IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **BRYAN MAURICE JONES,** Defendant and Appellant.	S042946 **CAPITAL CASE**

San Diego County Superior Court No. CR136371
The Honorable Laura P. Hammes, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

Appellant was charged with a series of brutal murders and attempted murders spanning August of 1985 through October of 1986. Three of the murder victims were found in dumpsters behind appellant's apartment; two of them had been set on fire. The fourth murder victim was found nude in a grassy area close to where appellant worked, the body wrapped in bedding. All four murder victims showed signs of having been severely beaten, although one of the victims' bodies was so severely burned that postmortem determinations about the body were difficult. Appellant's two attempted murder victims and a third victim had been brought to appellant's home or the residence where he worked, near where one of the bodies was found. Each of the attempted murder victims was strangled, beaten, and sexually assaulted. Two different DNA tests – DQ-Alpha and Polymarker – were conducted on seminal fluid found in the murder victims' vaginas and anal cavities. The results did not exclude appellant as a contributor and there was testimony addressing the population frequencies of appellant's known DNA with that of the DNA samples found with the victims. The jury did not reach verdicts on two of the four murder counts; the counts involving the burned bodies.

The defense presented evidence attempting to establish that someone other than appellant committed the crimes. The defense offered explanations for fingerprints, carpet fibers and other circumstantial evidence tying appellant to the crimes and claimed the sex with the attempted murder victims was consensual.

On appeal, appellant unsuccessfully attempts to dissect the evidence and attack the trial court's joinder of all the offenses. Appellant's strategy of fragmenting the evidence and instructions into pieces is unavailing because this Court considers the totality of the evidence, giving deference to the trial court's evidentiary determinations, and considers the jury instructions as a whole.

STATEMENT OF THE CASE

On January 27, 1994, the District Attorney of San Diego County filed a nine-count Second Amended Information charging appellant as follows: in count one with the August 15, 1985, attempted murder of Maria R. (Pen. Code, §664/187, subd. (a)); in count two with August 29, 1985, murder of Tara Simpson (Pen. Code, § 187, subd. (a)); in count three with the February 11, 1986, murder of Trina Carpenter (Pen. Code, § 187, subd. (a)); in count four with the May 9, 1986, murder of JoAnn Sweets (Pen. Code, § 187, subd. (a)); in count five with the August 15, 1986, murder of Sofia Glover (Pen. Code, § 187, subd. (a)); in count six with the October 20, 1986, attempted murder of Karen M. (Pen. Code, §§ 664/187, subd. (a)); in count seven with the October 20, 1986, forcible rape of Karen M. (Pen. Code, § 261, subd. (a)(2)); in count eight with the October 20, 1986, sodomy by use of force of Karen M. (Pen. Code, § 286, subd. (c)); and in count nine with the October 20, 1986, forcible oral copulation of Karen M. (Pen. Code, § 288a, subd. (c)). (31 CT 5803-5806.) The information further alleged an enhancement and several special

circumstances as follows: regarding count one, the attempted murder of Maria R., appellant used a dangerous weapon, to wit: a rope (within the meaning of Pen. Code, § 12022, subd. (b)); regarding count three, the murder of Carpenter, the special circumstance of murder during the commission of a rape (within the meaning of Pen. Code, § 190.2, subd. (a)(17)); regarding count four, the murder of Sweets, the special circumstance that appellant committed the murder during the commission of sodomy (within the meaning of Pen. Code, § 190.2, subd. (a)(17)); regarding count five, the murder of Glover, the special circumstances of murder during the commission of rape and murder during the commission of sodomy (Pen. Code, § 190.2, subd. (a)(17)); the information further alleged the special circumstance that appellant committed multiple murders (within the meaning of Pen. Code, § 190.2, subd. (a)(3)). (31 CT 5803-5806.)

