruesome, and both the prosecutor and defense counsel cautioned the jury against being swayed by passion upon viewing the photographs]; *People v. Cain, supra*, 10 Cal.4th at p. 29 [photographs of victims at the crime scene and during autopsy were not unduly gruesome or inherently inflammatory]; *People v. Crittenden* (1994) 9 Cal.4th 83, 134 [photographs showing the victims' wounds, including two autopsy photographs, unpleasant, but not unduly shocking or inflammatory]; *People v. Wash* (1993) 6 Cal.4th 215, 245-246 [five crime scene photographs and thirteen autopsy slides not unduly gruesome or inflammatory].)

Since the photographs had sufficient probative value, and were not unduly inflammatory in the context of the case, appellant has clearly failed to show an abuse of discretion in admitting the photographs into evidence.

E. Any Error Was Harmless

Even if error occurred, reversal is not warranted. This Court has stated that a miscarriage of justice warranting reversal occurs when the reviewing court, after an examination of the entire cause, including the evidence, is of the opinion "that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The erroneous admission of a photograph is reviewed under the Watson standard. (*People v. Scheid, supra*, 16 Cal.4th at p. 21.) Here, respondent disagrees with appellant's assertion that this case was a "close one" such that the alleged error requires reversal. (AOB 70.)

There was overwhelming evidence adduced at trial proving appellant's guilt. During the guilt phase of the trial, the prosecution evidence showed that on the evening of the murder, appellant accompanied Jackson when he wanted to "get a victim" that

evening. (13 RT 2378-2383; 14 RT 2624.) They subsequently got Genoveva, appellant's victim. (12 RT 2208-2214, 2236.) Appellant was present while Jackson raped Genoveva. (13 RT 2385-2395, 2398-2399, 2401-2402; 14 RT 2403-2408, 2410-2414, 2478, 2546-2547, 2552, 2617.) They took her to Arnold Road where appellant carried the unconscious Genoveva into a ditch and shot her in the forehead and cheek. (13 RT 2414-2419, 2421-2427.) Appellant and his companions then disposed of evidence of the shooting and left the scene. (13 RT 2433-2438, 2443-2446, 2480; 14 RT 2561-2562.) The circumstances of appellant's shooting Genoveva, as well as the rape that occurred earlier in the evening, were confirmed by the physical evidence recovered from the murder scene, during the autopsy of Genoveva's body, and after an examination of the ballistics and other physical evidence. (11 RT 2063-2082, 2103-2110, 2117-2121, 2126-2129, 2132-2137, 2140-2148, 2160-2163; 12 RT 2164-2183, 2193, 2197-2198, 2202-2205, 2267-2268, 2281-2297; 15 RT 2719-2729-2730, 2734, 2738-2751.) The prosecution also produced evidence showing that the handgun used to kill Genoveva had been purchased by appellant. (12 RT 2247-2250, 2253-2266; 13 RT 2303-2314, 2438; 14 RT 2590, 2596; 15 RT 2660-2680, 2789; People's Exhibit 43.) Appellant admitted to his girlfriend at the time that he had killed Genoveva because Jackson had raped her. (15 RT 2789-2791, 2800-2813, 2819-2820.) While the photographs corroborated the testimony concerning the nature of Genoveva's injuries, the testimony concerning the nature of those injuries certainly would have led the jury to find that appellant murdered her with premeditation and deliberation. In other words, the photographs did not disclose to the jury any information that was not presented through the testimony of the witnesses. (See *People v. Scheid, supra*, 16 Cal.4th at p. 21.) Moreover, the trial court instructed the jury that it was not to be influenced by sympathy, passion, or prejudice. (19 RT 3390-3391; 2 CT 239.)

Any error in the admission of the photographs during the guilt phase of the trial, also was harmless at the penalty phase of the trial. The prosecution offered extensive evidence of appellant's participation in the prior rape and robbery of Myra M. and the robbery of Jaime M. in 1991. (20 RT 3623-3034, 3635-3645, 3653, 3659-3684, 3690-

3692, 3696, 3708-3719.) The prosecution also offered evidence that appellant threatened to kill Rollins for testifying against appellant. (20 RT 3735-3739.) The jury also heard the prosecution evidence of the effect that Genoveva's murder had on her children. (20 RT 3742-3747, 3752-3761, 3772-3790.) The prosecution and defense evidence regarding the psychological evaluations conducted on appellant did not show that he was incompetent or lacked the mental ability to refuse to participate in such brutal crimes, as discussed in the Statement of Facts, ante. Despite the defense evidence of appellant's personal history with his father and his education, there was overwhelming evidence in support of the judgment of death.

It is therefore not reasonably probable that appellant would have received a more favorable guilt phase result but for the alleged error. (See *People v. Watson, supra*, 46 Cal.2d at p. 836; see also *People v. Allen, supra*, 42 Cal.3d at pp. 1257-1258 [admission of photographs cumulative to other evidence that "was itself detailed and essentially uncontested" may have been an abuse of discretion, but any error was harmless].) And, there was no reasonable probability of a different result at the penalty phase due to the admission of the challenged photographs at the guilt phase. (*People v. Hardy* (1992) 2 Cal.4th 86, 200 [no reasonable probability that admitting allegedly gruesome photographs at penalty phase affected the outcome of the penalty phase].) Even under a stricter standard, any federal constitutional error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) This claim fails.

IV. THE KIDNAPING CONVICTION AND THE KIDNAPING SPECIAL CIRCUMSTANCE WERE SUPPORTED BY SUBSTANTIAL EVIDENCE

In Claim 4, appellant argues that there was insufficient evidence of the kidnaping conviction and the kidnaping special circumstance because: (1) the only evidence of kidnaping came from accomplice Rollins, and (2) there was no corroboration of Rollins's testimony. Appellant also claims that the trial court should have granted his motion for judgment of acquittal at the end of the prosecution case pursuant to Penal Code section

1118.1. He argues that these errors deprived him of his state and federal rights to due process, a fair trial, and a reliable determination of guilt and penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 71-87.) Respondent disagrees.

A. Relevant Legal Principles

The standard of appellate review for determining the sufficiency of the evidence is "settled." (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) On appeal, the reviewing court considers the whole record in the light most favorable to the judgment to determine whether there is substantial evidence, defined as evidence that is "reasonable, credible, and of solid value," from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Ibid.*; *People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [99 S.Ct. 2781, 61 L.Ed.2d 560].) The reviewing court presumes every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. (*People v. Wilson, supra*, 44 Cal.4th at p. 806.)

The reviewing court does not "reweigh evidence or reevaluate a witness's credibility." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The reviewing court defers to the trier of fact's evaluation of witness credibility. (*People v. Richardson* (2008) 43 Cal.4th 959, 1030; *People v. Snow* (2003) 30 Cal.4th 43 66.) The "testimony of a single witness is sufficient for the proof of any fact." (*People v. Richardson, supra*, 43 Cal.4th at p. 1030; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885.)

"The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special-circumstance allegations." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129; *People v. Maury* (2003) 30 Cal.4th 342, 396.) If the prosecution has relied on circumstantial evidence, "the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Guerra, supra*, 37 Cal.4th at p. 1129; *People v. Farnam, supra*, 28

Cal.4th at p. 143.) The same sufficiency-of-the-evidence standard also applies when reviewing the trial court's denial of a motion for judgment of acquittal pursuant to Penal Code section 1118.1. (*People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. 2.)

Penal Code section 1111 "prohibits conviction on the testimony of an accomplice unless the testimony is corroborated by other evidence tending to connect the defendant with the commission of the crime." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 214; *People v. Hayes* (1999) 21 Cal.4th 1211, 1270.) Penal Code section 1111 defines an accomplice "as one who is liable to prosecution for the identical offense charged against the defendant...." (See *People v. Whisenhunt, supra*, 44 Cal.4th at p. 214; *People v. Hayes, supra*, 21 Cal.4th at p. 1270.)

Such corroborating evidence need not corroborate every fact to which the accomplice testified, but is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is truthful. It may be slight and entitled to little consideration standing alone. (*People v. Fauber* (1992) 2 Cal.4th 792, 834-835.) The requisite corroboration may also be established entirely by circumstantial evidence. Corroborating evidence must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime, but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1204; *People v. Zapien* (1993) 4 Cal.4th at 929, 982.)

B. There Was Adequate Corroboration Of Rollins's Testimony Regarding The Kidnaping Of Genoveva Such That There Was Sufficient Evidence Of Appellant's Guilt For Simple Kidnaping And A True Finding As To The Kidnaping Special Circumstance

The elements of simple kidnaping, in violation of Penal Code section 207, subdivision (a), are: "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping." (*People v. Rayford* (1994) 9 Cal.4th 1, 8 fn. 3;.) Under Penal Code section

190.2, subdivision (17)(B), a criminal defendant is eligible for the death penalty if he or she has committed the murder while engaged in the commission of, or attempted commission of, kidnapping in violation of Penal Code section 207.

Appellant contends that there was insufficient evidence of kidnaping, both at the conclusion of the prosecution's case-in-chief and at the end of the trial, because the only evidence supporting the kidnaping came from Rollins, and his testimony was not adequately corroborated.[42]/ (AOB 75-84.) Moreover, appellant argues, Rollins's testimony itself was "unbelievable" (AOB 77), and the evidence shows that Genoveva went with Jackson and appellant willingly (AOB 82-83). These claims lack merit.

The prosecutor conceded[43]/ that they had no evidence to prove whether Genoveva initially entered the Cadillac with Jackson at the Buddy Burgers restaurant consensually.[44]/ (18 RT 3258, 3381.) Rollins's testimony and the testimony from Lydia Sattiewhite regarding Rollins's call to her on the night of the murder established that the rape occurred in a parking lot near the Mira Loma apartment complex and a Sav-On Drug Store. (18 RT 3259.) The autopsy evidence was consistent with theory that the sexual contact Jackson had with Genoveva was rape rather than consensual.[45]/ (18 RT 3248-3251.) Consequently, any movement of Genoveva or sexual contact in the Cadillac was without her consent from the time the rape started, even if she earlier entered the Cadillac

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[42] During argument to the jury at the close of the guilt phase of the trial, the prosecution acknowledged that Rollins's testimony had to be corroborated. (17 RT 3179-3180, 3186-3188, 3204-3205; 18 RT 3212-3213.) The jury also was instructed that Rollins's testimony had to be corroborated. (19 RT 3404-3406; 2 CT 270, 272-273.)

[43] At the beginning of the argument, the prosecutor stated that their theory as to the kidnaping was that Genoveva was moved from the Mira Loma apartments to Arnold Road against her will. (17 RT 3202.)

[44] Appellant's argument that Genoveva was a "drug-dependent prostitute" who went with appellant, Jackson, and Rollins "willingly for alcohol, the promise of drugs, or payment" is irrelevant. (AOB 80-82.) The prosecution's theory was that even if Genoveva's initial interaction was consensual, any consent ended once the rape occurred.

[45] The prosecution argued that there was no evidence to support the defense theory that Genoveva agreed to have sex with Jackson in exchange for drugs. (18 RT 3225-3226.)

voluntarily. (18 RT 3381-3382.) Genoveva also was unconscious at the time that appellant carried her into the ditch and that autopsy evidence established this fact independent of Rollins's testimony. (18 RT 3220, 3227-3228, 3257-3258, 3336.)

The prosecution's evidence during its case-in-chief showed that on the night of the murder, Genoveva left the Casa Del Oro Restaurant with two Hispanic men. (12 RT 2208-2214, 2236.) Later in the evening, Rollins met appellant near a Buddy Burgers restaurant on Oxnard Boulevard, near 5th Street. He saw Jackson in the back seat of a Cadillac with Genoveva. (13 RT 2385-2393.) After moving to a parking area near the Mira Loma apartment complex in Oxnard, appellant explained to Rollins that they had "gaffled" Genoveva in the car, which Rollins understood to mean that they had "snatched up" Genoveva. Jackson had pushed the Genoveva's head down in the back seat. Rollins heard Jackson tell Genoveva to shut up. Genoveva yelled at Jackson in Spanish. (13 RT 2394-2395, 2398-2399, 2401-2402; 14 RT 2546-2547, 2617.) Rollins saw Genoveva spit on Jackson, and Jackson began hitting her. Jackson pushed Genoveva back down into the seat of the car. It appeared to Rollins that Genoveva was fighting with Jackson and did not agree to what Jackson was doing to her. Genoveva also appeared drunk. (14 RT 2403-2404, 2478, 2552.) Appellant subsequently told Rollins that he and Jackson were going to "the dead-end," which Rollins believed was Arnold Road. (13 RT 2406-2408, 2410, 2412-2414.)

Later that evening when he met Jackson and appellant at Arnold Road, Rollins saw Jackson push Genoveva out of the Cadillac. She appeared to be unconscious, and her body moved only when she was pushed. Jackson pushed Genoveva to the passenger side of the car and then pushed her into appellant. Appellant grabbed her. Rollins then moved his car to another location on Arnold Road. When Rollins returned to the Cadillac, he heard three gunshots. When Rollins heard the shots, Jackson was in the backseat of the Cadillac and appellant was in the ditch on the side of the road. Rollins could not see Genoveva when the shots were fired. (13 RT 2414, 2419, 2421-2426.) After hearing the gunshots, Rollins went to look in the ditch. Genoveva was lying face

up in the ditch and her legs were "kind of jumping." Appellant was standing over her. Nobody else was in the ditch. (13 RT 2426.)

Under well settled principles of law, there is no requirement that every single aspect of Rollins's testimony be independently corroborated. (*People v. Slaughter, supra*, 27 Cal.4th at p. 1204; *People v. Zapien, supra*, 4 Cal.4th at p. 982; *People v. Fauber, supra*, 2 Cal.4th at pp. 834-835.) Contrary to appellant's argument (AOB 83), there is ample evidence from Rollins's testimony and the medical expert testimony that showed force was used against Genoveva. Genoveva had suffered a blow to the right side of her head which could have rendered her unconscious, and Dr. Lovell opined that Genoveva was unconscious when she was killed. (12 RT 2169-2171, 2176.) Although Dr. Lovell was unable to opine whether Genoveva's injuries were consistent with forced sexual activity (12 RT 2165, 2178, 2180, 2183), Dr. Woodling was able to form the opinion that the sexual activity was not consensual. (15 RT 2729-2730, 2734, 2738-2751.)

Appellant complains that the testimony of Lydia Sattiewhite failed to corroborate Rollins's testimony about the location of the rape because her testimony relied on a telephone call Rollins made to her from the parking lot where the rape occurred. (AOB 83.) Even removing Lydia Sattiewhite's testimony from the corroboration evidence, Rollins's testimony is still sufficiently corroborated by the medical expert testimony which shows that Genoveva was raped before appellant carried her into the ditch on Arnold Road to murder her. Moreover, appellant's statement to the police provides additional corroboration because he confirmed that Rollins was not with appellant and Jackson when they took Genoveva. (16 RT 2833-2836, 2843-2849, 2857.)

Appellant also argues that Rollins's testimony was unbelievable due to his meeting appellant and Jackson at just the time the rape occurred and later at just the time that Genoveva was removed from the Cadillac at Arnold Road, as well as due to inconsistencies between Rollins' testimony and his statements to the police. (AOB 77-80.) These arguments lack merit because appellant is inappropriately asking this court to reweigh or reevaluate the credibility of Rollins. (*People v. Guerra, supra*, 37 Cal.4th at p. 1129; *People v. Ochoa, supra*, 6 Cal.4th at 1206.)

Even though the prosecution essentially conceded that it could not prove Genoveva was forced into initially going with appellant and Jackson, the concession was not fatal to proving the kidnaping charge and special circumstance. "'Even if the victim's initial cooperation is obtained without force or the threat of force, kidnaping occurs if the accused subsequently restrains his victim's liberty by force and compels the victim to accompany him further.'" (*People v. Morgan* (2007) 42 Cal.4th 593, 615, quoting *People v. Alcala* (1984) 36 Cal.3d 604, 622, citation and internal quotation omitted.) The record, as demonstrated above, shows that after the initial meeting, Genoveva was eventually raped in the Cadillac by Jackson and moved against her will to the Arnold Road location. At that location, Genoveva was unconscious and moved further by appellant into the ditch where he shot and killed her. Thus, there was sufficient evidence that Genoveva was moved by force and against her will, and the kidnaping charge and special circumstance were supported by substantial evidence both at the close of the prosecution's case-in-chief and at the close of the guilt phase of the trial.[46]/ Because there was no error, appellant's claim that his conviction should be reversed for insufficient evidence must be rejected, along with his derivative claims that any error also violated other state and federal constitutional provisions.

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[46] Appellant asks this Court to adopt a "series of safeguards" that had been drafted by the United Nations Economic and Social Council in 1984 to protect the rights of death penalty defendants. (AOB 86-87.) This Court has repeatedly rejected such a request because no reasons have been offered for why the safeguards should be applied here and, if so, how they would change the outcome of the case. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1029 [citing cases].) Appellant, like the defendant in *Hovarter*, also has offered no explanation for why the safeguards should be applied to his case or how their application would result in a finding that the evidence of kidnaping was insufficient. (AOB 86-87; *People v. Hovarter, supra* 44 Cal.4th at p. 1029.) Consequently, following the reasoning in Hovarter, appellant's claim has been waived. (*People v. Hovarter, supra* 44 Cal.4th at p. 1029.)

V. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY REGARDING THE LACK-OF-CONSENT ELEMENT OF KIDNAPING

In Claim 5, appellant contends that the jury was incorrectly instructed regarding the lack-of-consent element for kidnaping. He further argues that the error violated his right to a jury trial, due process, and a fair trial under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 88-99.) Specifically, he claims that the trial court's instructions "erroneously defined the type of knowledge required for effective consent," "required a positive display of cooperation," and "failed to define the quantum of force that would vitiate consent." (AOB 89.) Respondent submits that the jury instructions regarding consent were correct.

A. Relevant Proceedings

The jury was instructed as follows regarding whether movement by the victim was the product of consent:

> When one consents to accompany another, there is no kidnapping so long as such condition of consent exists.
>
> To consent to an act or transaction, a person must
>
> One, act freely and voluntarily and not under the influence of threats, force or duress;
>
> Two, have knowledge of the true nature of the act or transaction involved; and
>
> Three, possess sufficient mental capacity to make an intelligent choice whether or not to do something proposed by another person.
>
> Mere passivity does not amount to consent. Consent requires a free will and positive cooperation in act or attitude.

(19 RT 3416; 2 CT 295; CALJIC No. 9.56.)

B. Relevant Legal Principles

"In a criminal case, a trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Cruz, supra*, 44 Cal.4th at p. 664, citing

People v. Breverman (1998) 19 Cal.4th 142, 154; *People v. Rubalcava* (2000) 23 Cal.4th 322, 333-334.) "That obligation includes instructions on all of the elements of a charged offense and on recognized defenses and on the relationship of these defenses to the elements of the charged offense." (*People v. Rubalcava, supra*, 23 Cal.4th at p. 334, citations and quotations omitted, *People v. Sedeno* (1974) 10 Cal.3d 703, 716, overruled on other grounds by *People v. Breverman* (1998) 19 Cal.4th 142, 178, fn. 26.)

C. This Court Has Previously Held That The Version Of CALJIC No. 9.56 Given At Appellant's Trial Correctly Stated The Law Regarding Consent; Appellant Has Offered No Justification For Finding That The Instruction Could Have Been Mis-Applied By The Jury In This Case

In *People v. Davis* (1995) 10 Cal.4th 463, this Court held that the version of CALJIC No. 9.56 given at appellant's trial "correctly states the law." (*Id.* at p. 517.) Appellant recognizes the holding in *Davis* that the instruction correctly states the law. Nonetheless, appellant posits three reasons why this Court's holding in *Davis* was erroneous and should not be followed in this case. (AOB 91.) Respondent submits that each of appellant's reasons lack merit.

First, appellant asserts that the instruction would allow the jury to find him guilty of kidnapping through deception if it found Genoveva's ignorance of the "'true nature of' her asportation" prevented her from giving effective legal consent to being moved. (AOB 90-91.) This Court rejected this same argument in *Davis*, finding that the instruction "does not declare or suggest that fraud, deceit, or dissimulation vitiate consent." The term "act or transaction" refers to the "earlier phrase 'to accompany another.'" Additionally, "'knowledge of the true nature of the act or transaction involved' refers to the act or transaction of accompanying another, i.e., physical asportation." (*People v. Davis, supra*, 10 Cal.4th at p. 517.)

This Court, in *Davis*, also found that there was no reasonable likelihood that the jury would misapply the instruction because: (1) the jury was properly instructed that a kidnaping could occur where the victim initially voluntarily went somewhere with the defendant, but thereafter was transported after being forcibly restrained from leaving, and

(2) the prosecutor's closing argument did not suggest that the victim initially entered the defendant's car for transportation as a result of fraud, deceit, or deception, but instead argued that in the course of consensual asportation, the defendant applied force and transformed the event into a kidnaping from that point on. (*People v. Davis, supra*, 10 Cal.4th at pp. 517-518.) It is true that appellant's jury was not directly instructed that a kidnaping may occur when the initial asportation was voluntary, but the victim later was forcibly restrained and moved. However, it was unmistakenly clear that the prosecution was relying on the proper theory that regardless of whether there was consensual asportation originally, there was forcible restraint when the victim was raped, and all movement following that point was a non-consensual kidnaping. The prosecution's argument, like the prosecution's argument in *Davis*, did not suggest that Genoveva initially went with appellant and Jackson because of fraud, deceit, or deception. The prosecutor conceded that they had no evidence to prove whether Genoveva initially entered the Cadillac with Jackson at the Buddy Burgers restaurant consensually.[47]/ (18 RT 3258, 3381.) Rollins's testimony, Lydia Sattiewhite's testimony, and the autopsy evidence established that any movement of Genoveva from the time the rape started to the time that appellant murdered her in the ditch on Arnold Road was without her consent. (18 RT 3220, 3227-3228, 3248-3251, 3257-3259, 3336, 3381-3382.)

Appellant argues that the jury submitted a question to the trial court during deliberation that showed it believed the initial movement of Genoveva was done through "deception rather than force." (AOB 94; 19 RT 3446-3448.) While it is true that the jury asked about a scenario where the "defendant was willingly with the rapist when the victim was picked up and knew what the intentions were," the focus of the question plainly was on aider and abettor liability for appellant. The question did not indicate that the jury believed that Genoveva accompanied appellant and Jackson due to fraud, deceit, or deception. Rather, the question referred to Genoveva simply being "picked up" with

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[47] Appellant's even concedes that "the prosecutor did not explicitly claim that the kidnapping was accomplished through deception." (AOB 93.)

no other surrounding circumstances regarding her accompanying appellant and Jackson. Moreover, the jury's question showed that it believed a rape, an unconsented act, to have occurred. (19 RT 3446-3448 [two other factors in the jury's scenario were that "the defendant witnessed the rape" and "the defendant disposed of the victim after the alleged rape"].) Consequently, the jury was correctly instructed and there was no possibility that the jury misapplied the instruction. (*People v. Davis, supra*, 10 Cal.4th at p. 518, citing *People v. Clair* (1992) 2 Cal.4th 629, 662-663.)

Appellant also argues that the jury was precluded from properly determining consent because it was instructed that "[m]ere passivity does not amount to consent" and that "[c]onsent requires a free will and positive cooperation in act or attitude." He also contends that these instructions are unsupported by statutory and decisional law. (AOB 95-96.) Respondent submits that the sentences challenged by appellant are entirely consistent with the requirement that "[t]o consent to an act or transaction, a person must . . . act freely and voluntarily." Read together, the challenged sentences state that consent requirement will not be satisfied if the victim is merely passive or inactive during the movement. Consequently, as this Court has approved of the "act freely and voluntarily" requirement in *Davis*, the references to "mere passivity" and "positive cooperation" are supported by decisional law.

Furthermore, the prosecution conceded that it had no evidence whether Genoveva voluntarily accompanied appellant and Jackson initially, but the evidence of Genoveva's injuries showed that any movement after the rape was without Genoveva's consent. No evidence was presented that Genoveva was merely passive when she was transported by appellant and Jackson following the rape. Thus, the jury was correctly instructed and there was no possibility that the jury misapplied the instruction. (*People v. Davis, supra*, 10 Cal.4th at p. 518; *People v. Clair, supra*, 2 Cal.4th at pp. 662-663.)

Appellant further complains that the instruction erroneously failed to define the quantum of force needed to vitiate the victim's consent. (AOB 96-97.) A trial court has no duty to define a statutory or other term for the jury when the jury would have no difficulty understanding the term without such guidance. (*People v. Bland* (2002) 28

Cal.4th 313, 334; *People v. Estrada* (1995) 11 Cal.4th 568, 574.) "A court has no sua sponte duty to define terms that are commonly understood by those familiar with the English language, but it does have a duty to define terms that have a technical meaning peculiar to the law." (*People v. Bland, supra*, 28 Cal.4th at p. 334; *People v. Estrada*, supra, 11 Cal.4th at p. 574; *People v. Mayfield* (1997) 14 Cal.4th 668, 773.)

Appellant has cited *People v. Bland* in support of his argument that further definition of "force" was needed in this case. (AOB 97.) In *Bland*, this Court found that the trial court erred in failing to provide additional instruction regarding the meaning of "proximate cause." (*People v. Bland, supra*, 28 Cal.4th at pp. 334-335.) Such further instruction was needed because "[e]ven courts and the legal community have struggled with the meaning of proximate causation." (*Ibid.*; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1050-1054.)

In *In re Michele D.* (2002) 29 Cal.4th 600, this Court recognized that there previously had been no case law or statutory definition of the amount of force needed to effectuate a simple kidnaping. (*Id.* at pp. 605-606.) However, this Court also recognized that the term "force" for kidnaping needed to be addressed in that particular case, which involved a minor who moved an infant who was incapable of resisting or consenting to the movement. Further definitions of "force" and "consent" were needed under those facts to avoid unjust results and absurd consequences that the Legislature did not intend, namely an inability to punish defendants who moved infant victims a substantial distance for an illegal purpose or with an illegal intent. (*Id.* at pp. 603, 605-614.)

In the present case, however, appellant has offered no examples of unjust results or absurd consequences in light of the evidence. The prosecution evidence showed that substantial force was used against Genoveva to effectuate the rape and to render her unconscious afterward. There is no possibility that the jury would have misapplied the instruction regarding consent, or incorrectly found that an insufficient amount of force was used against Genoveva. (*People v. Davis, supra*, 10 Cal.4th at p. 518; *People v. Clair, supra,* 2 Cal.4th at pp. 662-663.) Because this Court has found that CALJIC No. 9.56 correctly states that the law regarding consent, and there was no possibility that the

jury misapplied the consent instruction, no reversal is required. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Lamas* (2007) 42 Cal.4th 516, 526 [*Chapman* harmless error standard applies to instructional errors regarding an element of an offense]; *People v. Flood* (1998) 18 Cal.4th 470, 502-504.)

VI. THERE IS NO NEED FOR REVERSAL OF THE DEATH VERDICT AS APPELLANT HAS FAILED TO ESTABLISH ANY ERROR WITH RESPECT TO HIS CONVICTIONS AND THE TRUE FINDING FOR THE SPECIAL CIRCUMSTANCES

In Claim 6, appellant does not allege any error. Rather, he requests that this Court reverse the death verdict should any count or special circumstance be vacated. (AOB 100-102.) Respondent submits for the reasons set forth elsewhere in this brief with respect to appellant's actual claims of error, no reversal is warranted. Moreover, insofar as either of the special circumstances fails, the penalty phase verdict should still be affirmed if one valid special circumstance remains, since the evidence underlying the special circumstances was admissible at the penalty phase under Penal Code section 190.3, subdivision (a). (See *Brown v. Sanders* (2006) 546 U.S. 212, 220-221 [126 S.Ct. 884, 163 L.Ed.2d 723].)

VII. THE TRIAL COURT HAD JURISDICTION TO TRY APPELLANT FOR FIRST DEGREE MURDER

In Claim 7, appellant contends that the indictment did not properly charge him with first degree murder. Rather, the indictment charged him with only murder in violation of Penal Code section 187, subdivision (a), without any allegation of degree so that it must be interpreted to have charged him only with second degree murder. Appellant argues that the failure to properly charge him with first degree murder, resulted in the trial court lacking subject matter jurisdiction to try him for first degree murder. Appellant contends that as a result of these errors, he was denied his right to notice of the charges against him, due process of law, a fair trial, and a reliable capital verdict in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, as well as article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 103-111.)

This same claim has recently been rejected by this Court in *People v. Harris* (2008) 43 Cal.4th 1269, 1294-1295, and has been repeatedly rejected in prior decisions of this Court. (*Ibid.*; *People v. Hughes* (2002) 27 Cal.4th 287, 369, citing cases ("[W]e have repeatedly held that an information charging murder in violation of section 187 is sufficient to support a first degree murder conviction").) In *Harris*, this Court rejected a claim, which has been repeated by appellant herein (AOB 107-109), that this line of authority is irreconcilable with *People v. Dillon* (1983) 34 Cal.3d 441. (*People v. Harris*, *supra*, 43 Cal.4th at pp. 1294-1295.)

In *Harris*, this Court also rejected a claim, repeated by appellant herein (AOB 109-110), that the allegations in the indictment were insufficient within the meaning of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476 [120 S.Ct. 2348, 147 L.Ed.2d 435]. (*People v. Harris, supra*, 43 Cal.4th at p. 1295.) Similar to the Harris defendant, appellant does not contend that he lacked actual notice of the prosecution's theory of first degree murder. (*Ibid.*) Appellant's "*Apprendi* claim is illusory; the [indictment] included special circumstance allegations that fully supported the penalty verdict." (*Ibid.*; 1 CT 1-2.)

Appellant has offered no reasons why this Court should reverse its recent decision in *Harris* regarding this claim of error. Consequently, appellant's claim fails. Insofar as appellant's constitutional claims necessarily res upon a finding of error in the charging process, they also must be rejected.

VIII. APPELLANT HAD NO RIGHT TO HAVE THE JURY INSTRUCTED ON VOLUNTARY MANSLAUGHTER BASED UPON DURESS THAT NEGATED MALICE, PREMEDITATION, AND DELIBERATION

In Claim 8, appellant argues that the trial court erred in failing to grant the defense request to have the jury instructed on voluntary manslaughter, based upon the theory that duress could negate malice aforethought as well as premeditation and deliberation. Appellant contends that the trial court's failure to grant the defense request for such jury instruction denied him due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances, and penalty, in violation of the

Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 112-119.) Respondent disagrees.

The trial court refused the defense request to instruct the jury that voluntary manslaughter could be found if appellant committed the murder under duress. (17 RT 3064-3069.) The trial court instructed the jury that "Where a person commits a crime punishable with death, it is not a defense that he committed the act or made the omission charged under threats or menaces of immediate death or bodily harm." (19 RT 3420; 2 CT 301.)

"In a criminal case, a trial court must instruct on general principles of law relevant to the issues raised by the evidence, even absent a request for such instruction from the parties." (*People v. Cruz, supra*, 44 Cal.4th at p. 664, *People v. Breverman, supra*, 19 Cal.4th at p. 142.) "The obligation extends to instruction on lesser included offenses when the evidence raises a question as to whether all the elements of the charged offense were present, but not when there is no evidence that the offense committed was less than that charged." (*People v. Cruz, supra*, 44 Cal.4th at p. 664; *People v. Breverman, supra*, 19 Cal.4th at p. 142.)

Appellant's argument regarding the applicability of the duress defense was rejected by this Court in *People v. Anderson* (2002) 28 Cal.4th 767. In *Anderson*, this Court clearly held that "[d]uress is not a defense to murder" and that "duress cannot reduce murder to manslaughter." (*Id.* at p. 770.) The "basic rationale" for allowing duress as a defense to crimes other than murder is that "'for reasons of social policy, it is better that the defendant, faced with a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the other person.'" (*Id.* at p. 772, quoting LaFave, Criminal Law (3d ed. 2000) section 5.3, p. 467.) The basic rationale no longer applies when the defendant commits murder under duress because "'the resulting harm-i.e. the death of an innocent person - is at least as great as the threatened harm - i.e. the death of the defendant.'" (*People v. Anderson, supra*, 28 Cal.4th at p. 772, quoting *United States v. LaFleur* (9th Cir. 1991) 971 F.2d 200, 205.)

This Court also found that duress should not be a defense to implied-malice second degree murder. No such defense is needed because "the circumstances of duress would certainly be relevant to whether the evidence establishes the elements of implied malice murder." (*People v. Anderson, supra*, 28 Cal.4th at pp. 778-779.)

This Court also expressly found that duress should not be allowed to reduce the crime of murder to the crime of manslaughter by negating malice. The Legislature has created two manslaughter crimes: a killing upon a sudden quarrel or heat of passion, and a killing as a result of unreasonable, but good faith, belief in having to act in self defense. (*People v. Anderson, supra*, 28 Cal.4th at p. 781, citing Pen. Code, §§ 192, 192, subd. (a); *People v. Blakeley* (2000) 23 Cal.4th 82, 87-88.) "Neither of these two circumstances describes the killing of an innocent person under duress." (*People v. Anderson, supra*, 28 Cal.4th at p. 781.) This Court recognized that some commentators have argued that duress should be allowed to mitigate murder to manslaughter. (*Ibid.*, citations omitted.) However, "[t]he problem with making a killing under duress a form of manslaughter is that no statute so provides." (*Id.* at p. 782.) Furthermore, this Court saw "no basis on which to create a new, nonstatutory, form of voluntary manslaughter." (*Id.* at p. 783.) The jury was still allowed to consider appellant's argument regarding duress on the question of penalty because Penal Code section 190.3, factor (g), allows the jury to consider whether the defendant has been acting under "extreme duress." (*People v. Anderson, supra*, 28 Cal.4th at p. 783.)

This Court lastly rejected the claim that duress can "negate premeditation and deliberation, thus resulting in second degree and not first degree murder." (*People v. Anderson, supra*, 28 Cal.4th at p. 784.) A "killing under duress, like any killing, may or may not be premeditated, depending on the circumstances." (*Ibid.*) For example, "[i]f a person obeys an order to kill without reflection, the jury might find no premeditation and thus convict of second degree murder." (*Ibid.*) "As with implied malice murder, this circumstance is not due to a special doctrine of duress but to the legal requirements of first degree murder." (*Ibid.*) Thus, "unless and until the Legislature decides otherwise, a malicious, premeditated killing, even under duress, is first degree murder." (*Ibid.*)

Accordingly, no instructional error occurred because under California law, duress cannot mitigate a murder to voluntary manslaughter and cannot negate premeditation. This claim fails, as do all derivative constitutional claims asserted by appellant.

IX. IT APPEARS THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ACCORDING TO CALJIC NO. 2.11.5; HOWEVER, ANY ERROR WAS HARMLESS

In Claim 9, appellant claims that the trial court erred in instructing the jury according to CALJIC No. 2.11.5. Appellant contends that because the jury was instructed not to "give any consideration" as to why an unjoined perpetrator was not on trial, the jury may have disregarded the grant of immunity to Rollins in weighing the credibility of Rollins's testimony. He claims that the error violated his rights to due process, a fair trial, and a reliable penalty determination within the meaning of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and article I, section 7, 15, 16, and 17 of the California Constitution. (AOB 120-124.) Respondent submits that appellant waived this claim by failing to object that the instruction should be limited to Jackson and did not apply to Rollins because he testified at trial under a grant of immunity. Nonetheless, any instructional error was harmless.

A. Relevant Proceedings At Trial

At a hearing outside the presence of the jury, at the request of the prosecution, the trial court informed the parties that it would instruct the jury according to CALJIC No. 2.11.5. Appellant's trial counsel did not object to giving the instruction. (17 RT 3071.)

The trial court instructed the jury as follows:

> There has been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which the defendant is on trial.
>
> There may be many reasons why such person is not here on trial. Therefore, do not discuss or give any consideration to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted. Your duty is to decide whether the People have proved the guilt of the defendant on trial.