Following the determination of several pretrial motions,[1/] on February 8, 1994, a jury trial commenced. (38 CT 7215.) On March 31, 1994, the jury found appellant guilty of counts one, and four through nine, making a true finding that appellant used a deadly weapon during the commission of attempted murder (count one) as well as finding true the special circumstances that appellant murdered Sweets and Glover during the commission of sodomy (counts four and five), and that appellant committed multiple murder. (38 CT 7286-7295.) The jury did not return verdicts regarding counts two and three, the murderers of Simpson and Carpenter, nor make a finding regarding the special circumstances of murder during the commission of rape. (35 CT 6566-6565; 6573.)

On April 6, 1994, the penalty trial began. (38 CT 7297.) On April 12, 1994, the jury returned a verdict of death. (37 CT 6948.)

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1. The specific details of the various motions will be fully set forth and detailed in the briefing, as necessary, to determine the issues raised by appellant.

On September 16, 1994, the court denied appellant's motion for a new trial and for modification of the sentence (pursuant to Pen. Code, § 190.4, subd. (e)) and sentenced appellant to death. (38 CT 7316.) On that same day, the trial court imposed a total determinate prison term of 36 years four months as follows: for count one, the upper term of nine years with a consecutive one-year sentence for the weapons use enhancement; for count six, a consecutive sentence of one-third of the midterm of two years four months; for count seven, a consecutive upper term of eight years; for count eight, a consecutive upper term of eight years; for count nine, a consecutive upper term of eight years. (37 CT 7155, 38 CT 7316-7317.) The court stayed the imposition of the prison term pending appellant's execution and granted the People's motion to dismiss counts two and three. (38 CT 7317.)

This appeal is automatic.

STATEMENT OF FACTS

Over a period of approximately 16 months, appellant committed the attempted murders of Maria R. and Karen M. as well as the murders of Sofia Glover and JoAnn Sweets. While the jury did not reach a verdict regarding the murders of Tara Simpson or Trina Carpenter, their burned bodies were found in dumpsters in the alley behind appellant's apartment; Glover's body was similarly found in a dumpster behind appellant's apartment. All four of the murder victims were brutally beaten and showed signs of strangulation and, with the exception of Glover, the evidence definitively established they were prostitutes. Both Maria and Karen were also prostitutes and both had been lured to appellant's home to commit an act of prostitution. It was the prosecutor's theory of the case that appellant had developed a pattern of picking up women – typically prostitutes – beating and strangling them, and forcing

them to have sex. Bertha R. also testified to a similar experience as Maria R. and Karen M., although she was not a prostitute.

Prosecution's Case

In 1985 and 1986, appellant lived with his mother, Ann Jones, in an apartment at 4424 51st Street, No. 5, in San Diegto. (26 RT 2436-2437, 28 RT 2780-2781.) A rental agreement established that appellant and Jones occupied the apartment together from April 1985 through the end of April 1986, and at that time appellant assumed the lease. (29 RT 3067-3069.) However, appellant left the apartment on June 20, 1986. (29 RT 3069-3070.)

Appellant's mother, Ann Jones, worked as a health-care provider for an elderly woman, Tillie Wilsie, who lived at 4639 Mississippi Street in a single-family residence. (25 RT 2333-2335; 26 RT 2439, 2602-2603, 2605-2607.) Jones typically spent the night at the Wilsie home five days a week, having two days off. (26 RT 2452, 2622-2624.) Appellant would go to the Wilsie home to visit and sometimes work for Ms. Wilsie. (26 RT 2440, 2451-2452, 2607.) Tillie Wilsie passed away on July 6, 1986, and appellant was given a key to the home to stay there and to take care of it. (26 RT 2606-2607, 2621.) In August 1986 the body of Sofia Glover was found nearby the Wilsie residence and in October 1986 the offenses against Bertha R. and the attempted murder of Karen M. occurred at this residence. (25 RT 2263-2265; 26 RT 2532, 2639-2640.)

During 1985 and 1986, appellant had use of, and was seen driving, a light blue car. (25 RT 2337, 2241-2342; 26 RT 2442; 27 RT 2708-2709.) The car had a two-tone paint finish which was faded. (26 RT 2442-2443.) It was seen by witnesses on various occasions at the Wilsie home. (25 RT 2337; 26 RT 2608.) Appellant drove both Karen and Bertha in this car to the Wilsie home where he raped them. (26 RT 2525-2526; 26 RT 2640.)