(19 RT 3396; 2 CT 219.)

It is well settled that CALJIC No. 2.11.5 should not be given with respect to an unjoined perpetrator who testifies at the defendant's trial. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1055, citing cases.)

B. Appellant Has Waived This Claim Of Instructional Error By Failing To Request That The Instruction Be Limited To Only Fred Jackson And Not Bobby Rollins

In the present case, the instruction would have been proper had it been limited to Fred Jackson, who did not testify at appellant's trial. Thus, appellant's argument is essentially that the trial court erred in failing to tailor CALJIC No. 2.11.5 to apply only to Jackson and not Rollins. Consequently, contrary to appellant's assertion (AOB 120, fn. 30), appellant has waived this claim by failing to request the instruction be limited to only Jackson. (*People v. Sully* (1991) 53 Cal.3d 1195, 1218, citing *People v. Lang* (1989) 49 Cal.3d 991, 1024; *People v. Andrews* (1989) 49 Cal.3d 200, 218.)

C. Even If Error Occurred, Any Error Was Harmless

Any error in failing to limit CALJIC No. 2.11.5 to apply to only Jackson was harmless in light of the other instructions that were given regarding witness credibility. Here, the jury would have properly assessed the grant of immunity to Rollins in weighing the credibility of his testimony because the trial court instructed the jury according to CALJIC No. 1.01 [instructions to be considered as a whole], CALJIC No. 2.20 [credibility of witness], and CALJIC No. 3.18 [testimony of accomplice to be viewed with distrust]. (17 RT 3391, 3397-3398, 3407; 2 CT 240, 251-252, 275.) "Where the jury has been so instructed, [this Court has] repeatedly held, giving CALJIC No. 2.11.5 is not prejudicial error." (*People v. Brasure, supra*, 42 Cal.4th at p. 1055, citing *People v. Jones* (2003) 30 Cal.4th 1084, 1113-1114; *People v. Cain, supra*, 10 Cal.4th at pp. 34-35; *People v. Price, supra*, 1 Cal.4th at pp. 445-446.)

X. CALJIC NO. 2.51 IS A CORRECT AND PROPER STATEMENT OF THE LAW REGARDING MOTIVE

In Claim 10, appellant argues that instructing the jury according to CALJIC No. 2.51 was error. He claims that the instruction improperly allowed the jury to determine

his guilt for murder based only upon a showing of motive, that it reduced the prosecution's burden of proof for the charge of murder, and required appellant to prove an absence of motive to establish his innocence for the murder charge. Appellant further contends that the instructional error violated the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution as well as article I, sections 7, 15, 16, and 17 of the California Constitution in that the erroneous instruction denied him due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, special circumstances, and penalty. (AOB 125-131.)

Respondent submits that this claim fails as it has been repeatedly rejected by this Court, and appellant has failed to offer any reason for this Court to overturn its prior decisions. (*People v. Loker* (2008) 44 Cal.4th 691, 707; *People v. Kelly* (2007) 42 Cal.4th 763, 792; *People v. Cleveland* (2004) 32 Cal.4th 704, 750.)

At trial, the jury was instructed as follows:

> "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(19 RT 3399-3400; 2 CT 258.)

In *Cleveland*, this Court found that although CALJIC No. 2.51 does not include instructions regarding the prosecution's burden of proof or the reasonable doubt standard of proof, "it did not undercut other instructions that correctly informed the jury that the prosecution had the burden of proving guilt beyond a reasonable doubt." (*People v. Cleveland, supra*, 32 Cal.4th at p. 750.)

The defendant in *Cleveland* complained, as does appellant herein (AOB 125), that the instruction could be read as implying that motive alone is sufficient to establish guilt for murder. (*People v. Cleveland, supra*, 32 Cal.4th at p. 750.) This Court held that an argument regarding the lack of clarity in the instruction itself was not cognizable because the defendant had not requested a clarifying instruction. (*Ibid.*) Thus, although

appellant's failure to object to the instruction prevents the entire claim from being waived (AOB 125, fn. 32), appellant's failure to object does render his claim regarding the lack of clarity of the instruction non-cognizable.

Moreover, any error was harmless in that the jury was fully instructed regarding the prosecution having the burden of proof regarding the crime of murder and that the evidentiary burden was proof beyond a reasonable doubt. (19 RT 3403; 2 CT 266.) Additionally, in light of the strong evidence against appellant, it is clear that the jury did not base its verdict on motive alone. (*People v. Cleveland, supra*, 32 Cal.4th at p. 750; see Section III.E, *supra*.) Thus, this claim fails.

XI. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY REGARDING THE TRIAL PROCESS

In Claim 11, appellant claims that the trial court erroneously instructed the jury regarding the trial process. He contends that the trial court erroneously lightened the prosecutor's burden of proof by referring to the guilt phase of the trial in terms of the jury determining the guilt or innocence of appellant. He also contends that twelve of the CALJIC jury instructions misled the jury as to the burden of proof. Appellant further contends that these instructional errors violated the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution as well as article I, sections 7, 15, 16, and 17 of the California Constitution in that the erroneous instructions denied him due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, special circumstances, and penalty. (AOB 132-144.) Respondent submits that no instructional errors occurred.

A. The Trial Court's References To Appellant's Innocence As Well As CALJIC Nos. 1.00, 2.01, and 2.51 Did Not Diminish The Prosecution's Burden Of Proof

Appellant contends that the prosecution's burden of proof was reduced when the trial court said that the guilt phase of the trial could be called the "guilt trial" or the "innocence trial," and mentioned that the jury were to consider the evidence "in determining the guilt or innocence of the defendant." (AOB 132-133, citing 7 RT 1311,

1323, 1339, 1368, 1371; 8 RT 1402, 1410, 1428; 11 RT 1935.) He also complains that the prosecutor referred to a choice between guilt or innocence. (AOB 133, citing 6 RT 1163; 11 RT 1930, 2008.) Appellant further contends that similar improper references are in CALJIC No. 1.00,[48]/ 2.01,[49]/ and 2.51[50]/ such that the prosecution's burden of

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[48] The trial court instructed the jury as follows:

Ladies and Gentlemen of the Jury:

You have heard all the evidence and the arguments of the attorneys, and now it is my duty to instruct you on the law that applies to this case.

The law requires that I read the instructions to you. You will have these instructions in written form in the jury room to refer to during your deliberations.

You must base your decision on the facts and the law.

You have two duties to perform. First, you must determine the facts from the evidence received in the trial and not from any other source. A 'fact' is something proved directly or circumstantially by the evidence or by stipulation. A stipulation is an agreement between attorneys regarding the facts. Second, you must apply the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdict and any independent finding you are instructed to include in your verdict.

You must accept and follow the law as I state it to you, whether or not you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.

You must not be influenced by pity for a defendant or by prejudice against him. You must not be biased against the defendant because he has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that he is more likely to be guilty than innocent. You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the

(continued...)

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defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences.

(19 RT 3389-3391; 2 CT 238-239.)

[49] The trial court instructed the jury 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, (1) consistent with the theory that the defendant is guilty of the crime, but two, (2) 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.

(19 RT 3393-3394; 2 CT 244.)

[50] The trial court instructed the jury as follows:

Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(19 RT 3399-3400; 2 CT 258.)

proof was "diminished" because the jury was told to decide between guilt or innocence rather than whether appellant was guilty beyond a reasonable doubt. (AOB 132-135.)

In *People v. Whisenhunt, supra*, 44 Cal.4th 174, this Court "summarily reaffirm[ed] [its] previous holdings upholding the constitutionality" of CALJIC Nos. 1.00, 2.01, and 2.51 against the claim, as appellant raises herein, that the instructions lessened the prosecution's burden of proof beyond a reasonable doubt. (*Id.* at pp. 220-221, citing *People v. Guerra* (2006) 37 Cal.4th 1067, 1138-1139; *People v. Nakahara* (2003) 30 Cal.4th 705, 713-714.)

Here, the jury was given correct instructions on the prosecution's burden of proof and on the presumption of innocence by CALJIC No. 2.90. Neither the court's innocent characterization of the guilt phase proceedings, nor any of the challenged instructions, undermined these instructions. No reasonable juror would have mischaracterized these remarks and instructions, as a standard of proof different from the clear standard set out in CALJIC No. 2.90. (See *People v. Prieto* (2003) 30 Cal.4th 226, 254.)

B. CALJIC Nos. 2.22, 2.27, and 8.20 Did Not Place An Unconstitutional Burden Of Proof On Appellant

Appellant contends that three of the jury instructions placed an unconstitutional burden of proof on him during the guilt phase of the trial. He contends that CALJIC No. 2.22[51]/ erroneously informed the jury that "their ultimate concern must be to determine

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[51] The trial court instructed the jury as follows:

> "You are not bound to decide an issue of act in accordance with the testimony of a number of witnesses which does not convince you as against the testimony of a lesser number or other evidence which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the number of witnesses, but in the convincing force of the evidence.

(19 RT 3398-3399; 2 CT 255.)

which party has presented evidence that is comparatively more convincing than that presented by the other party." (AOB 136.) Appellant also contends that CALJIC No. 2.27[52]/ erroneously suggests that the "defense, as well as the prosecution, had the burden of proving facts." (AOB 136.) Lastly, he contends that CALJIC No. 8.20[53]/ erroneously

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[52] The trial court instructed the jury as follows:

"You should give the uncorroborated testimony of a single witness whatever weight you think it deserves. However, testimony by one witness which you believe concerning any fact whose testimony about that fact does not require corroboration, is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends.

(19 RT 3399; 2 CT 257.)

[53] The trial court instructed the jury as follows:

All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree.

The word 'willful' as used in this instruction means intentional.

The word 'deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word 'premeditated' means considered beforehand.

If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived

(continued...)

placed the burden on him to "absolutely eliminate the possibility of premeditation, rather than raise a reasonable doubt about that element." (AOB 137.)

In *Whisenhunt*, this Court also "summarily reaffirm[ed]" its previous holdings upholding the constitutionality of CALJIC Nos. 2.22, 2.27, and 8.20 against the claim that the instructions affected the prosecution's burden of proof beyond a reasonable doubt. (*Id.* at pp. 220-221, citing *People v. Guerra, supra*, 37 Cal.4th at pp. 1138-1139; *People v. Nakahara, supra*, 30 Cal.4th at pp. 714-715; *People v. Montiel* (1993) 5 Cal.4th 877, 941.)

C. CALJIC No. 2.90 Correctly Defines The Prosecution's Burden Of Proof

Appellant argues that CALJIC No. 2.90 [presumption of innocence - reasonable doubt - burden of proof][54]/ erroneously failed to instruct the jury that "the accused need

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(...continued)

> at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.
>
> To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill.

(19 RT 3408-3409; 2 CT 278-279.)

[54] The trial court instructed the jury as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in

(continued...)

not present any evidence for the jury to have a reasonable doubt." (AOB 138.) He further contends that this alleged flaw in CALJIC No. 2.90, along with language in CALJIC Nos. 1.00, 2.01, 2.11,[55]/ 2.60,[56]/ 2.61,[57]/ led the jury to "assume that the defense had the burden of producing sufficient evidence to raise a reasonable doubt." (AOB 139-142.)

First, respondent submits that "this claim has not been preserved for review because the defense failed to object or to request an admonition on the point." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1156.) Furthermore, in *Whisenhunt*, this Court again

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(...continued)

> that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

(19 RT 3403; 2 CT 266.)

[55] The trial court instructed the jury as follows:

> Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events or to produce all objects or documents mentioned or suggested by the evidence.

(19 RT 3396; 2 CT 248.)

[56] The trial court instructed the jury as follows:

> A defendant in a criminal trial has a Constitutional right not to be compelled to testify. 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.

(19 RT 3400; 2 CT 259.)

[57] The trial court instructed the jury as follows:

> In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against him on any such essential element.

(19 RT 3400; 2 CT 259.)

acknowledged that the constitutionality of CALJIC No. 2.90 is "conclusively settled." (*People v. Whisenhunt, supra*, 44 Cal.4th at p. 221, citing *Victor v. Nebraska* (1994) 511 U.S. 1, 16-17 [114 S.Ct. 1239, 127 L.Ed.2d 583].) Even though the trial court's instruction included the since-disapproved phrase "moral certainty," no error occurred as the United States Supreme Court had upheld the constitutionality of a definition of reasonable doubt that used the phrase "moral certainty." (*People v. Whisenhunt, supra*, 44 Cal.4th at p. 221, fn.13, citing *Victor v. Nebraska, supra*, 511 U.S. at pp. 16-17.)

To the extent that appellant argues that CALJIC Nos. 1.00, 2.01, and 2.11, along with CALJIC No. 2.90, also lessened the prosecution's burden of proof, his claim also fails. As mentioned earlier, the constitutionality of CALJIC Nos. 1.00 and 2.01 have been summarily reaffirmed by this Court. (*People v. Whisenhunt, supra*, 44 Cal.4th at p. 221, *People v. Guerra, supra*, 37 Cal.4th at pp. 1138-1139; *People v. Nakahara, supra*, 30 Cal.4th at pp. 713-714.) CALJIC 2.11 was found by this Court not to lessen the prosecution's burden of proof in *People v. Daniels* (1991) 52 Cal.3d 815, 872-873. (See also *People v. Orozco* (1981) 114 Cal.App.3d 435, 448.)

Appellant further argues that CALJIC Nos. 2.60 and 2.61 lessened the prosecution's burden of proof articulated in CALJIC No. 2.90 because 2.60 and 2.61 failed to affirmatively state that the defendant had no obligation to present evidence. Because the two instructions only instructed the jury that the defendant had no obligation to testify, appellant alleges the jury could impermissibly infer that he was obliged to present evidence. (AOB 141-142.) First, the argument is waived as appellant requested these instructions at trial. (2 CT 259-260; *People v. Jackson* (1996) 13 Cal.4th 1164, 1225.) This argument also fails because appellant chose to present evidence other than his testimony at trial. Therefore, he was not entitled to have CALJIC Nos. 2.60 and 2.61 tailored to reflect that no inference could be drawn from a decision to not testify and not present evidence. Because CALJIC No. 2.90 correctly states the prosecution's burden of proof, the definition of reasonable doubt, and the presumption of innocence, no reasonable juror would have been misled by CALJIC Nos. 2.60 and 2.61 to assume a

lower burden of proof applied. (See *People v. Daniels, supra*, 52 Cal.3d at pp. 872-873; *People v. Orozco, supra*, 114 Cal.App.3d at p. 448.)

XII. APPELLANT HAS FAILED TO ASSERT ANY SPECIFIC INSTANCES OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

In Claim 12, appellant raises no specific argument. Rather, he simply informs this Court that any ineffective assistance of trial counsel claims will be raised on habeas corpus. (AOB 145.) Accordingly, respondent will address any such claims if requested or ordered to do so after they are presented.

XIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RETAINING THE JURORS WHO EXPRESSED POTENTIAL TIME CONFLICTS DURING PENALTY PHASE DELIBERATIONS

In Claim 13, appellant argues that the trial court erroneously failed to replace three of the jurors who had expressed potential time conflicts during the second day of penalty phase deliberations. (AOB 146-150.) He asserts that the trial court's error violated his right to due process and "left the death sentence unreliable under Eighth Amendment standards." (AOB 146.) Respondent disagrees.

A. Relevant Proceedings At Trial

On March 23, 1994, during the second day of penalty phase deliberations (24 RT 4700), the jury foreperson sent a note to the trial court which read as follows:

Counsel, juror number 3 has a job promotion related test in Burbank on Tuesday, March 29, '94 at 9:00 a.m. The duration of the test is unknown. Juror number 8 has a work related conference in Las Vegas on 3-29 through 3-31. Juror Number 4 would like to let the Court know that she is on vacation at this time from school.

(24 RT 4705.) The trial court read the note to appellant's trial counsel and the prosecutor. (24 RT 4704-4705.) Both counsel agreed it was premature for the trial court to address the matter. (24 RT 4705-4706.)

The trial court drafted the following response:

> The Court will not take a position on these requests at this time. In the event that the jury has not arrived at a verdict by midafternoon on Monday, I will consider these requests at that time.

(24 RT 4706-4707; see AOB 146.) Both counsel agreed that the response was appropriate. (24 RT 4707.)

On March 24, 1994, the jury asked for a readback of the testimony of Dr. Markman. (3 CT 553.) The jury foreperson sent a note to the trial court which read as follows:

> Juror # 8 needs to know about her being able to go to the Las Vegas conference on 3/29/94 through 3/31/94 because of air line tickets & her boss needing to know. We need to know by 3:30 PM today if possible.

(3 CT 554.) The trial court sent the following response back to the jury:

> The court will not permit a recess in deliberations from 3/29/94 through 3/31/94 to allow Juror #8 to attend the Las Vegas conference.

(3 CT 554, 557-558.)

A second note was sent asked whether the trial court would "assist in getting a refund for [the] tickets." (3 CT 555.) The trial court sent a note back stating, "The Court will assist in any way possible." (3 CT 555, 557-558.)

A third note was sent which asked, "If we are unable to reach a unanimous decision either way, what will happen." (3 CT 556.) The trial court sent a note back stating, "The jury is not to be concerned with what will happen should the jury be unable to arrive at a verdict." (3 CT 556-558.)

On March 28, 1994, the jury requested a reading of the testimony of Myra Soto and Jaime M. (3 CT 559, 565.) On March 28, 1994, at 11:48 a.m., the jury reached its verdict in the penalty phase. (24 RT 4708-4711; 3 CT 563, 565.)

B. Waiver

Appellant did not object to the trial court's responses to the jury regarding the potential time conflicts. In fact, appellant's trial counsel expressly agreed that any action taken regarding the jurors would be premature if no verdict was reached by March 28, 1994. (24 RT 4705-4707.) Thus, appellant has waived the instant claim by expressly consenting to the court's action. (See *People v. Earp, supra*, 20 Cal.4th at p. 893; *People*

v. Mickey (1991) 54 Cal.3d 612, 664 [failure to object to dismissal under Penal Code section 1089 subject to waiver doctrine].)