Thursday, August 15, 1985, Sexual Assault Of Maria R.

On August 15,[2/] Maria R. was homeless in downtown San Diego and committing acts of prostitution to support herself and her drug habit. (24 RT 2041, 2059, 2069-2073.) Near Taco Bell on Broadway, appellant struck up a conversation with Maria at approximately 11:00 a.m., offering her $20 for sex. (24 RT 2042-2043.) Maria needed money for food and/or drugs, so she agreed. (24 RT 2044, 2071-2072.)

Appellant and Maria road the bus to appellant's home. (24 RT 2044-2045.) During the bus ride, appellant told her about going to college and living with his mother, and this put Maria at ease. (24 RT 2066.) They went to appellant's home at 4424 51st Street (24 RT 2045.) After appellant and Maria arrived at appellant's home, they had sex and appellant gave her $20. (24 RT 2045-2047.) Maria made herself a sandwich and took a shower. (24 RT 2045-2047, 2068.)

After Maria came out of the shower, she saw appellant standing with his hands behind his back and thought he wanted to have sex again. (24 RT 2048, 2077-2078.) Appellant had a rope behind his back which he wrapped around her neck and began choking her. (24 RT 2048.) Maria attempted to crawl away but appellant choked her to the point of unconsciousness at least two times. (24 RT 2048-2050.)

The second time Maria regained consciousness, appellant told her, "bitch, if you want me to let you go, you have to suck my dick." (24 RT 2050-2051, 2080.) Though Maria did not like oral sex, she complied out of fear of appellant. (24 RT 2051.) After appellant took back his $20, he let her leave. (24 RT 2051-2052.)

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2. The day of the week and date of the offense was stipulated to by the parties. (38 RT 4219.)

Maria immediately contacted the police who went to appellant's house, picked him up and brought them both to the police station. (24 RT 2052-2054.) Officer Gilbert Ninness with the City of San Diego Police Department responded to Maria's call and met her near a pay phone at 51st and El Cajon Blvd. (24RT 2090-2092.) Maria told Officer Ninness she had been choked three times and forced to orally copulate appellant at a nearby apartment complex. (24 RT 2092-2093.) Maria had bruises on her neck, was adamant that appellant be arrested and took Officer Ninness to the apartment. (24 RT 2094-2095, 2097.) Appellant was at the apartment, was *Mirandized* and placed under arrest for forcible oral copulation before being taken down to the police station. (24 RT 2095-2096, 2100.) At the apartment, Officer Ninness found a 12- to 15-inch-long woven leather rawhide rope which Maria identified as the item appellant used to choke her. (24 RT 2098-2099.)

Maria R. told Officer Ninness they had sex three times: first, consensual sex; second, appellant forced her to orally copulate him after choking her; third, appellant had sex "doggy style" with her. (24 RT 2104.) At first appellant denied having sex with Maria but then stated Maria felt "obligated to him" to have sex because he had helped her out. (24 RT 2096-2097.) According to appellant, Maria told him she had been beaten up by a Mexican, so appellant invited her to his home to get cleaned up. (24 RT 2097.) However, at trial Maria denied having a fight with a Mexican. (24 RT 2111-2112.) Appellant stated that he had sex "doggy style" with Maria, ejaculating into her vagina. (24 RT 2098.) According to appellant, Maria asked for $10 after they had sex, but he didn't have it. (24 RT 2098.)

At trial, Maria denied meeting appellant prior to August 15 of this contradicted what she told Officer Ninness. (24 RT 2064, 2107.) Appellant told Officer Ninness that he had met Maria three or four times (24 RT 2103), and Maria told Officer Ninness she had gone riding with appellant in his car

once before. (24 RT 2107).

Approximately a week after he attacked her, Maria went to appellant's apartment building with some "church people" – a man and woman – to confront appellant. (24 RT 2082-2083.) The church people went to appellant's apartment and spoke to someone while Maria stayed in the car. Maria did not know what was said during the conversation between the church people and appellant. (24 RT 2084.)

At the time of trial, Maria acknowledged having shoplifting convictions and one petty theft conviction. (24 RT 2085-2086.)

Thursday, August 29, 1985, Murder Of Tara Simpson

On August 29, 1985,[3/] at approximately 3:30 a.m., a worker at a gas station on El Cajon Blvd. and Altadena noticed smoke coming from a dumpster in the alley behind appellant's apartment. (24 RT 2116-2118.) Approaching the dumpster he could see flames coming from it and smell either gas or oil. (24 RT 2119.) As he walked away, he heard an explosion, ran back to the gas station and called 911. (24 RT 2119-2120.)

A San Diego Police Officer responded within five minutes to the fire which was in a dumpster in the North alley near the 5000 block of El Cajon Blvd. – behind appellant's apartment. (24 RT 2130-2131.) After the fire was put out, firefighters reported to him they had found a body in the dumpster, and when the officer looked in the dumpster, he saw the charred remains of a nude female, burned beyond recognition. (24 RT 2132-2133.) The officer called for a sergeant to handle the crime scene, and at approximately 4:30 a.m. began knocking on doors at the apartment complex on the other side of the fence from where the dumpster was located to see if anyone could give him information.

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3. The day of the week and date of the offense was stipulated to by the parties. (38 RT 4219.)

(24 RT 2134-2136.) While people in most of the apartments responded when he knocked on their doors, no one in appellant's apartment (apartment 5) responded. (24 RT 2135-2136, 2140-2141.)

An investigation of the area near the dumpster revealed a pack of matches on a dumpster approximately 60 feet away from the one in which Simpson's body was found. (24 RT 2150.) No fingerprints were found on the matchbook. (24 RT 2160-2161, 2170.)

Examination of the dumpster indicated that the fire was arson and that it started and spread quickly. (24 RT 2185-2188.) Charring patterns indicated a flammable liquid ignited the contents of the dumpster. (24 RT 2183, 2192-2193.) Also, an expert opined that there was not enough debris in the dumpster to create the amount of heat necessary to have caused the damage the dumpster sustained without an accelerant. (24 RT 2184-2185.) In the dumpster the fire investigator found the charred remains of combustible paper products, wood, and a metal one-gallon container along with the Simpson's charred body. (24 RT 2179-2180.)

Simpson's body was burned so severely it was difficult to determine her ethnicity; her face was charred beyond recognition, her breasts were charred, the skin on her side was split, and the bones on her legs were showing. (24 RT 2133.) Vaginal swabs were taken from Simpson's body and sent to San Francisco, but the results were inconclusive for spermatozoa. (26 RT 2474-2476, 2505.) This was attributable to the severe burning of Simpson's body. (26 RT 2495-2498.) However, swabs taken from Simpson's mouth, vagina and rectum during the autopsy indicated the presence of seminal fluid. (30 RT 3197.)

The coroner's examination determined Simpson was an adult African-American female, 5 feet 8 inches tall, 137 pounds, but her age could not be determined because of the condition of her body. (30 RT 3181-3182.)

Despite her excessive burns, the coroner detected trauma to her nose which would not have been caused by fire. (30 RT 3183-3184.) Simpson's body had been exposed to so much heat the fatty tissues had popped and split the skin. (30 RT 3184.) Nonetheless, the coroner discovered a 3.5 inch knife wound in Simpson's abdomen, penetrating the muscle and the perineum, which could not have been caused by the fire. (30 RT 3186-3188.) The wound could have resulted in death if untreated. (30 RT 3188.) The coroner believed the knife wound occurred prior to death but could not make that determination with certainty. (30 RT 3188-3189.)