C. The Record Fails To Show To A Demonstrable Reality That The Jurors Who Expressed Potential Time Conflicts Were Unable To Perform The Functions Of A Juror

Under Penal Code section 1089, "If at any time, whether before or after the final submission of the case to the jury, . . . a juror requests a discharge and good cause appears therefore, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box. . . ." "A trial court may ask jurors to continue deliberating when, in the exercise of its discretion, it finds a "reasonable probability" they will be able to reach agreement." (*People v. Howard* (2008) 42 Cal.4th 1000, 1029; *People v. Pride* (1992) 3 Cal.4th 195, 265.)

"A trial court's ruling whether to discharge a juror for good cause under section 1089 is reviewed for abuse of discretion." (*People v. Guerra, supra*, 37 Cal.4th at p. 1158, citing *People v. Hart* (1999) 20 Cal.4th 546, 596.) "The juror's inability to perform the functions of a juror must appear in the record as a 'demonstrable reality' and will not be presumed." (*People v. Guerra, supra*, 37 Cal.4th at p. 1158, quoting *People v. Lucas, supra*, 12 Cal.4th at p. 489.)

There is nothing in the record that indicates the three jurors who expressed potential time conflicts were unable to perform their duties as jurors. Juror number 4 simply informed the trial court that she was on vacation at this time from school. She did not even request to be excused from the jury. (24 RT 4705.) Juror number 3 stated that there was a job promotion test on March 29, 1994, approximately three months after the date the penalty phase verdict was reached. (24 RT 4705.)

Juror number 8 stated only that she needed to know whether she would be able to go to a conference in Las Vegas that was scheduled for March 29 through March 31, 1994. The trial court's first response to juror number 8 was that the request would be considered by the mid-afternoon on March 28, 1994. (24 RT 4706-4707; see AOB 146.) Next, Juror number 8 apparently was concerned about informing her boss about her

ability to go to the conference. The trial court responded that a recess would not be allowed for juror number 8 to go to the conference. (3 CT 554, 557-558.) The last expressed concern of juror number 8 was whether the trial court would assist in obtaining a refund for the tickets to the conference. The trial court said that it would "assist in any way possible." (3 CT 555, 557-558.)

The record shows that of the three jurors who originally informed the trial court of potential time conflicts, no such conflict arose at all for two of the three jurors. As to the third juror, the trial court addressed the apparent financial concern regarding the tickets for the conference and offered to "assist in any way possible." (3 CT 555.) During this time, the jury continued with its deliberations, even requesting readback of testimony from three of the witnesses. (3 CT 553, 559, 565.) None of the three asked to be discharged, or objected to the trial court's actions. There is no evidence showing that these jurors felt compelled to return a speedy verdict, or that other jurors were affected by it. The alleged inability of these three jurors to perform their duties did not appear as a demonstrable reality on this record. (*People v. Beeler* (1995) 9 Cal.4th 953, 989-990 [no coerced verdict and no abuse of discretion in court's decision to allow deliberations to continue after one juror's father had died].) This claim fails.

XIV. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR MODIFICATION OF VERDICT

In Claim 14, appellant contends that the trial court erroneously denied his automatic post-trial motion for modification of the verdict. Appellant argues that in denying the motion, the trial court erroneously considered matters other than the evidence presented to the jury, namely, information from appellant's probation report, appellant's lack of remorse, and victim impact evidence from an unrelated crime, to be the most important aggravating factors. He further argues that these errors violated his rights to due process, a fair trial, equal protection, and a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution as well as article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 151-161.) Respondent disagrees.

A. Relevant Proceedings At Trial

Following the penalty phase verdict, appellant moved for modification of the death verdict. (3 CT 567-578; 24 RT 4714-4734.) During argument, appellant's trial counsel observed that the probation report included statements from Genoveva's mother and son that they did not wish appellant to receive the death penalty. Appellant's trial counsel learned of the statements only after the penalty phase verdict was reached. (24 RT 4714.) Appellant's trial counsel wanted a continuance to further prepare for a motion for a new trial based on the newly discovered evidence, but appellant did not personally want to waive time. (24 RT 4714-4715.)

The prosecutor asserted that Genoveva's son had told the witness/victim advocate that he was in favor of appellant receiving the death penalty, and that the statement in the probation report was new. The prosecutor had been told that Genoveva's mother was Catholic and "very much against the death penalty, and that is as far as that went." (24 RT 4716.) The prosecutor did not oppose a continuance to allow appellant's trial counsel could prepare for a new trial motion. The prosecutor was willing to stipulate that Genoveva's mother was against the death penalty and that the prosecution knew of her opinion. (24 RT 4717.)

Appellant's trial counsel moved for a new trial based on the newly discovered evidence of the opinion of the death penalty held by Genoveva's mother and son arguing. The evidence would have provided context for the prosecutor's argument during the penalty phase about the emotional hardship on the victim's family. The prosecutor opposed the motion, pointing out that the evidence of their opinion of the death penalty was not relevant as aggravation or mitigation evidence. (24 RT 4718-4720.) The trial court did not believe that Genoveva's mother expressed an opinion in favor of or against the death penalty during her testimony. Instead, her testimony was "as being a mother who by reason of this occurrence was devastated." There also was "nothing in her testimony that would lead me to view that she sought vingence [sic] or she sought some type of reprisal." (24 RT 4721.) The trial court denied the motion for a new trial, finding

that the newly discovered evidence was inadmissible at the penalty phase of the trial. (24 RT 4721-4722.)

The trial court then heard argument on appellant's "simultaneously" made motion for a new trial on the grounds that the circumstances in mitigation outweighed the circumstances in aggravation, and motion for a modification of the verdict. (24 RT 4722.) The trial court informed the parties that it had read the written motions and the prosecution's opposition. (24 RT 4722, 4725.) The trial court also heard argument from the parties. (24 RT 4722-4731.)

Prior to ruling on the motion, the trial court informed the parties as follows:

> As counsel well knows, the Court in considering a motion for reduction or for modification of verdict or on motion for new trial is not to try the case de novo, as though there was no jury. The Court - - the Court's function is to reweigh the evidence and then after having reweighed the evidence, determine whether or not the jury verdict is supported by the evidence. [¶] The evidence at the penalty phase was not in dispute. I have reweighed all of the evidence. I have looked at the totality of the circumstances surrounding the commission of the crime that is before the court.

(24 RT 4731-4732.)

The trial court found appellant's crime to be "one of the most egregious" and "one of the most serious" of crimes he had ever heard. The trial court found as follows:

> What is particularly egregious about it is the callous manner in which the victim is murdered. After being raped and kidnapped, rendered unconscious, she is executed with three bullets to her head. And then after the execution style of the murder, the Defendant, as well as his accomplices, go to a coffee shop and have something to eat.
>
> The Court has not heard, nor has the jury heard, any remorse on the part of the Defendant. Heard a lot of concern from the Defendant's family.
>
> And then I look at thee totality of the circumstances surrounding the rape and robbery on the Oxnard Beach. And again I have presided over many, many robberies and many, many rapes. That

rape and that robbery was perhaps one of the most egregious rape and robberies that I have ever seen.

(24 RT 4732.)

As to the rape and robberies in Oxnard, the trial court found as follows:

The classic nightmare that that case represents is indescribably brutal for Jamie and Myra [M.]. He will have to go through the rest of his life knowing that he was compelled to stand by and hold his lover's hand as she is being repeatedly raped, and this Defendant is the trigger man that is facilitating that event.

The humiliation and victimization of the victim in that case, Myra [M.], is overwhelming as well.

I think that the jury, and I think this Court might feel somewhat differently if, not withstanding the egregious nature of this murder, you did not have the Oxnard situation. And I recall when the jury was deliberating the - - I think the last day of deliberations they wanted the testimony of one of those victims read back; that is, one of the Oxnard Beach victims read back.

(24 RT 4732-4733.)

As to other possible circumstances in aggravation, the trial court found as follows:

I don't give a great deal of weight in looking at the conviction of possessing cocaine for sale, and I don't give a great deal of weight, either, to the threat against Rollins. I see that all of the time in these kinds of cases.

(24 RT 4733.)

As to the circumstances in mitigation, the trial court found as follows:

And then I contrast the aggravating factors to those in mitigation. And I look at the fact that we are not dealing with a person of significant intelligence who has borderline mental retardation with an IQ that, depending on who you talk to, is either 70 or 74 or 73, who suffered life-long abuse by his father.

I look at the impact that the case has had on the Defendant's family. I look at the impact that the case has had on the victim's family.

(24 RT 4733.)

In ultimately denying the motion for modification of the verdict, the trial court stated as follows:

> [A]fter having evaluated all of it, I cannot come to the conclusion that as a matter of law or as a matter of fact that the jury's verdict is not supported by the evidence. I conclude that for the reasons that I have stated, that the circumstances in aggravation outweigh those in mitigation, and by reason thereof I deny the motion to modify the verdict or to reduce the verdict. [¶] I deny the motion for new trial based upon insufficiency of the evidence. Based upon the allegation or claim that the circumstances in aggravation do not outweigh those in mitigation.

(24 RT 4733-4734.)

B. Appellant Has Forfeited The Instant Claim That Trial Court Relied On The Probation Report In Denying The Motion To Modify The Verdict; The Trial Court Did Not Rely Upon Appellant's Probation Report In Denying The Motion To Modify The Verdict

Appellant first claims that the trial court erroneously relied upon information in the probation report in denying the motion to modify the verdict. (AOB 153-155.) He correctly identified that immediately after having denied the motion, the trial court stated that it had read and considered the probation report. (AOB 153-154; 24 RT 4734.) Appellant has forfeited this claim, and to the extent the claim is cognizable, he is mistaken in asserting that the trial court relied on any information in the probation report in denying the motion.

Appellant's trial counsel did not object at trial on the basis that the trial court relied on the probation report in denying the motion to modify the verdict. Accordingly, he has forfeited this claim. (*People v. Samayoa* (1997) 15 Cal.4th 795, 859; *People v. Hill* (1992) 3 Cal.4th 959, 1013.) Even if not forfeited, appellant's claim fails on its merits.

"'In ruling on an application for modification of the verdict, the trial court may only rely on evidence that was before the jury. [Citation.] Therefore, the better procedure is to rule on the application for modification before reading the probation report.'" (*People v. Williams* (2006) 40 Cal.4th 287, 337, quoting *People v. Navarette, supra*, 30 Cal.4th at

p. 526.) "But reading the probation report before ruling on the section 190.4 motion is not prejudicial error when 'nothing in the record suggests the court considered or relied on the probation report ... when ruling on the application for modification.'" (*People v. Williams, supra*, 40 Cal.4th at p. 337, quoting *People v. Navarette, supra*, 30 Cal.4th at p. 526.)

Here, as in *Williams*, the trial court did not refer to any information from the probation report in stating its reasons for denying the motion to modify the verdict. (24 RT 4731-4734; *People v. Williams, supra*, 40 Cal.4th at p. 337.) Appellant also has failed to identify any specific item from the probation report that was relied upon by the trial court. He simply speculates that the trial court was affected by the information in the probation report because "it would have been difficult to put the recommendations and the information contained in the probation report outside of its mind." (AOB 154.) But the trial court also expressly informed the parties of the narrow scope of what evidence it considered in ruling on the motion. The trial court informed the parties that it would not "try the case de novo, as though there was no jury," and that it would only "reweigh" the "evidence at the penalty phase" which was not in dispute. (24 RT 4731-4732.) Under the circumstances, there was no reasonable possibility that the court's reading of the probation report affected its ruling. (*People v. Mendoza* (2000) 24 Cal.4th 130, 198.)

C. Appellant Has Forfeited The Instant Claim Regarding The Trial Court's Consideration Of Appellant's Lack Of Remorse In Denying The Motion To Modify The Verdict; The Trial Court Did Not Refer To Appellant's Lack Of Remorse As A Circumstance In Aggravation; Any Error That May Have Occurred Was Harmless

Appellant next complains that the trial court improperly relied on his failure to testify as evidence of lack of remorse and erroneously considered lack of remorse as a circumstance in aggravation . (AOB 155-158.) Appellant has forfeited this claim by failing to object at trial. Even if the claim is cognizable, appellant has failed to establish that the trial court found appellant's failure to testify showed a lack of remorse, or that it

considered a lack of remorse as a circumstance in aggravation. Any error by the trial court in treating lack of remorse as a circumstance in aggravation was harmless.

Appellant's trial counsel did not object at trial on the basis that the trial court found his failure to testify to be lack of remorse or that the trial court considered lack of remorse to be a circumstance in aggravation. Accordingly, he has forfeited this claim. (*People v. Kennedy* (2005) 36 Cal.4th 595, 638; *People v. Martinez* (2003) 31 Cal.4th 673, 701.) Even if not forfeited, appellant's claim fails on its merits.

Here, the trial court did not comment on appellant's refusal to testify at trial. Rather, the trial court's comments were expressly directed to the lack of any evidence of remorse. (24 RT 4732 ["The Court has not heard, nor has the jury heard, any remorse on the part of the Defendant. Heard a lot of concern from the Defendant's family.].) Simply commenting on a lack of remorse cannot reasonably be construed as commenting on the failure to testify. (*People v. Hardy, supra*, 2 Cal.4th at p. 209.) Rather, it would appear that the trial court's comments reflect that there was no evidence of remorse, not that his refusal to testify in itself showed a lack of remorse. (See *People v. Salcido* (2008) 44 Cal.4th 93, 160.)

Lack of remorse cannot be considered a circumstance in aggravation. (*People v. Kennedy, supra*, 36 Cal.4th at p. 638; *People v. Crittenden, supra*, 9 Cal.4th at p. 150.) However, "lack of remorse, because it suggests the absence of a mitigating factor, is deemed a relevant factor . . . as to whether the factors in aggravation outweigh those in mitigation." (*People v. Crittenden, supra*, 9 Cal.4th at p. 150; *People v. Marshall* (1990) 50 Cal.3d 907, 943-944.)

The trial court did not expressly refer to appellant's lack of remorse as an aggravating factor. Rather, the trial court mentioned appellant's lack of remorse during a discussion of the "totality of the circumstances surrounding the crime." (24 RT 4732; *People v. Ochoa* (2001) 26 Cal.4th 398, 449[58]/ [comment on lack of remorse as a

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[58] Ochoa was disapproved on other grounds in *People v. Prieto, supra*, 30 Cal.4th 226, 263, fn.14.

circumstance of the charged crime is appropriate under Penal Code section 190.3, subdivision (a).) After discussing the circumstances of the rape and robberies appellant committed against Jaime and Myra M., the trial court stated, "And then I contrast the aggravating factors to those in mitigation." This statement does not refer specifically to appellant's lack of remorse as being a circumstance in aggravation. (See *People v. Ochoa, supra*, 26 Cal.4th at p. 449 [proper to argue lack of remorse in showing that a potential mitigating factor was inapplicable].) Therefore, the trial court did not erroneously refer to appellant's lack of remorse as a circumstance in aggravation.

Even if error did occur, however, there is no reasonable possibility that the error affected the trial court's decision. (*People v. Kennedy, supra*, 36 Cal.4th at p. 638; *People v. Avena* (1996) 13 Cal.4th 394, 448.) The trial court found i"particularly egregious" and "callous" the circumstances of how appellant shot and killed Genoveva after she had been raped, kidnapped, and rendered unconscious. Also, after committing the "execution style" murder, appellant and his companions went to a coffee shop for something to eat. (24 RT 4732.) The trial court also was particularly concerned by the "indescribably brutal" and "most egregious" crimes appellant committed as to Jaime and Myra M. (24 RT 4732-4733.) Thus, it was not reasonably possible that the single mention of appellant's lack of remorse affected the trial court's overall balancing of the circumstances in aggravation against the circumstances in mitigation. Accordingly, any error was harmless.

D. Appellant Forfeited Any Claim That The Trial Court Improperly Used Victim Impact Evidence From A Separate Crime As A Circumstance In Aggravation; The Trial Court Properly Considered Appellant's Prior Unrelated Rape And Robbery Convictions In Denying The Motion To Modify The Verdict

Lastly, appellant contends that the trial court improperly considered, as a circumstance in aggravation, the impact of the prior rape and robberies on Myra and Jaime M. (AOB 158-159.) First, this claim is forfeited because appellant did not object on such grounds at trial. (*People v. Tafoya* (2007) 42 Cal.4th 147, 196; *People v. Riel, supra*, 22 Cal.4th at p. 1220.)

Even if not forfeited, the claim lacks merit. The penalty phase trier of fact may consider evidence of prior violent criminal activity in determining the penalty. (Pen. Code, § 190.3, subdivision (b); *People v. Holloway* (2004) 33 Cal.4th 96, 143 ["under factor (b), prior violent acts may be shown 'in context,' so as to fully illuminate their seriousness"].) In ruling on the motion to modify the verdict, the trial court was primarily concerned with the rape and robberies appellant committed against Myra and Jaime M. rather than victim impact evidence. The trial court described the crimes against Myra and Jaime M. as "one of the most egregious rape and robberies that I have ever seen," and a "classic nightmare." (24 RT 4732.) Thus, the trial court's reference to the circumstances of the prior crimes was permissible.

Additionally, reference to the victim impact from the prior crime also is permissible. (*People v. Holloway, supra*, 33 Cal.4th at p. 144 [evidence of victim's "emotional trauma" still suffered "years" after the crime found admissible].) Thus, the trial court was allowed to refer to the concern that Jamie "will have to go through the rest of his life knowing that he was compelled to stand by and hold his lover's hand as she is being repeatedly raped" and that Myra will still suffer an "overwhelming" amount of "humiliation and victimization." (24 RT 4732-4733.) Accordingly, this claim fails as do his derivative claims that there was state and federal constitutional error.[59]/

XV. APPELLANT WAS NOT ENTITLED TO A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE

In Claim 15, appellant argues that he was entitled to a new trial due to newly discovered evidence that Genoveva's mother and son told the probation officer that they did not want appellant to receive the death penalty. Appellant claims that the error resulted in a denial of his rights to due process, a fair jury trial, equal protection, and a reliable determination of penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and article I, sections 7, 15, 16, and 17 of

[59] Because appellant has failed to show that any error or prejudice occurred, his apparent claim of cumulative error also fails, and there is no need for remand. (AOB 159-160.)

the California Constitution. (AOB 162-174.) Respondent submits that no error occurred as the views of Genoveva's mother and son regarding imposition of the death penalty in this case were not admissible as circumstances in mitigation.[60]/

A ruling on a defendant's motion for a new trial is reviewed for abuse of discretion, and in order for a court to grant such a motion, the evidence must be such as to make a different probable on retrial. (*People v. Ochoa* (1998) 19 Cal.4th 353, 473; *People v. Padilla* (1995) 11 Cal.4th 891, 960-961.) Appellant claims that the views held by Genoveva's mother and son regarding imposition of the death penalty in this case were relevant mitigating evidence (AOB 164-168), necessary to rebut the prosecution's argument that the death penalty should be imposed on behalf of the Genoveva's family (AOB 168-172), and that he suffered prejudice (AOB 172-174). This Court has repeatedly rejected such claims in the past.[61]/

In *People v. Smith, supra*, 30 Cal.4th at p. 622, this Court held as follows:

> It is clear that the prosecution may not elicit the views of a victim or victim's family as to the proper punishment. (*Booth v. Maryland* (1987) 482 U.S. 496, 508-509, 107 S.Ct. 2529, 96 L.Ed.2d 440.) The high court overruled Booth in part, but it left intact its holding that "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." (*Payne v. Tennessee* [(1991) 501 U.S. 808, 830, fn. 2 [111 S.Ct. 2597, 115 L.Ed.2d 720]].) That court has never suggested that the defendant must be permitted to do what the prosecution may not do. The views of a crime victim, especially, as here, of the victim of one of the noncapital crimes, regarding the proper punishment has no bearing on the defendant's character or record or any circumstance of the offense. (*Skipper v. South Carolina* [(1986) 476 U.S. 1, 4 [106 S.Ct. 1669, 90 L.Ed.2d 1]].) Hence, the Eighth Amendment to the United States Constitution does not compel admission of those views. (*Robison v. Maynard* (10th Cir. 1991) 943 F.2d 1216,

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[60] The relevant facts regarding appellant's motion for a new trial were summarized in Section XIV.A, *ante*.

[61] Appellant even acknowledges that this Court has rejected such claims in *People v. Smith* (2003) 30 Cal.4th 581, 621-623. (AOB 165.)

> 1216-1217 [even after *Payne v. Tennessee, supra*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720, "testimony from a victim's relative that she did not want the jury to impose the death penalty was improper mitigating evidence and inadmissible at the penalty phase hearing"].)

This Court held that viewpoint testimony about imposition of the death penalty is admissible mitigating evidence under Penal Code section 190.3 when the view is of "somebody 'with whom defendant assertedly had a significant relationship.'" (*People v. Smith, supra*, 30 Cal.4th at pp. 622-623.) Such evidence "is proper mitigating evidence as 'indirect evidence of the defendant's character.'" (*Id.* at p. 623, quoting *People v. Ervin* (2000) 22 Cal.4th 48, 102.) "This evidence is admitted, not because the person's opinion is itself significant, but because it provides insights into the defendant's character." (*People v. Smith, supra*, 30 Cal.4th at p. 623, citing *People v. Ochoa, supra*, 19 Cal.4th at p. 456.) Here, it is abundantly clear that appellant had no significant relationship with Genoveva's mother and son.

The holding in *Smith* was reaffirmed by this Court in *People v. Lancaster* (2007) 41 Cal.4th 50, 97. In *Lancaster*, this Court also addressed whether such viewpoint evidence is admissible to rebut victim impact evidence from the victim's family. The defendant in *Lancaster* sought to admit as mitigation evidence testimony from the victim's friends and associates that the victim opposed the death penalty. (*Id.* at p. 96.) The defendant argued that the viewpoint evidence was relevant to rebut the victim impact evidence from the victim's mother, brother, and daughter, who testified about the effects the victim's death had on the family. (*Id.* at p. 98.)

This Court held that "[r]ebuttal evidence . . . must relate to the subject matter of the opponent's evidence." (*People v. Lancaster, supra*, 41 Cal.4th at p. 98, citing *People v. Brown* (2003) 31 Cal.4th 518, 579.) The defendant in *Lancaster* was unable to show any connection between the victim's viewpoint regarding the death penalty and the victim impact evidence. (*People v. Lancaster, supra*, 41 Cal.4th at p. 98.) Similarly, appellant has also failed to explain the connection between the viewpoint of Genoveva's mother and son and their testimony about how the loss of Genoveva has affected their lives.

There was no testimony at the penalty phase showing that Genoveva's mother or son wished for revenge. (20 RT 3742-3747, 3752-3761, 3772-3790.) Moreover, such viewpoint evidence would not have rebutted the brief references in the prosecutor's argument calling for "justice"[62]/ and "redress[]"[63]/ because the prosecutor never intimated that imposition of the death penalty was personally sought by Genoveva's mother and son. (AOB 168-169, citing 24 RT 4548, 4596.) Rather, the prosecution was solely responsible for asking for imposition of the death penalty. Accordingly, the views of Genoveva's mother and son about imposition of the death penalty in this case were inadmissible, and the trial court was plainly within its discretion in denying the motion for a new trial.

Even if error occurred, it was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. 18, 24; *People v. Frye* (1998) 18 Cal.4th 894, 1017 [applying *Chapman* to error in excluding mitigating evidence during penalty phase].) The prosecution offered extensive evidence of appellant's participation in the prior rape and robbery of Myra M. and the robbery of Jaime M. in 1991. (20 RT 3623-3034, 3635-3645, 3653, 3659-3684, 3690-3692, 3696, 3708-3719.) The prosecution also offered evidence that appellant threatened to kill Rollins for testifying against appellant. (20 RT 3735-3739.) The jury also heard the prosecution evidence of the effect that Genoveva's

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[62] The prosecutor argued as follows:

> The defendant and his family begged you for mercy. For the People of the State of California and for the family of Genoveva Gonzalez, I ask you for justice.

(24 RT 4548.)

[63] The prosecutor argued as follows:

> Everything that Christopher Sattiewhite had, the privilege of knowing from Margaret Sattiewhite his mother, he ripped from the grasp of those Gonzale[z] children. And there is only one way that that can be redressed, and you know what that is. You know in your heart what that is.

(24 RT 4604.)

murder had on her children. (20 RT 3742-3747, 3752-3761, 3772-3790.) The prosecution and defense evidence regarding the psychological evaluations conducted on appellant did not show that he was incompetent or lacked the mental ability to refuse to participate in such brutal crimes, as previously discussed. In view of the evidence presented by both sides at the penalty phase, it is plain that the irrelevant death penalty views of the victim's mother and son would not have altered the penalty verdict.. This claim fails, as does appellant's state and federal constitutional claims that are based on alleged error in denying the motion for a new trial.

XVI. THE PROSECUTION'S FAILURE TO DISCLOSE THE VIEWPOINT OF GENOVEVA'S MOTHER AND SON REGARDING APPLICATION OF THE DEATH PENALTY IN THIS CASE DID NOT VIOLATE *BRADY V. MARYLAND*

In Claim 16, appellant contends that the prosecutor's failure to disclose the viewpoint of Genoveva's mother and son regarding imposition of the death penalty in this case violated the prosecution's duty to disclose material exculpatory evidence within the meaning of *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215]. Appellant also claims that the error denied him his rights under the Fourteenth Amendment. (AOB 175-177; see Section XIV.A, *ante*.) Respondent disagrees.

This Court recently summarized the principles of Brady as follows:

> The prosecution has a duty under the Fourteenth Amendment's due process clause to disclose evidence to a criminal defendant when the evidence is both favorable to the defendant and material on either guilt or punishment. (*In re Sassounian* [(1995) 9 Cal.4th 535, 543], citing *United States v. Bagley* (1985) 473 U.S. 667, 674-678, 105 S.Ct. 3375, 87 L.Ed.2d 481; see also *Brady, supra*, 373 U.S. at p. 87, 83 S.Ct. 1194.) "Evidence is 'favorable' if it . . . helps the defense or hurts the prosecution, as by impeaching one of the prosecution's witnesses." (*Sassounian*, at p. 544, 37 Cal.Rptr.2d 446, 887 P.2d 527.) "Evidence is 'material' 'only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different.'" (*Ibid.*; accord, *Kyles v. Whitley* (1995) 514 U.S. 419, 433-434, 115 S.Ct. 1555, 131 L.Ed.2d 490.) Such a probability exists when the undisclosed evidence reasonably could be taken to put the whole case in such a different light as to undermine confidence in the verdict. (*Kyles*, at

p. 434, 115 S.Ct. 1555; *In re Brown* (1998) 17 Cal.4th 873, 886-887, 72 Cal.Rptr.2d 698, 952 P.2d 715.)

(*In re Miranda* (2008) 43 Cal.4th 541, 575.)

As explained in Section XV, *ante*, however, the viewpoints of Genoveva's mother and son about imposition of the death penalty in this case were irrelevant at the penalty phase of the trial. The views of a crime victim regarding proper punishment generally has no bearing on the defendant's character or record or any circumstance of the offense. (*Skipper v. South Carolina, supra*, 476 U.S. at p. 4; *People v. Smith, supra*, 30 Cal.4th at p. 622.) Admission of such viewpoint evidence as aggravating evidence by the prosecution violates the Eighth Amendment. (*Payne v. Tennessee, supra*, 501 U.S. at p. 830, fn. 2; *Booth v. Maryland, supra*, 482 U.S. at pp. 508-509; *People v. Smith, supra*, 30 Cal.4th at p. 622.) The United States Supreme Court "has never suggested that the defendant must be permitted to do what the prosecution may not do." (*People v. Smith, supra*, 30 Cal.4th at p. 622.)

In addition, such viewpoint evidence is admissible mitigating evidence only when the view is of "somebody 'with whom defendant assertedly had a significant relationship.'" (*People v. Smith, supra*, 30 Cal.4th at pp. 622-623.) Because appellant had no significant relationship with Genoveva's mother or son, evidence of their viewpoint is not admissible. Moreover, appellant has failed to demonstrate that the viewpoint evidence was relevant to rebut prosecution evidence at the penalty phase. (*People v. Lancaster, supra*, 41 Cal.4th at pp. 96-98; 20 RT 3742-3747, 3752-3761, 3772-3790; 24 RT 4548, 4596.) Consequently, no Brady error occurred.

Moreover, the viewpoint evidence was not material.[64]/ Under the totality of the circumstances, considering the penalty phase proceedings and the questionable relevance

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[64] For Brady purposes, materiality "is not whether the defendant would more likely than not have received a different verdict with the [undisclosed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (*People v. Ochoa, supra*, 19 Cal.4th at p. 474, quoting *In re Brown, supra*, 17 Cal.4th at p. 886.)

of the undisclosed evidence, there is no reasonable probability that appellant would have obtained a more favorable outcome at the penalty phase had the viewpoint evidence been disclosed. (*Kyles v. Whitley, supra*, 514 U.S. at p. 434; In re *Miranda, supra*, 43 Cal.4th at p. 575; In re *Brown, supra,* 17 Cal.4th at pp. 886-887.) Appellant's claim fails.

XVII. THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT EVIDENCE CONCERNING APPELLANT'S CONVICTION FOR A PRIOR RAPE AND ROBBERIES

In Claim 17, appellant argues that the trial court, over defense objections, erroneously admitted the victim impact evidence concerning the rape of Myra M. and the robberies committed as to Myra and Jaime M. Appellant claims that the error violated his rights to confrontation, due process of law, a fundamentally fair penalty proceeding, and reliable sentencing as guaranteed under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 178-189.) Respondent submits that appellant's claims lack merit.

First, appellant's claim that Myra and Jaime M. should not have been allowed to briefly testify about the harm caused to them has been repeatedly and expressly rejected by this Court and appellant presents no compelling reason to reconsider these decisions. (AOB 180-183; *People v. Demetruilias* (2006) 39 Cal.4th 1, 39 ["[T]he circumstances of the uncharged violent criminal conduct, including its direct impact on the victim or victims of that conduct, are admissible under factor (b)"]; see also *People v. Holloway, supra*, 33 Cal.4th at p. 143; *People v. Mendoza, supra*, 24 Cal.4th at pp. 185-186.) Thus, there is no error per se in admitting victim impact evidence related to a defendant's other violent crimes under factor (b).

Second, appellant claims that the admission of victim impact evidence as part of the circumstances of the crime pursuant to factor (a) of Penal Code section 190.3 renders factor (a) unconstitutionally vague and overbroad. (AOB 184-185.) This Court has repeatedly rejected this vagueness argument. (*People v Jurado* (2006) 38 Cal.4th 72,

132; *People v. Roldan, supra*, 35 Cal.4th at p. 733; *People v. Benavides* (2005) 35 Cal.4th 69, 107.)

Third, appellant claims that the victim impact evidence regarding the rape and robberies he committed against Myra and Jaime M. were inadmissible under Penal Code section 190.3, subdivision (a), because victim impact evidence concerning another crime should be admissible only if "directly related" to the capital crime. (AOB 185-187.) Whatever merit there might be to appellant's interpretation of the scope of factor (a), that interpretation is of no consequence here, where the challenged testimony was admissible under factor (b). (*People v. Mendoza, supra*, 24 Cal.4th at p. 186 ["The impact of a capital defendant's past crimes on the victims of those crimes is relevant to the penalty decision."]; *People v. Clark* (1990) 50 Cal.3d 583, 629; *People v. Price, supra*, 1 Cal.4th at p. 479; *People v. Karis* (1988) 46 Cal.3d 612, 641.)

Lastly, even if error occurred it was harmless. "[E]rror in the admission of evidence under [Penal Code] section 190.3, factor (b) is reversible only if 'there is a reasonable possibility it affected the verdict,' a standard that is 'essentially the same as the harmless beyond a reasonable doubt standard of [*Chapman v. California, supra*, 386 U.S. at p. 24].'" (*People v. Lewis* (2008) 43 Cal.4th 415, 527; *People v. Lancaster, supra*, 41 Cal.4th at p. 94.) In addition to the extensive evidence of appellant's involvement in the murder of Genoveva, the prosecution also introduced evidence of the effect that Genoveva's murder had on her children and the fact of appellant's prior violent crimes committed upon Myra and Jaime M., and the psychological evidence introduced by the prosecution and appellant failed to show that appellant was incompetent or lacked the mental ability to refuse to participate in the brutal murder of Genoveva. (See Section III.E, *supra*.) Considering all the evidence that was presented at the penalty phase, any error in admitting victim impact evidence of the crimes appellant committed against Myra and Jaime M. was harmless beyond a reasonable doubt. This claim fails, as do the derivative state and federal constitutional claims that are predicated on this alleged error.

XVIII. THE TRIAL COURT DID NOT ERR IN REFUSING APPELLANT'S REQUEST TO INSTRUCT THE JURY ON THE MEANING OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

In Claim 18, appellant argues that the trial court erred by refusing his requested jury instruction defining the sentence of life without the possibility of parole. He claims that the error denied him his right to due process and a fair and reliable determination of penalty in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 190-196.) Appellant's contention lacks merit because the trial court was not required to the requested instruction.

A. Relevant Proceedings At Trial

Appellant's trial counsel requested that the jury be instructed as follows at the penalty phase of the trial:

> Life without the possibility of parole means exactly what it says - the defendant will be imprisoned for the rest of his life. For you to conclude otherwise would be to rely on conjecture and speculation and would be a violation of your oath as trial jurors.

(3 CT 506.) The trial court refused the instruction. (23 RT 4406.)

During argument to the jury at the penalty phase of the trial, the prosecutor argued as follows regarding the imposition of the death penalty:

> It provides the rest of us with security knowing that people who commit these terrible acts are going to be held personally responsible and they're going to be justly punished, and no one else will have to fall victim to them again.

(23 RT 4598.) Later, the prosecutor argued that appellant has "spent his adult life as a predator" and that "he is not going to change." (23 RT 4607.) The prosecutor further argued as follows:

> It is highly unlikely that he would be able to change his habitual manner of interaction with and reaction to the environment. [¶] No one within the confines of the Department of Corrections would be safe with that man as a prisoner.

(23 RT 4607.) Appellant's trial counsel interjected an objection that this was improper argument. The trial court sustained the objection and instructed the jury to disregard the argument. (23 RT 4607-4608.) The following argument of the prosecutor was made without objection:

> When the defendant goes off to State prison, he takes with him all the character traits that we know he has. He will continue the only behavior that he knows. [¶] We know that Bobby Rollins certainly isn't safe. We know that Fred Jackson isn't safe. We know that he has already threatened to kill Bobby Rollins. We know, based on the letter that he wrote to Bobby Rollins, that they have already - - he has already put the word out on Fred Jackson and they are all - - he has already been run from the yard.

(23 RT 4608.)

Appellant's trial counsel repeatedly explained to the jury the effect of a sentence of life without the possibility of parole. He argued as follows:

> But what did that verdict [of guilt] mean? [¶] What was the practicability of that verdict? [¶] Because this morning and this afternoon we have been hearing a lot of things. What that meant, ladies and gentlemen, is that Christopher Sattiewhite will die in jail. That's what that means. He will die in jail. [¶] Now, when we talked about punishment, that's what this is about. This is about punishment. You could not let him out of jail if you wanted to. If you felt that you were wrong, you couldn't let him out of jail. He is gone. He is done. He is finished.
>
> The only question is, is when does he die? [¶] Does he die in the gas chamber a little quicker, or does he die of old age in the State prison? [¶] But that's what that means.

(23 RT 4610.)

Appellant's trial counsel returned again in the argument to explain the effect of a sentence of life without the possibility of parole. He argued as follows regarding an appropriate punishment for appellant:

> And that [punishment] is not a trip to the gas chamber because he, again, is done. He is not going anywhere. He will never see another summertime outside of prison.

(23 RT 4618.) Later in the argument, appellant's trial counsel again elaborated as follows on the meaning of life without the possibility of parole:

> Now, ladies and gentlemen, execute and punishment are not the same because I have to keep telling you this. He should be punished. And [co-counsel] Mr. Gunnels and I believe that firmly. Yes, we will punish him. Of course we will punish him. He has lost his right to live in our society and in our community. That's gone forever. That's not on the table. That's not for discussion.