The coroner also found signs of asphyxia based on the condition of her heart but found no evidence of trauma to her throat area or airway. (30 RT 3190-3191.) There were also signs of trauma to Simpson's renal gland above the right kidney. (30 RT 3192.) The coroner estimated the cause of death to be alcohol and cocaine poisoning even though the stab wound could have been fatal if untreated. (30 RT 3197-3199.) Because there was no smoke in Simpson's lungs, she was dead before she was burned. (30 RT 3191-3192.)

Thursday, February 11, 1986, Murder Of Trina Carpenter

On February 11, 1986,[4] at approximately 9:45 p.m. Daniel Wood, who lived in an apartment on Altadena Avenue, arrived home and parked his car in his assigned spot next to a dumpster in the same alley as the dumpster where Simpson's body was found, approximately a block away. (25 RT 2208, 2242.) Leaving his car, he did not notice anything unusual and thought the dumpster lid was closed. (25 RT 2209.) However, when Wood returned to his car between five and 30 minutes later, he noticed smoke coming from the dumpster and the dumpster lid was closed. (25 RT 2209-2210.) Wood's

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4. The day of the week and date of the offense was stipulated to by the parties.) (38 RT 4219.)

apartment manager called the fire department. (25 RT 2210.)

On the same night, at approximately 10:00 p.m., Michelle Klindt, who lived on Altadena and had an assigned spot in the alley on the other side of the dumpster as Wood, heard a loud "thunk" in the alley. (25 RT 2217-2220.) The dumpster area was well lit, and when Klindt looked out her window she could see the front end of an older, light blue car with oxidized paint. (25 RT 2222-2223, 2229.) The car was parked near the dumpster and the lid of the dumpster was open. (25 RT 2020-2021.) A half-hour later Klindt heard fire trucks arrive, and when she went outside, the blue car was no longer there. (25 RT 2224-2225, 2236.)

Joseph Nagy, a captain with the San Diego fire department, received and responded to the call regarding the dumpster fire. (25 RT 2242.) Captain Nagy stated the fire on February 11 was not as intense as the Simpson fire. (25 RT 2243.) The fire took less water and time to put out, but in the dumpster they found Carpenter's body along with clothing and a gas can. (25 RT 2244, 2300.)

Carpenter was African-American, 5 feet 4 inches tall, weighing 114 pounds and was 22 years old. (30 RT 3200.) Carpenter's body had been folded up and placed in a large, green lightweight gym bag which was partially scorched and had the initial "D. Belman." (25 RT 2298-2299, 2321-2322, 2412-2413; 30 RT 3200-3201.) Her body was partially charred – thighs, feet and elbows were burned – and her legs and feet were coming out of the end of the bag. (25 RT 2298-2299, 2321-2322, 2415-2416; 30 RT 3200-3201.) In the dumpster with Carpenter were items of clothing and a purse containing a partially burned red Bible; both the purse and Bible smelled of flammable liquids. (25 RT 2382-2384.) The clothing, purse, and other debris in the dumpster tested positive for a petroleum-based fire accelerant. (27 RT 2736-2738, 2740.)

Carpenter died from asphyxia caused by strangulation. (30 RT 3208.) Carpenter's eyes had broken blood vessels indicative of asphyxia and her scalp showed signs of asphyxia as well. (30 RT 3201, 3206.) While there were no ligature marks around her neck, she did have bruising and extensive injuries to her neck indicating manual strangulation. (30 RT 3203, 3205-3206, 3208-3210.) She also had teeth marks on her tongue where she had bitten it. (30 RT 3202-3203:) Carpenter did have cocaine and cocaine metabolites in her system. (30 RT 3207.)

In the bag with Carpenter's body were two cotton balls, one in her hand and one near her buttocks. (25 RT 2393, 2419; 26 RT 2510.) The cotton balls had spermatozoa on them, possibly drainage from her vagina. (26 RT 2477-2478.) Swabs were taken from Carpenter's mouth, vagina and rectum, and there were spermatozoa on the vaginal slides but not on her rectal or oral slides. (26 RT 2479-2481, 2508.) Carpenter's vagina indicated recent sexual activity, and she had a high concentration of acid phosphatase – a component of semen – in her vagina as well as some sperm. (26 RT 2458-2459; 30 RT 3203, 3207.) Swabs from Carpenter's rectum and mouth did not have spermatozoa, but there was fecal discharge from her rectum which made it difficult to detect sperm. (30 RT 3204, 3207.)