(23 RT 4634.)

Later still, appellant's trial counsel continued to elaborate on the meaning of life without the possibility of parole:

> But we talk a lot about the death penalty. For just a few minutes let's talk about what life without parole means. Just think about that. Because that is probably the most horrible punishment that you can have.
>
> You got some plans?
>
> Do you remember when we talked about after the verdict we were going to start on the 14th and some of you said well, wait a minute, I got plans?
>
> Okay. Well, that's reasonable. I am not whining about that. It's just an example. You are - - spring's coming up. You know, summer's coming up.
>
> You got plans?
>
> He's done. He got no plans. He will have no privacy, he will be locked up, he will have a guard for the rest of his life. He will never be able to go to the store and get those five items we were talking about. He will never be able to do anything a free person can do again for the rest of his life. He will be locked up until he dies. Think about that. Just think about the enormity of it.
>
> When we talk about punishing somebody, he - - I don't think he comprehends it. I don't know if I could comprehend it if somebody came and slammed the doors on me.
>
> What about you?

If they slammed the doors on you and you will never ever get out.

(23 RT 4641-4642.) Appellant's trial counsel continued as follows:

> Chris Sattiewhite gets no chance at parole. He will see 'em come, he will see 'em go. He will see everything from behind bars. The clanking of that door is the music that he is going to hear for the rest of his life.
>
> Now that's punishment, ladies and gnetlemen. Every time that door clangs, whether it's here or whether it's at Folsom or San Quentin or some other prison, that's the music that he is going to hear to remind him of what he did, to remind him. When his mother dies he won't go to the funeral.
>
> When anything happens he is stuck, ladies and gentlemen. He is done. He can't go anywhere. He can't hurt anybody because whether or not he is at Pelican Bay or Tracy or any other prison, he will never be released. That, ladies and gentlemen, is punishment. When he looks through the glass at his visitors, that's as close as he comes.
>
> So ladies and gentlemen, when you have plans this summer, when you are back there deliberating and you say well, come on, let's go, it's 4:30, let's wrap this up, all he is going to be doing is just waiting for a plastic spoon and his food because that's all he gets. And that's day after day after day. When you take the pages off the calendar, there is nothing there. There is no hope. His dreams, if he had any at all, are gone.
>
> And this nonsense that he is going to sit there and think about his great deeds is just absolute garbage. He doesn't have the capacity to dream, but he will suffer. He will suffer.
>
> So what does life without the possibility of parole mean?
>
> It means that society is protected. You don't have to worry about it. There is closure. It is over. It is over and he is punished and he is punished and his family is punished. And he will be reminded every time he sees a sister or gets a letter of what he did, because he caused it.
>
> So, ladies and gentlemen, that is what life without parole is, and just think about that as you are driving home.

(23 RT 4642-4644.)

B. The Trial Court Properly Refused Appellant's Request For A Special Instruction Regarding The Meaning Of Life Without The Possibility Of Parole

As mentioned in Section V.C., ante, a trial court has no duty to define any term for the jury that is commonly understood by those familiar with the English language, and which has no technical meaning peculiar to the law. (*People v. Bland, supra*, 28 Cal.4th at p. 334; *People v. Estrada, supra*, 11 Cal.4th at p. 574.) This Court has rejected arguments similar to the one made herein by appellant regarding the need for a jury instruction defining life without the possibility of parole. (*People v. Martinez, supra*, 31 Cal.4th at pp. 698-700; *People v. Prieto, supra*, 30 Cal.4th at pp. 270-271; *People v. Smithey* (1999) 20 Cal.4th 936, 1009.) CALJIC Nos. 8.84 and 8.88, which were given in the present case (3 CT 424, 485-486; 24 RT 4661, 4687-4689), adequately inform the jury of the defendant's ineligibility for parole.[65]/ (*People v. Martinez, supra*, 31 Cal.4th at pp. 698-700; *People v. Prieto, supra*, 30 Cal.4th at pp. 270-271; *People v. Smithey, supra*, 20 Cal.4th at p. 1009.)

"[T]he concept of life without the possibility of parole is clear." (*People v. DePriest, supra*, 42 Cal.4th at p. 58; citing *People v. Arias* (1996) 13 Cal.4th 92,172.)

This Court also has concluded that CALJIC Nos. 8.84 and 8.88 resolved any ambiguity on the issue of whether a defendant who receives a life sentence is eligible for parole. Further, it was distinguishable from the situations found defective by the United States Supreme Court in *Simmons v. South Carolina* (1994) 512 U.S. 154, 169 [114 S.Ct 2187, 129 L.Ed.2d 133], *Kelly v. South Carolina* (2002) 534 U.S. 246, 256 [122 S.Ct. 726, 151 L.Ed.2d 670], and *Shafer v. South Carolina* (2001) 532 U.S. 36, 52 [121 S.Ct. 1263, 149 L.E.2d 178]. (AOB 190-192; see *People v. DePriest, supra*, 42 Cal.4th at pp.

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[65] Moreover, this Court has explained in prior cases that an instruction, such as the one requested by appellant, is not accurate given the Governor's power of commutation and pardon, and because of the possibility of appellate reversal. (*People v. DePriest* (2007) 42 Cal.4th 1, 58; *People v. Kipp* (1998) 18 Cal.4th 349, 378-379 [and cases cited therein].)

58-59; *People v. Wilson* (2005) 36 Cal.4th 309, 355 [noting that, unlike CALJIC Nos. 8.84 & 8.88, which instruct the jury that it can sentence a defendant to either death or "confinement in the state prison for life without the possibility of parole," in *Simmons*, Kelly, and Shafer the juries were instructed that the alternative to a death sentence was one of "life imprisonment" without any mention that a capital defendant who received such a sentence would not be eligible for parole].)

Furthermore, the prosecutor's argument that "[n]o one within the confines of the Department of Corrections would be safe" if appellant were a prisoner did not require an instruction regarding the meaning of life without the possibility of parole. As mentioned above, the trial court's instructions were correct and adequate. Moreover, the objection of appellant's trial counsel to this argument was sustained by the trial court, and the trial court instructed the jury to disregard that portion of the prosecutor's argument. (23 RT 4607-4608.) Juries are presumed to follow such instructions by the trial court. (*People v. Carter* (2005) 36 Cal.4th 1114, 1176-1177.)

Lastly, there is no possibility of prejudice from refusing appellant's requested jury instruction. It is inconceivable that the jury would not have understood the concept conveyed by the requested jury instruction in light of the instructions actually given, and the extensive argument to the jury by appellant's trial attorney regarding the meaning of life without the possibility of parole. The jury was instructed to disregard the brief reference the prosecutor made regarding the safety of Department of Corrections personnel. In addition, as explained in Section XVI, ante, there was overwhelming evidence in support of the jury's penalty verdict. Accordingly, even if error occurred, appellant suffered no prejudice. (*People v. Demetrulias, supra*, 39 Cal.4th at p. 39, citing *Chapman v. California, supra*, 386 U.S. at p. 24.) This claim fails, as do the state and federal constitutional claims that are predicated on the existence of error.

XIX. THE PENALTY PHASE JURY INSTRUCTIONS REGARDING AGGRAVATING FACTORS CORRECTLY STATED THE PROSECUTION'S BURDEN OF PROOF

In Claim 19, appellant argues that the penalty phase jury instructions regarding the finding of aggravating factors incorrectly stated the prosecution's burden of proof. He claims that the trial court erroneously refused to instruct the jury, as requested by appellant's trial counsel, that each aggravating factor must individually be found true beyond a reasonable doubt before the jury could rely on that aggravating factor in determining appellant's sentence. Appellant claims that due to the instructional error, he was denied his rights to have his guilt and penalty proved beyond a reasonable doubt, to a unanimous jury verdict, and a fair and reliable determination of his sentence. Thus, the erroneous instruction violated the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 197-206.) Respondent disagrees.

Appellant's trial counsel requested that the jury be instructed as follows at the penalty phase of the trial:

> Before you may consider any of the factors that I have listed for you as aggravating, you must find that the factor has been established by the evidence presented in this case beyond a reasonable doubt. You may not consider any factor as a basis for imposing the punishment of death on the defendant unless you are first convinced beyond a reasonable doubt that it is true.

(3 CT 501.) The trial court refused to so instruct the jury, finding that the instruction incorrectly stated the prosecution's burden of proof. (23 RT 4402-4404.)

Appellant mistakenly claims that the instruction erroneously stated the prosecution's burden of proof within the meaning of the United States Supreme Court's decisions in *Apprendi v. New Jersey, supra*, 530 U.S. 466, *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. 2531, 159 L.Ed.2d 403], *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], and *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621]. (AOB 197-206.)

In *People v. Romero* (2008) 44 Cal.4th 386, this Court recently rejected the same argument asserted by appellant herein. This Court stated as follows in pertinent part:

> The jury at the penalty phase "need not . . . achieve unanimity as to specific aggravating circumstances, or find beyond a reasonable doubt that an aggravating circumstance is proved (except for other crimes) . . . ." (*People v. Morrison* (2004) 34 Cal.4th 698, 730-731, 21 Cal.Rptr.3d 682, 101 P.3d 568.) At the penalty phase, the trial court need not and should not instruct the jury on the burden of proof. (*People v. Panah* (2005) 35 Cal.4th 395, 499, 25 Cal.Rptr.3d 672, 107 P.3d 790.) It is sufficient that the jury be instructed, as it was here, that to return a verdict of death each member of the jury "'must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.'" (*People v. Box, supra*, 23 Cal.4th at p. 1216, 99 Cal.Rptr.2d 69, 5 P.3d 130.) . . . The United States Supreme Court's decisions in *Cunningham v. California* [], *United States v. Booker* [], *Blakely v. Washington* [], *Ring v. Arizona* [], and *Apprendi v. New Jersey* [], do not affect or change these conclusions. (*People v. Prince* (2007) 40 Cal.4th 1179, 1297-1298, 57 Cal.Rptr.3d 543, 156 P.3d 1015.)

(*People v. Romero, supra*, 44 Cal.4th at pp. 428-429.)

Appellant has not offered a basis for why this Court should no longer follow the established authorities cited in *Romero*. (AOB 197-206.) Thus, appellant's claim fails as do his state and federal constitutional claims that are predicated on the existence of error.

XX. THE TRIAL COURT PROPERLY REFUSED APPELLANT'S REQUESTED PENALTY PHASE JURY INSTRUCTIONS REGARDING VICTIM IMPACT EVIDENCE AND EVIDENCE OF APPELLANT'S BACKGROUND

In Claim 20, appellant contends that the trial court erroneously refused his requested penalty phase jury instructions regarding victim impact evidence and evidence of his background. He claims that the trial court's error denied him his rights to a jury trial and a fair and reliable penalty determination in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 207-214.) These claims lack merit.

A. Appellant's Requested Special Instruction Regarding The Treatment Of Victim Impact Evidence Was Duplicative Of Other Jury Instructions

Prior to the penalty phase of the trial, appellant's trial counsel requested that the jury be instructed as follows:

> Evidence has been introduced in this case that may arouse in you a natural sympathy for the victim or the victim's family.
>
> You must not allow such evidence to divert your attention from your proper role in deciding the appropriate punishment in this case.
>
> You may not impose the penalty of death as a result of an irrational, purely emotional response to this evidence.

(3 CT 505.) The trial court refused to instruct the jury as requested by appellant's trial counsel. (23 RT 4406.)

The trial court instructed the penalty phase jury according to CALJIC No. 8.84.1, which states in pertinent part:

> You must neither be influenced by bias or prejudice against the Defendant nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion consciously and reach a just verdict.

(24 RT 4662; 3 CT 425.)

To the extent that appellant claims that the trial court should have provided the instruction regarding the victim impact evidence, his claim is contrary to recent decisions of this Court. In *People v. Carey* (2007) 41 Cal.4th 109, this Court found the defendant was not entitled to a special penalty phase jury instruction that the jury "may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument." (*Id.* at p. 134.) In finding that instructional error did not occur, this Court stated as follows:

> We have in the past rejected the argument that a trial court must instruct the jury not to be influenced by emotion resulting from victim impact evidence. (*People v. Griffin* (2004) 33 Cal.4th 536,

> 591, [] [trial court need not give duplicative instructions]; [*People v. Ochoa, supra*, 26 Cal.4th at p. 455] [proposed instruction that jury may not impose death penalty as a result of an irrational, subjective response to emotional evidence is duplicative of CALJIC No. 8.84.1].) Moreover, in *People v. Harris* (2005) 37 Cal.4th 310, 358[], we upheld the rejection of a jury instruction identical to the one proposed by defendant here. In *Harris*, the trial court concluded the instruction was confusing because it cautioned the jury against a subjective response to emotional evidence and argument without specifying whether the subjective reaction was that of the victim's family or that of the jurors themselves. (*Id.* at p. 359 [].)

(*People v. Carey, supra*, 41 Cal.4th at p. 134; accord *People v. Harris, supra*, 43 Cal.4th at p. 1318; *People v. Zamudio* (2008) 43 Cal.4th 327, 368-369.)

In the present case, the trial court instructed the penalty phase jury "must neither be influenced by bias or prejudice against the Defendant" and that "the People and the Defendant have a right to expect that [the jury] will consider all of the evidence, follow the law, exercise [its] discretion consciously and reach a just verdict." (24 RT 4662.) Accordingly, the trial was not obligated to provide the duplicative instruction requested by appellant.

B. Appellant's Special Requested Instruction Regarding Appellant's Background As Mitigating Evidence Was Duplicative Of Other Penalty Phase Jury Instructions

Appellant's trial counsel requested that the penalty phase jury be instructed that "Evidence has been presented of defendant's lifestyle or background. You cannot consider this evidence as an aggravating factor, but may consider it only as a mitigating factor." (3 CT 496.) The trial court refused the requested instruction. (23 RT 4399-4400.) The trial court also instructed the jury that it could consider the following in determining which penalty to impose:

> K, any other circumstances which lessons [sic] the gravity of the crime, even though it is not a legal excuse for the crime and any sympathetic or other aspect of the Defendant's character or record that the Defendant offers as a basis for a sentence less than death related to the offense for which he is on trial.

(24 RT 4672; 3 CT 447.)

No special instruction is needed to inform the jury that evidence appellant's background and lifestyle can only be mitigating, as it has been well settled by this Court that "[t]he trial court is not required to instruct the jury that mitigating factors can only be mitigating. (*People v. Perry* (2006) 38 Cal.4th 302, 319; *People v. Farnam* (2002) 28 Cal.4th 107, 191.) Moreover, the standard jury instructions "'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.'" (*People v. Valencia* (2008) 43 Cal.4th 268, 309, quoting *People v. Barnett, supra*, 17 Cal.4th at pp. 1176-1177.) "The court need not give pinpoint instructions regarding what mitigating evidence the jury may consider." (*People v. Perry, supra*, 38 Cal.4th at p. 310.) Thus, the trial court was under no duty to instruct the jury as requested by appellant's trial attorney.

Thus, the record shows that the penalty phase instructions were adequate and correct. Consequently, no error occurred when the trial court refused appellant's requested special instructions for the penalty phase. This claim fails.

XXI. THE TRIAL COURT HAD NO DUTY TO INSTRUCT THE JURY THAT IT MUST UNANIMOUSLY AGREE WHETHER APPELLANT COMMITTED A PREMEDITATED MURDER OR A FELONY MURDER BEFORE FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE

In Claim 21, appellant contends that the trial court erroneously failed to instruct the jury that it must unanimously agree whether appellant committed premeditated murder or felony murder before finding him guilty of murder in the first degree. Appellant contends that this instructional error denied him the right to have all of the elements of the crime of which he was convicted proven beyond a reasonable doubt, his right to a unanimous jury verdict, and his right to a fair and reliable determination that he committed a capital offense, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 215-223.) Respondent submits that this claim lacks merit.

The United States Supreme Court and this Court have rejected appellant's contentions. (*People v. Loker, supra*, 44 Cal.4th at pp. 707-708; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *Schad v. Arizona* (1991) 501 U.S. 624, 630 645 [111 S.Ct. 2491, 115 L.Ed.2d 555] [unanimity as to the theory under which a killing is deemed culpable is not compelled as a matter of state or federal law].) As this Court stated in *Loker*,

> We have "'repeatedly rejected this contention, holding that the jurors need not unanimously agree on a theory of first degree murder as either felony murder or murder with premeditation and deliberation. [Citations.]' (*People v. Nakahara*[, *supra*, 30 Cal.4th at p. 712].) Here, as in *Nakahara*, we 'are not persuaded otherwise by [*Apprendi v. New Jersey, supra*, 530 U.S. 466]. There, the United States Supreme Court found a constitutional requirement that any fact that increases the maximum penalty for a crime, other than a prior conviction, must be formally charged, submitted to the fact finder, treated as a criminal element, and proved beyond a reasonable doubt. [Citation.] We see nothing in *Apprendi* that would require a unanimous jury verdict as to the particular theory justifying a finding of first degree murder. [Citation.]' (*People v. Nakahara, supra*, [30 Cal.4th at pp. 712-713].)" (*People v. Morgan[, supra*, 42 Cal.4th at p. 617].) Nor, contrary to defendant's contention, are felony murder and premeditated murder separate crimes. (*Ibid.*)

(*People v. Loker, supra*, 44 Cal.4th at pp. 707-708.) Appellant does not give any reason to justify this Court revisiting its decisions rejecting his contentions. Thus, this claim fails.

XXII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT IT COULD NOT RETURN A VERDICT OF SECOND DEGREE MURDER UNLESS IT UNANIMOUSLY ACQUITTED APPELLANT OF FIRST DEGREE MURDER

In Claim 22, appellant contends that the trial court erroneously instructed the jury that it could not return a verdict of second degree murder unless it unanimously acquitted him of first degree murder.[66]/ He claims that the instruction "subjects the jurors to the

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[66] Without objection from appellant's trial attorney (17 RT 3089), the trial court instructed the jury as follows:

(continued...)

(...continued)

If you are [not] satisfied beyond a reasonable doubt that the Defendant is guilty of the crime of first degree murder as charged in Count 1, and you unanimously so find, you may convict him of any lesser crime provided you are satisfied beyond a reasonable doubt that he is guilty of such crime.