Dr. Edward Blake, an expert in analyzing DNA from various bodily fluids, analyzed DNA samples in the instant case using the PCR DQ-Alpha technique. (28 RT 2875-2885, 2891-2903.) Dr. Blake analyzed sperm on the cotton balls found in the duffel bag as well as known specimens from Carpenter and appellant. (28 RT 2911-2913.) The sperm specimen contained an unequal mixture of two different DQ-Alpha types, indicating two different sperm donors. (28 RT 2912-2913-2916.) Epithelial cells consistent with Carpenter's DNA type were also found in the sperm specimen. (28 RT 2915-2916.) The dominant amount of sperm DNA was consistent with appellant's

DNA type. (28 RT 2914-2916, 2925-2926, 2935-2936.)

Dr. Blake also did a population frequency analysis of of the various DQ-Alpha genotypes amongst African-Americans, Caucasians, and Mexican-Americans; appellant's genotype appeared in approximately 6% of the African-American population, 5% in the Caucasian population, and in slightly more than 2% of the Mexican-American population. (28 RT 2937-2944.)

Friday, May 9, 1986, Murder Of JoAnn Sweets

On the morning of May 9, 1986,[5] at approximately 10:00 a.m., Sweets' body was found under a knit blanket in a dumpster by a man looking for recyclable cans. (25 RT 2344, 2350.) The dumpster was located behind appellant's apartment complex[6] in the alley a short distance away from where Carpenter's body was found in a dumpster. (25 RT 2302, 2362, 2367.) She was nude except for a black bra and black shirt. (25 RT 2398.)

Sweets was an African-American, 5 feet 9 inches tall, 152 pounds and 34 years old. (30 RT 3211.) Sweets had suffered massive injury to her face and neck. Sweets died from manual strangulation, having broken blood vessels in her eyes – a sign of asphyxia. (30 RT 3212, 3218.) Sweets had extreme injuries to her nose, mouth, jaw and neck. (30 RT 3212-3214.) Her face and neck were swollen and she had massive hemorrhaging in her neck. (30 RT 3212-3214.) Her neck was broken at the fifth cervical vertebrae, her spinal cord was crushed, her left clavicle was broken, her first rib was broken and her right carotid artery was lacerated. (30 RT 3213-3214, 3216-3217.)

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5. The day of the week and date of the offense was stipulated to by the parties. (38 RT 4219.)

6. Officer Ninness participated in the investigation and recalled it was the same apartment complex where Maria R. had been sexually assaulted. (25 RT 2365-2366.)

Extreme force was necessary to inflict these wounds. (30 RT 3214, 3217.)

In the dumpster, Sweets' body was wrapped in a floral print sheet as well as a white mattress pad and put into two black plastic bags which were taped together. (25 RT 2399.) Her body was found under a blanket which covered everything in the dumpster and which was described as a green, brown, gold and white afghan. (25 RT 2351, 2395-2397.)

Appellant's sister, LaVern Allen, crocheted as did her mother. (28 RT 2780-2782.) Allen identified the afghan covering Sweets in the dumpster as one either she or her mother had crocheted. (28 RT 2783-2785, 2794-2797, 2802-2805, 2007-2011.)

Appellant's fingerprint was found on the upper left edge of the dumpster. (25 RT 2400-2402.) On Sweets' shirt, the sheet, mattress pad, and afghan were fibers matching carpet fibers from appellant's apartment. (29 RT 3093-3095, 3130-3134.)