You will be provided with guilty and not guilty forms as to Count 1 for the crime of murder in the first degree and lesser crimes thereto. Murder in the second degree is a lesser crime to that of murder in the first degree. Thus you are to determine whether the Defendant is guilty or not guilty of murder in the first degree or of any lesser crime thereto.

In doing so you have discretion to chose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it to be productive to consider and reach tentative conclusions on all charged and lesser crimes before reaching any final verdict.

Before you return any final or formal verdicts you must be guided by the following.

One, if you unanimously find Defendant guilty of first degree murder as to Count 1, your foreperson should sign and date the corresponding guilty verdict form and all other verdict forms as to Count 1 should be left unsigned.

Two, if you are unable to reach a unanimous verdict as to the charge in Count 1 of first degree murder, do not sign any verdict forms as to that count and report your disagreement to the Court.

Three, the Court cannot accept a verdict of guilty of second degree murder as to Count 1 unless the jury also unanimously finds and returns a signed verdict form of not guilty as to murder of the first degree. [Four,] If you find defendant not guilty of the murder in the first degree but cannot reach a unanimous agreement as to murder of the second degree, your foreperson should sign and date the not guilty of murder in the first degree form and should report this disagreement to the Court.

(continued...)

same pressure to ignore the reasonable doubt standard that they would face if no lesser-included offense instruction were given at all," and "give[s] an unfair advantage to the prosecution." He also claims that the instruction denied him due process of law, a jury trial, and a reliable verdict as to sentence as required by the Sixth, Eighth, and Fourteenth Amendments. (AOB 224-225.) Respondent disagrees.

This Court has repeatedly rejected the contention appellant raises herein. As this Court recently held in *People v. Whisenhunt, supra*, 44 Cal.4th at pp. 222-223:

As defendant acknowledges, we have upheld the "acquittal first" rule, namely, that a jury must unanimously agree to acquit a defendant of a greater charge before returning a verdict on a lesser charge. (*People v. Fields* (1996) 13 Cal.4th 289, 309-311[].) Since Fields, we have repeatedly rejected arguments similar to those raised by defendant that the "acquittal first" rule "precludes full jury consideration of lesser included offenses" and encourages "false unanimity" and "coerced verdicts." (See *People v. Nakahara, supra*, 30 Cal.4th at p. 715[]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200-1201[].) We do so again here.

As appellant has given this Court no reason to overturn its established precedent on this issue, this claim fails.

XXIII. THE PROSECUTOR'S PENALTY PHASE ARGUMENT WAS PROPER

In Claim 23, appellant argues that the prosecutor erred in several respects during closing argument of the penalty phase of the trial. Appellant contends that the prosecutor improperly argued that the sentence in this case needed to be death to protect prison guards, satisfy society's demand for safety and closure, and to make the victim's family

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(...continued)

> Five, if you unanimously find Defendant not guilty of first degree murder but guilty of second degree murder, your foreperson should sign and date the corresponding verdict forms. Do not sign any other verdict forms as to that count.

(19 RT 3423-3424; 2 CT 310-312.)

whole. Appellant asserts that these arguments denied him his rights to due process, a fair trial, equal protection, and a reliable jury determination of penalty within the meaning of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 226-235.) Respondent submits that nothing about the prosecutor's argument warrants reversal.

A. Any Error Regarding The Prosecutor's Argument About Safety In The Department Of Corrections Was Harmless

During the penalty phase of the trial, the trial court sustained a defense objection to the prosecutor's argument that "No one within the confines of the Department of Corrections would be safe with that man as a prisoner." (23 RT 4607-4608.) Appellant contends that reversible error occurred. (AOB 226-228.) He is mistaken.

First, the trial court instructed the jury to disregard the prosecutor's argument. (23 RT 4607-4608.) This Court presumes that the jurors followed the trial court's instructions. (*People v. Hovarter, supra*, 44 Cal.4th at p. 1005, citing *People v. Gray, supra,* 37 Cal.4th at p. 231.) Furthermore, following the trial court having sustained the defense objection, the prosecutor argued without objection:

> When the defendant goes off to State prison, he takes with him all the character traits that we know he has. He will continue the only behavior that he knows.
>
> We know that Bobby Rollins certainly isn't safe. We know that Fred Jackson isn't safe. We know that he has already threatened to kill Bobby Rollins. We know, based on the letter that he wrote Bobby Rollins, that they have already - - he has already put the word out on Fred Jackson and they are all - - he has already been run from the yard.

(23 RT 4608.) The prosecutor's argument about appellant's future dangerousness in prison was supported by the facts regarding appellant's threats against Jackson and Rollins.

"There is a wide range of permissible argument at the penalty phase." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1172, citing *People v. Ochoa, supra*, 19 Cal.4th at p. 463.) The prosecutor "may argue from the defendant's past conduct, as indicated in the

record, that the defendant will be a danger in prison." (*People v. Zambrano, supra*, 41 Cal.4th at p. 1179, citing *People v. Boyette* (2002) 29 Cal.4th 381, 446.) A prosecutor also properly may comment on a "defendant's potential to endanger others in prison" if sentenced to life imprisonment without the possibility of parole. (*People v. Huggins* (2006) 38 Cal.4th 175, 253.)

Consequently, there is no reasonable probability appellant would have obtained a more favorable result during the penalty phase had that the prosecutor's earlier, and more brief, argument not been made. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1071 ["A defendant's conviction will not be reversed for prosecutorial misconduct . . . unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct"].)

B. No Prosecutorial Misconduct Occurred Due To The Prosecutor's References To The Needs Of Society And The Comments About The Victim's Family Visiting The Grave Site During Argument At The Penalty Phase Of The Trial

Appellant next claims that the prosecutor committed misconduct when arguing as follows at the penalty phase of the trial:

> As a society we must redress the outrage for this. We must have closure so that we feel secure knowing that justice is served and not one more person will fall victim to Chris Sattiewhite. That is what we need as a society, and as incongruent as it seems, sentencing the Defendant to a life in prison is sentencing the Defendant to a life of opportunities that Genoveva Gonzales will never have a again.

(23 RT 4596-4597.) Appellant's trial counsel did not object to this argument.[67]/ (23 RT 4597.) Appellant's claim lacks merit.

Under the United States Constitution, prosecutorial misconduct occurs only if the prosecutor's actions so infect the trial with unfairness that the resulting conviction is a denial of due process. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070; *People v. Earp,*

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[67] It appears that no objection was required to preserve this issue for appeal. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1417; *People v. Moon* (2005) 37 Cal.4th 1, 17; *People v. Cleveland* (2004) 32 Cal.4th 704, 762.)

supra, 20 Cal.4th at p. 858; see also *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [94 S.Ct. 1868, 40 L.Ed.2d 431].) Under California law, prosecutorial misconduct only occurs when the prosecutor uses "'deceptive or reprehensible methods to attempt to persuade either the court or the jury.'" (*People v. Wallace, supra*, 44 Cal.4th at p. 1070, quoting *People v. Earp, supra*, 20 Cal.4th at p. 858.) "'A defendant's conviction will not be reversed for prosecutorial misconduct' that violates state law, however, 'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.'" (*People v. Wallace, supra*, 44 Cal.4th at p. 1071, quoting *People v. Crew* (2003) 31 Cal.4th 822, 839.)

Although appellant suggests there was error under *Caldwell v. Mississippi* (1985) 472 U.S. 320 [105 S.Ct. 2633, 86 L.Ed.2d 231], because the prosecutor's argument somehow diminished the jury's sense of personal responsibility for an individualized penalty verdict (AOB 228), the argument plainly did not do so. It was clear that at all times the penalty decision was one that each juror must bear responsibility for, considering appropriate criteria such as victim impact.

Here, the prosecutor's argument was an appropriate commentary on the impact of the murder on the victim and her family. (See *People v. Cox* (1991) 53 Cal.3d 618, 657 [urging the jury to remember victim is proper response to argument that life without parole was sufficient punishment]; *People v. Zapien, supra*, 4 Cal.4th at pp. 991-992.) A reasonable jury would have interpreted the prosecutor's remarks as a proper attempt to contrast victim impact evidence against the penalty the prosecution believed appellant deserved. (*People v. Sanchez* (1995) 12 Cal.4th 1, 73 [finding no impropriety in argument asked the jury to consider the horror of the victims before they died, and contrasting it with the defendant's ability to be alive if the jury returned a verdict of life without the possibility of parole].) Moreover, isolated brief references to retribution or community outrage do not constitute misconduct so long as such arguments do not form the principal basis for advocating death. (*People v. Ghent* (1987) 43 Cal.3d 739, 771.)

C. Appellant Has Forfeited Any Claim That The Prosecutor Committed Misconduct By Making An Inflammatory Call For Vengeance During The Penalty Phase Argument; No Misconduct Occurred

Appellant contends that the prosecutor committed misconduct during the penalty phase argument by including an inflammatory call for vengeance. (AOB 229-233.) Appellant has waived this claim by failing to object to the challenged argument at trial. Even assuming the claim has been preserved for review, no misconduct occurred.

The prosecutor argued as follows at the penalty phase:

> Now if you impose life without parole, certainly Christopher Sattiewhite will spend the rest of his Christmases and Thanksgivings and 4th of Julys and birthdays behind bars, but that is a whole lot of a better deal than he gave Genoveva Gonzales.
>
> She will never get to bake cookies and cakes at Christmas again for her children. She will never get to root for Chava at a baseball game or encourage him in his school work, or watch Chava and Sandy[,] Vanessa and Edgar grow up and get married and have children.
>
> And Christopher Sattiewhite, he will have - - he will have his 150 bucks every two weeks compliments of Wayne Walker in his account. And he will able to - - he will be able to sit in his cell and enjoy the recounting of how he executed the girl in the ditch after his friend murdered [*sic*] her.
>
> And he will be able to enjoy recounting how he terrorized the young boy on the beach and pull him off of his girlfriend and how he threw the blanket over his head while his two buddies raped the fellow's girlfriend.

(23 RT 4547-4548.) The prosecutor also argued as follows:

> As a society we must redress our outrage for this. We must have closure so that we feel secure knowing that justice is served and not one more person will fall victim to Chris Sattiewhite. That is what we need as a society, and as incongruent as it seems, sentencing the Defendant to a life in prison is sentencing the Defendant to a life of opportunities that Genoveva Gonzales will never have again.

> The Defendant in prison will get to wake up everyday. He will get to see the seasons change. He will get to watch TV. He will get to listen to music. he will get to read books. He will get to read the newspaper. His family gets to visit him on visiting days and holidays, and his birthday. And he gets to write letters. He gets to read letters. And he gets to go to school if he wants and he gets to work if he wants. And although his sister said they would rather visit him in prison than in a graveyard, think about what the Gonzales family does every Sunday after church. They bring their mother flowers at the cemetery.
>
> And what about Mr. Walker? Mr. Walker wanted to say all of the right things and he wanted to do all of the right things. He's [sic] is going to give Chris Sattiewhite $300 a month in his bank. Christopher Sattiewhite is going to be king of the hill in the Department of Corrections with $300 a month.
>
> He is going to run the show. He is going to act out his fantasy. He will have the plan. And what do you think the Gonzales family could do with $300 a month? That would be a God send [sic] to them.
>
> So when you think about the opportunities that Chris Sattiewhite will have in prison, you have to ask yourself, "Well, where is the justice in that? Where is the fairness?" That should really offend your sense of justice.

(23 RT 4596-4598.)

Appellant has forfeited his instant contention because he failed to object to the challenged portions of the prosecutor's argument and request an admonition to the jury. (*People v. Harris, supra*, 43 Cal.4th at p. 1290, citing *People v. Thornton* (2007) 41 Cal.4th 391, 454.)

Moreover, even if the claim has not been forfeited, appellant has failed to establish that the challenged portions of the prosecutor's penalty phase argument were improper. The argument of the prosecutor is similar to that found proper in *People v. Riggs, supra*, 44 Cal.4th 248. In *Riggs*, the prosecutor argued that the defendant's "[r]ough, rough rearing" does not "do anything to help" the mother of the murder victim. (*Id.* at p. 323.) The prosecutor further argued that "I'm sure that that is not much consolation or sola[ce]

for [the murder victim's mother] when she goes out and visits her daughter at the grave site." (*Ibid.*)

This Court found that "[a]lthough phrased in an emotional manner, the prosecutor's comments permissibly contrasted the potential mitigating effect of [the] defendant's past against the significant impact the murder had on [the murder victim's] family." (*People v. Riggs, supra*, 44 Cal.4th at p. 324.) This Court also found that the "argument invoked the impact of the murder on the [victim's] family, a relevant factor in the penalty determination, and was not an unduly inflammatory appeal to the jury's emotions." (*Ibid.*)

Here, as in *Riggs*, the prosecutor was phrased in an "emotional manner," but was simply invoking the significant effect that the murder had on Genoveva's family. (*People v. Riggs, supra*, 44 Cal.4th at p. 324.) Additionally, the prosecutor was simply drawing a contrast in the argument between the significant effect the murder had on Genoveva's family and the fact that appellant may continue his dangerous lifestyle in prison, another proper matter for the penalty phase jury's consideration. (*People v. Zambrano, supra*, 41 Cal.4th at p. 1179; *People v. Boyette, supra*, 29 Cal.4th at p. 446; *People v. Ghent, supra*, 43 Cal.3d at p. 771.) Accordingly, no misconduct occurred.

D. Appellant Forfeited Any Claim That The Prosecutor's Argument Violated *Payne v. Tennessee*; The Prosecutor's Argument Was Proper

Appellant also contends that the prosecutor's argument comparing appellant's life in prison with the impact of the murder on Genoveva's family violated *Payne v. Tennessee, supra*, 501 U.S. 808, in that it improperly called for comparative judgments between appellant and the victim's family. (AOB 223-224.) Appellant has forfeited this claim by failing to raise the instant objection at trial and request an admonition to the jury. (*People v. Harris, supra*, 43 Cal.4th at p. 1290, citing *People v. Thornton, supra*, 41 Cal.4th at p. 454.)

Moreover, the prosecutor's argument was proper. In *Payne*, the court reiterated its prior holdings that a capital defendant must be "treated as a uniquely individual human

being" when considering whether the death penalty should be imposed. (*Payne v. Tennessee, supra*, 501 U.S. at p. 822 [citations and quotations omitted]; *Booth v. Maryland, supra*, 482 U.S. at p. 504; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [96 S.Ct. 2978, 49 L.Ed.2d 944].) However, the court has "never held or even suggested . . . that the defendant, entitled as he was to individualized consideration, was to receive that consideration wholly apart from the crime which he had committed." (*Payne v. Tennessee, supra*, 501 U.S at p. 822.) The court further instructed as follows:

> As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind - for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead each victim's uniqueness as an individual human being, whatever the jury might think the loss to the community resulting from his death might be.

(*Id.* at p. 823.)

In the present case, the portion of the penalty phase argument challenged by appellant does not call for the jury to ignore the uniqueness of appellant or Genoveva in deliberating whether the death penalty should be imposed. Rather, the prosecutor was focusing on impact that Genoveva's own family experienced in contrast to appellant being allowed to continue his criminal lifestyle in prison. Accordingly, the prosecutor's argument did not violate *Payne v. Tennessee*.

E. Any Error Was Harmless

As explained in Section III.E, *ante*, there was overwhelming evidence in support of the death penalty. Although the arguments were emotional, they pertained to proper subject matter. Accordingly, it was not reasonably possible that the jury would have reached a different penalty verdict had the challenged portion of the prosecutor's argument been omitted. (See *People v. Sanchez, supra*, 12 Cal.4th at p. 73 [finding no impropriety in argument that urged the jury to consider horror of victims before they died, and contrasting it with the defendant's ability to be alive if the jury returned a verdict of life without the possibility of parole].)

XXIV. CALIFORNIA'S USE OF THE DEATH PENALTY DOES NOT VIOLATE INTERNATIONAL LAW

In Claim 24, appellant contends that California's use of the death penalty as a regular form of punishment, and as applied in this case, violates international law, including the International Covenant on Civil and Political Rights. (AOB 236-240.) Appellant has acknowledged that this Court has recently and repeatedly rejected the instant claim. (AOB 236, citing *People v. Cook* (2006) 39 Cal.4th 566, 618-619.) He also asks this Court to reconsider its prior holdings on this matter "in light of the international community's overwhelming rejection of the death penalty as a regular form of punishment." (AOB 236.) Respondent submits that this Court has again recently rejected the instant claim, and should reject appellant's claim as he has offered no basis for this Court to overturn its prior decisions.

In *People v. Lewis, supra*, 43 Cal.4th at p. 539, this Court observed that when the United States ratified the International Covenant on Civil and Political Rights, "'it specially reserved the right to impose the death penalty on any person, except a pregnant woman, duly convicted under laws permitting the imposition of capital punishment.'" (*Ibid.*, quoting *People v. Cook, supra*, 39 Cal.4th at p. 619.) This Court also found that "'international law does not bar imposing a death sentence that was rendered in accord with state and federal constitutional and statutory requirements.'"[68]/ (*People v. Lewis, supra*, 43 Cal.4th at p. 539, quoting *People v. Cook, supra*, 39 Cal.4th at p. 620; see also *People v. Blair* (2005) 36 Cal.4th 686, 755.) For the reasons set forth in this Respondent's Brief, appellant has failed to demonstrate that any prejudicial error occurred. (AOB 239-240.) Accordingly, imposition of the death penalty in this case does not violate international law. This claim fails.

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[68] To the extent appellant asserts that a higher standard for sufficiency of the evidence should be applied, his claim is in error. (AOB 239.) Rather, state and federal constitutional requirements would apply with respect to appellant's sufficiency-of-the-evidence argue in Claim 4. (*People v. Lewis, supra*, 43 Cal.4th at p. 539; *People v. Cook, supra*, 39 Cal.4th at p. 620.)

XXV. APPELLANT'S NUMEROUS CHALLENGES TO CALIFORNIA'S DEATH PENALTY LAW ARE WITHOUT MERIT

In Claim 25, appellant asserts many challenges to the validity of California's Death Penalty Law and penalty phase jury instructions. Each of these claims lacks merit.