The plastic bags in which Sweets' body had been placed were processed using special equipment in Canada – the equipment was not available in the United States. (27 RT 2746-2747.) Fingerprints from the right thumb, the side of the palm, and from the knuckle of the second joint of the left index finger matched appellant's latent fingerprints. (28 RT 2820, 2823-2825, 2827, 2847-2851.) These were the only fingerprints found on the bags except for a fourth print which was not clear enough to make out. (28 RT 2850-2851, 2873.)

Swabs were taken from Sweets' mouth and vagina and swatches cut from the sheet in which she had been wrapped. (25 RT 2405-2407.) However, no sperm was found on Sweets' oral or vaginal slides. (26 RT 2486-2487, 2510-2511.)

Five areas of the bed sheet in which Sweets was wrapped were stained with semen and sent to a lab to be processed for DNA testing. (26 RT

2482-2484, 2512-2513.) Dr. Blake tested the stains and found a mixed sample of semen and epithelial cells in one portion of the sheet. (28 RT 2926-2928.) The epithelial cells matched Sweets and the sperm fraction matched appellant. (28 RT 2928.) On the control portion of the sheet – the portion without semen – Dr. Blake also found epithelial cells matching appellant's DQ-Alpha DNA type. (29 RT 3038-3039.)

The same population frequency analysis as that set forth above applied to the Sweets DNA evidence.

Friday, August 15, 1986, Murder Of Sophia Glover

At 6:30 a.m. on August 15,[7] police responded to a phone call regarding a body found on Madison Avenue. (25 RT 2247.) Glover's body was in the grassy portion between the curb and sidewalk – the parkway –on the 2200 block of Madison Avenue near the alley. (25 RT 2248-2249.) Glover's body was rolled up in a green blanket with her feet sticking out of the end of the blanket. (25 RT 2250-2251, 25 RT 2308-2309.)

When Glover's body was unraveled from the blanket, she was nude except for a scarf wrapped around her neck. (25 RT 2309.) The blanket was examined and found to have fecal matter, some blood, and semen stains. (26 RT 2488, 2515-2517.) Glover's body had numerous insect bites, a large abraded area on her buttocks and upper thigh, a laceration to the right side of her head, and a small abrasion on the midline of her neck. (25 RT 2311-2312.)

Glover's autopsy established she was an African-American female, 37 years old, 5 feet 3 inches, and 111 pounds. (30 RT 3236.) Glover had severe trauma to her head, neck and chest. (30 RT 3237-3241.) Glover had a laceration behind her ear, broken blood vessels in her eyes, scrapes and

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7. The day of the week and date of the offense was stipulated to by the parties. (38 RT 4220.)

abrasions around her neck, several bruises on her collarbone, bruising on her left armpit and on the left side of her chest, and blunt force trauma injuries on her scalp. Glover died of asphyxia due to manual strangulation; the medical examiner opined the scarf could have been used as a ligature and not left a mark on her neck. (30 RT 3244.) No sperm were found on oral swabs, but a small amount was found on the vaginal swabs. (30 RT 3244-3245.) Acid phosphatase, an enzyme found in seminal fluid, and sperm were found on Glover's anal swab. (26 RT 2458-2462.) Glover also had cocaine in her system. (30 RT 3243.)

That same day Glover's body was found, Tillie Wilsie's neighbor[8/] returned home from work at approximately 4:30 p.m. and found a pile of clothes neatly folded in a stack in the alleyway. (25 RT 2263-2265.) The pile of clothes consisted of a white Chargers T-shirt, a multicolored scarf trimmed in light blue, a burgundy tote bag imprinted with the phrase "I like champagne, Cadillacs and cash," a burgundy blouse, a pair of green quilted slippers, and a pair of gray nylon pants. (25 RT 2268-2269.)

Bettie Davis, a friend of Sophia Glover, recalled Glover coming to her home in southeast San Diego on Trojan Avenue on August 14, 1986, at approximately 10:30 p.m. to change her clothes and get cleaned up. (25 RT 2286-2289.) When Glover left Davis' home that evening, at approximately 11:00 p.m., she was wearing the gray pants, burgundy top, scarf, and green slippers which were found in the alley, and Davis identified the tote bag as the one Glover was carrying when she left Davis' home. (25 RT 2288-2291, 2294.) Davis had grown up with Glover and knew Glover was on the streets and did not have a place to stay, so she had told Glover she was welcome to come by and visit, cleanup, and change clothes, and Glover did so. (25 RT

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8. The neighbor resided at 4665 Mississippi Street next door to Wilsie. (25 RT 2263-2265.)