Appellant contends that Penal Code section 190.2 is impermissibly broad because it contains too many special circumstances. He acknowledges that this Court has rejected this contention in *People v. Stanley* (1995) 10 Cal.4th 764, 842-843. (AOB 241-242.) This contention has been rejected by the United States Supreme Court. (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871, 79 L.Ed.2d 29].) As this Court has also held, "California's death penalty statute 'does not fail to perform the constitutionally required narrowing function by virtue of the number of special circumstances it provides or the manner in which they have been construed.'" (*People v. Beames* (2007) 40 Cal.4th 907, 933, quoting *People v. Morrison* (2004) 34 Cal.4th 698, 730.)

Appellant contends that Penal Code section 190.3, subdivision (a), is impermissibly broad because it contains no narrowing principle. He acknowledges that this claim has been rejected by this Court in *People v. Kennedy, supra*, 36 Cal.4th at p. 641, and *People v. Brown* (2004) 34 Cal.4th 382, 401. (AOB 242-243.) This claim also fails. "Section 190.3 sufficiently narrows the class of murderers eligible for capital punishment." (*People v. Harris, supra*, 43 Cal.4th at p. 1322, citing *People v. Barnwell* (2007) 41 Cal.4th 1038, 1058; *People v. Bonilla* (2007) 41 Cal.4th 313, 358.)

Appellant contends that the jury in the penalty phase of the trial should be required to find the aggravating factors true beyond a reasonable doubt and the jury also should be required to find beyond a reasonable doubt that the factors in aggravation outweighed the factors in mitigation. Appellant contends that the beyond-a-reasonable-doubt standard is required under the United States Supreme Court cases of *Apprendi*, *Ring, Blakely*, and

Cunningham.[69]/ He acknowledges that this claim has been rejected in *People v. Blair, supra*, 36 Cal.4th at p. 753. (AOB 243-247.) This Court recently again rejected this claim. "The jury at the penalty phase 'need not . . . find beyond a reasonable doubt that an aggravating circumstance is proved (except for other crimes), [or] that aggravating circumstances outweigh mitigating circumstances.'" (*People v. Romero, supra*, 44 Cal.4th at p. 429, quoting *People v. Morrison, supra,* 34 Cal.4th at pp. 730-731.)

Appellant contends that the jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether the aggravating factors outweighed the mitigating factors, and the appropriateness of the death penalty rather than life in state prison without the possibility of parole. He acknowledges that these claims have been rejected in *People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137, and *People v. Arias, supra*, 13 Cal.4th at p. 190. (AOB 247-248.) This Court has again recently rejected these claims. California's "'death penalty statute is not unconstitutional for failing to provide the jury with instructions of the burden of proof and [the] standard of proof for finding aggravating and mitigating circumstances in reaching a penalty determination.'" (*People v. Romero, supra*, 44 Cal.4th at p. 429, quoting *People v. Morrison, supra*, 34 Cal.4th at pp. 730-731.)

Appellant contends that the jury should have been instructed that it had to unanimously find that an aggravating factor was true. He also argues that the United States Supreme Court's decision in *Ring v. Arizona, supra*, 536 U.S. 584, casts doubt on the prior holdings. He acknowledges that this claim has been rejected in *People v. Prieto, supra*, 30 Cal.4th at p. 275. (AOB 248-250.) This Court recently rejected this claim as well. "The jury at the penalty phase 'need not . . . achieve unanimity as to specific

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[69] *Apprendi v. New Jersey, supra*, 530 U.S. 466; *Ring v. Arizona, supra*, 536 U.S. 584; *Blakely v. Washington, supra*, 542 U.S. 296; *Cunningham v. California, supra*, 549 U.S. 270.

aggravating circumstances.'" (*People v. Romero, supra*, 44 Cal.4th at p. 429, quoting *People v. Morrison, supra*, 34 Cal.4th at pp. 730-731.)

Appellant contends that the jury should have been instructed it had to unanimously find true that he committed prior unadjudicated criminal acts before such acts could be considered a factor in aggravation. He acknowledges that this Court has rejected this claim in *People v. Anderson* (2005) 25 Cal.4th 543, 584-585, and *People v. Ward, supra*, 36 Cal.4th at pp. 221-222. (AOB 250-251.) This Court again rejected this claim in *People v. Lewis* (2006) 39 Cal.4th 970, 1068. Additionally, in *People v. Brasure*, this Court held as follows:

> "[W]e also disagree with defendant that our statute is unconstitutional because it does not require jurors to agree unanimously on the existence of particular factors in aggravation. [Citations.] While all the jurors must agree death is the appropriate penalty, the guided discretion through which jurors reach their penalty decision must permit each juror individually to assess such potentially aggravating factors as the circumstances of the capital crime (§§ 190.3, factor (a)), prior felony convictions (*id.*, factor (c)), and other violent criminal activity (*id.*, factor (b)), and decide for him- or herself "what weight that activity should be given in deciding the penalty." [Citation.] The series of normative judgments involved in deciding whether a particular circumstance is indeed aggravating and, if so, what weight it should be given, cannot be fitted into a scheme of unanimous jury factfinding."

(*People v. Brasure, supra*, 42 Cal.4th at p. 1068, quoting *People v. Demetrulias, supra*, 39 Cal.4th at p. 41.)

Appellant contends that CALJIC No. 8.88, which was read to the penalty phase jury (3 CT 485-486; 24 RT 4687-4689), was impermissibly vague in stating that the jurors had to be "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (AOB 251; 3 CT 486; 24 RT 4689.) Appellant acknowledges that this Court has rejected this claim in *People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14. (AOB 251.) This Court has consistently rejected this claim. (*People v. Geier* (2007) 41 Cal.4th 555, 618-619;

People v. Carter (2003) 30 Cal.4th 1166, 1226.) Appellant has offered no compelling reason for this Court to overturn its prior rulings.

Appellant contends that CALJIC No. 8.88 erroneously stated that death if the appropriate punishment if the evidence "warrants" it. (AOB 251-252; 24 RT 4689; 3 CT 486.) He contends that the instruction "failed to inform the jury that the central determination is whether death is the appropriate punishment." He acknowledges that this Court has rejected this claim in *People v. Arias, supra*, 13 Cal.4th at p. 171. (AOB 251-252.) This Court has consistently rejected this claim. (*People v. Geier, supra*, 41 Cal.4th at pp. 618-619; *People v. Smith* (2005) 35 Cal.4th 334, 370.) Appellant again has offered no compelling reason for this Court to overturn its prior rulings.

Appellant contends that CALJIC No. 8.88 unconstitutionally failed to inform the jury to return a verdict of life without the possibility of parole if they find that the factors in mitigation outweigh the factors in aggravation. He acknowledges that this Court has rejected this claim in *People v. Duncan* (1991) 53 Cal.3d 955, 978. (AOB 252-253.) This Court has consistently rejected this claim. (*People v. Geier, supra*, 41 Cal.4th at pp. 618-619; *People v. Taylor* (2001) 26 Cal.4th 1155, 1181.) Appellant again has offered no compelling reason for this Court to overturn its prior rulings.

Appellant contends that the penalty phase jury instructions erroneously failed to inform the jurors regarding the burden of proof as to mitigating factors, and that unanimity was not required for the finding of mitigating factors. (AOB 253-254.) This Court has consistently rejected appellant's claim regarding instruction for the burden of proof. (*People v. Valencia, supra*, 43 Cal.4th at p. 311 ["The death penalty statute is not unconstitutional for failing to provide the jury with instructions of the burden of proof and standard of proof for finding aggravating and mitigating circumstances in reaching a penalty determination"]; *People v. Morrison, supra*, 34 Cal.4th at pp. 730-731 [same].) This Court also has consistently rejected the claim that the jury should be instructed that unanimity is not required for finding mitigating factors to be present. (*People v. Cook* (2007) 40 Cal.4th 1334, 1365 [rejecting claim that jury should be instructed that unanimity is not required for determining whether mitigating factors existed]; *People v.*

Smith, supra, 30 Cal.4th at p. 639 [same]; *People v. Breaux, supra*, 1 Cal.4th at pp. 314-315 [same].) These claims fail.

Appellant contends that the jury erroneously should have been instructed that life without parole was the presumed punishment. He acknowledges that this Court rejected the claim in *People v. Arias, supra*, 13 Cal.4th at p. 190. (AOB 254-255.) This Court again rejected the claim in *People v. Kennedy, supra*, 36 Cal.4th at p. 641, and in *People v. Coffman* (2004) 34 Cal.4th 1, 129. This claim fails.

Appellant contends that the jury was not required to make written findings during the penalty phase. He acknowledges that this Court has rejected this claim in *People v. Cook, supra*, 39 Cal.4th at p. 619. (AOB 255-256.) This claim fails as this Court has again recently rejected the exact claim appellant has asserted. (*People v. Cruz, supra*, 44 Cal.4th at p. 681; *People v. Romero, supra*, 44 Cal.4th at p. 428; *People v. Riggs, supra*, 44 Cal.4th at p. 329.)

This Court has consistently held that, contrary to appellant's argument (AOB 256), that use of restrictive adjectives such as "extreme" and "substantial" in the sentencing statute and instructions do not render either unconstitutional. (*People v. Watson* (2008) 43 Cal.4th 652, 704.) Appellant contends that insofar as the jury instructions used these adjectives regarding mental or emotional disturbance as a mitigating factor for factor (d), it prevented consideration of mitigating evidence under factor (k). He acknowledges that this Court has rejected this claim in *People v. Avila, supra,* 38 Cal.4th at p. 614. However, he asks that this Court reconsider its prior line of decisions in light of *Brewer v. Quartermain*, 127 S.Ct. 1706. (AOB 256-260.) Appellant's claim fails.

Brewer is wholly inapposite to the present case. California's death penalty statute, unlike the Texas statute at issue in *Brewer*, expressly permits the jurors to consider a wide array of mitigating evidence, including whether the defendant had a mental defect, or extreme emotional disturbance, which affected his ability to fully consider the nature and consequences of his actions. (Pen. Code §§ 190.3, subds. (d), (h) & (k).) Furthermore, unlike the circumstances in *Brewer*, the prosecutor in this case never sought to preclude the jury from considering the mitigating effect of evidence regarding

appellant's mental health issues and his alleged intoxication. Instead, the prosecutor merely stated that such evidence was not severe enough to constitute an extreme emotional disturbance under factor (d), and that those problems did not preclude him from appreciating the nature and consequences of his actions were not entitled to much weight as mitigation under factor (k). (23 RT 4511, 4513.) Accordingly, because there is no reason to believe the jury was impermissibly restricted in its consideration of mitigating circumstances, appellant's claim should be rejected.

Appellant contends that the jury should have been instructed which sentencing factors were aggravating and which were mitigating. He claims that the failure to instruct allowed the jury to find that a lack of a "mitigating" factor was actually an aggravating factor. He acknowledges that this Court has rejected the claim in *People v. Hillhouse* (2002) 27 Cal.4th 469, 509. (AOB 260.) This Court has repeatedly rejected this claim. "[W]e have held the trial court is not obligated to identify which factors are mitigating and which are aggravating [citations], or to instruct that the absence of evidence supporting a particular mitigating factor is not aggravating." (*People v. Lewis, supra*, 43 Cal.4th at p. 532, citing *People v. Rogers, supra*, 39 Cal.4th at p. 897; *People v. Pollock* (2004) 32 Cal.4th 1153, 1193-1194; *People v. Farnam, supra*, 28 Cal.4th at p. 191.) This claim fails.

Appellant contends that California's death penalty scheme unconstitutionally fails to require inter-case proportionality review. He recognizes that this Court has rejected this claim in *People v. Fierro* (1991) 1 Cal.4th 173, 253. (AOB 260-261.) This Court has repeatedly rejected this claim. "Neither the federal nor state Constitution requires intercase proportionality review for death penalty cases." (*People v. Lindberg* (2008) 45 Cal.4th 1, 54, citing *Pulley v. Harris, supra*, 465 U.S. at pp. 50-51; *People v. Williams*, supra, 40 Cal.4th at p. 287.)

Appellant contends that he was denied equal protection under the United States Constitution and the California Constitution because the trial court would not grant appellant's request and compel prosecution witness Bobby Rollins to submit to a pretrial deposition. Appellant claims that a deposition would have been compelled in a civil trial,

and that the failure to compel a deposition in his criminal trial, denied him equal protection. (AOB 261-265.) This claim also lacks merits.

> "In resolving equal protection issues, the United States Supreme Court has used three levels of analysis. Distinctions in statutes that involve suspect classifications or touch upon fundamental interests are subject to strict scrutiny, and can be sustained only if they are necessary to achieve a compelling state interest. . . . But most legislation is tested only to determine if the challenged classification bears a rational relationship to a legitimate state purpose."

(*In re Smith* (2008) 42 Cal.4th 1251, 1262-1263, quoting *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200.)

Contrary to appellant's argument (AOB 262-264), a criminal defendant does not have "a fundamental due process right to pretrial interviews or depositions of prosecution witnesses." (*People v. Panah, supra*, 35 Cal.4th at p. 458, citing *People v. Municipal Court (Runyan)* (1978) 20 Cal.3d 523, 530-531.) In *Runyan*, this Court held that "'[p]retrial discovery in favor of defendants, . . . is not required by due process.'" (*People v. Municipal Court (Runyan), supra*, 20 Cal.3d at p. 530, quoting *Jones v. Superior Court* (1962) 58 Cal.2d 56, 59-60.) "'It generally has been recognized that (a) right to a deposition in criminal cases did not exist at common law, *nor is it a constitutional right*.'" (*People v. Municipal Court (Runyan), supra*, 20 Cal.3d at p. 530 [emphasis in original], quoting *People v. Bowen* (1971) 22 Cal.App.3d 267, 278.)

This Court stated as follows:

> We note that an accused is not, of course, wholly without means of ascertaining the facts upon which a criminal charge is based. In felony cases, the preliminary examination or grand jury hearing transcripts will ordinarily provide a valuable source of pretrial information. In addition, police reports and witnesses' statements are readily discoverable upon a proper showing of need. (See *Pitchess v. Superior Court* [(1974)] 11 Cal.3d 531, 537-538[] (discovery of sheriff's records of prior brutality by deputies).) Furthermore, nothing ordinarily would prevent the accused from interviewing prosecution witness to ascertain their version of the events. (See *Clark v. Superior Court* [(1961)] 190 Cal.App.2d 739,

742-743[]; *People v. Lopez* (1963) 60 Cal.2d 223, 246-247[] (discovery of names of prosecution witnesses).)

> There are many reasons why the Legislature may be reticent to extend deposition procedures in criminal cases notwithstanding a constitutional authorization: the existence of sufficient alternative means of achieving pretrial discovery; the factor of considerable state expense relating to the payment of witness and transcription fees, for the services of a magistrate [citation], counsel and security arrangements; substantial trial delays which might ensue, given the necessity for adequate notice of depositions, opportunity for objections and hearings, and difficulties in scheduling depositions which, under present law [citation] must be taken in defendant's presence if he so desires.
>
> The Legislature has chosen to limit the availability of deposition procedures in criminal cases to those particular situations which it has specified. We do not speculate is to its reasons. It is enough for us to know that it has not chosen to do what constitutionally it may do.

(*People v. Superior Court (Runyan), supra*, 20 Cal.3d at pp. 531-532.)

Plainly under the applicable rational basis test, there was no equal protection violation. The only prejudice appellant believes he has suffered due to the alleged violation of equal protection is that he was unable to "pin down" the testimony of prosecution witness Bobby Rollins. He complains that prior to his trial testimony, Rollins never had testified or asserted that appellant was wearing gloves during the murder and that he said that he "always wanted to do that." (AOB 262, fn. 58.) Appellant has failed to explain how compelling Rollins to be subject to a pretrial deposition would have prevented him from including statements at trial that he had not made previously. Moreover, appellant has failed to explain why he was unable to attempt to impeach Rollins during the course of the trial due to his new testimony. Accordingly, any error that may have occurred was harmless beyond a reasonable doubt, and appellant is not entitled to relief for his equal protection claim. (*Chapman v. California* (1968) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705]; *People v. Taylor* (1982) 31 Cal.3d 488, 501-502; see *People v. Humphrey* (1996)13 Cal.4th 1073, 1089.)

Appellant's final contention is that California's capital sentencing scheme violates the Equal Protection Clause because capital defendants are treated differently than non-capital defendants in that there is no burden of proof for aggravating and mitigating circumstances, no requirement of unanimity for findings regarding aggravating and mitigating circumstances. He acknowledges that this Court has previously rejected these equal protection arguments in *People v. Manriquez* (2005) 37 Cal.4th 547, 590. (AOB 266.) This Court has recently reaffirmed its holding in *Manriquez* regarding appellant's equal protection claim. (*People v. Loker, supra*, 44 Cal.4th at p. 756 [capital and non-capital defendants are not similarly situated]; *People v. Watson, supra*, 43 Cal.4th at p. 701 [same].) Accordingly, this claim fails, as do all of the other challenges appellant has raised in Claim 25 of his Appellant's Opening Brief.

XXVI. APPELLANT HAS FAILED TO SHOW THAT ANY CUMULATIVE PREJUDICIAL ERROR OCCURRED AT TRIAL

In Claim 26, appellant argues that the cumulative effect of the errors that occurred at the guilt and penalty phases of the trial warrant reversal. (AOB 267-270.) As set forth in this Respondent's Brief, appellant has failed to show that any prejudicial error occurred during his trial. Consequently, this claim fails. (*People v. Wallace, supra*, 44 Cal.4th at p. 1099; *People v. Mungia* (2008) 44 Cal.4th 1101, 1143.)

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CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court affirm the judgment in its entirety.

Dated: February 13, 2009

EDMUND G. BROWN JR.
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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 56,187 words.

Dated: February 13, 2009

EDMUND G. BROWN JR.
Attorney General of California

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Christopher James Sattiewhite***

Case No.: **S039894**

I declare:

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

On February 13, 2009, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 13, 2009, at Los Angeles, California.

Y. Cuan-Claro
Declarant

Signature

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