2286-2288, 2292-2293.) Before Glover left that evening, Glover told Davis she would be right back. (25 RT 2295.)

Dr. Blake did an analysis of the sperm found on Glover's anal swab. (28 RT 2929.) Using PCR DQ-Alpha DNA analysis, Dr. Blake detected epithelial cells consistent with Glover's DNA as well as sperm cells consistent with appellant's DNA. (28 RT 2929-2936.) The same population frequency analysis previously discussed was also applicable to Glover's DNA analysis. (See 28 RT 2937-2942.)

Thursday, October 16, 1986, Offenses Against Bertha R.

In October 1986,[9] Bertha R. was living in North Park with her son and brother and had a job at the Navy exchange in the cafeteria. (26 RT 2635-2637.) She was not a prostitute. On October 16, Bertha had received a check from her sister and started walking to a check cashing business when she forgot the address, and stopped to look it up in the phone book. (26 RT 2636-2637.)

As Bertha was attempting to find the address, appellant pulled up in a blue 280Z and offered to drive her to the check cashing business. (26 RT 2637-2638, 2640.) Even though Bertha did not know appellant, he seemed nice, so she took the ride. (26 RT 2639.) However, when they arrived at the business the computers were down, so they could not cash Bertha's check. (26 RT 2639.) Appellant asked Bertha if she wanted to "kick it" (hang out) with him, and she agreed. Appellant took Bertha to the Wilsie home on Mississippi. (26 RT 2639-2640.)

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9. The day of the week and date of the offense was stipulated to by the parties. (38 RT 4220.)

Bertha recalled entering through the back of the home where there was a ramp, and appellant told her that his mother worked at the house. (26 RT 2640-2641.) After they entered the house, they sat down on the couch and appellant offered Bertha a marijuana cigarette to smoke with him. After they smoked the marijuana cigarette, appellant asked if he could kiss her. Bertha said no. (26 RT 2641-2642.)

While they were watching TV, appellant came from behind Bertha and grabbed her by the neck with his arm. (26 RT 2643.) Appellant put a knife to her neck and told her he would kill her and then ordered her to take off her clothes. (26 RT 2643-2645.) While appellant held Bertha by the neck, she removed her clothing and they got on the floor. (26 RT 2645.) Bertha was on her stomach, and when appellant unsuccessfully attempted to insert his penis into her anus, he rolled her onto her back and inserted his penis into her vagina. (26 RT 2646-2647.) When he was finished, appellant allowed Bertha to dress and then went through her purse and took her money. (26 RT 2648-2649.)

Appellant then told Bertha "I got to find someplace to put you," and they exited the home through the backdoor and got into his car. (26 RT 2650.) Appellant drove Bertha to Fiesta Island, told Bertha he knew where her family lived and would kill them, and then forced her to orally copulate him. (26 RT 2650-2652.) Appellant drove to Old Town and then Golden Hills where the car overheated. (26 RT 2653-2654.) Because she was afraid, Bertha did not attempt to escape or talk with appellant. (26 RT 2653-2655.) Appellant then drove to a Burger King and ordered himself a soda and Bertha a water. (26 RT 2655-2656.)

After they left Burger King, appellant drove to an alley approximately a block away. Bertha stated she was going to throw up, and appellant told her not to get sick in the car. (26 RT 2656-2657.) Bertha then jumped out of the car, tripped and cut her leg, and a woman came out of a

nearby building to help her. (26 RT 2657.)

The woman who helped Bertha was Olivia Gonzalez who worked with Catholic Charities. (27 RT 2688-2689, 2692.) The back of the building in which Gonzalez worked was on the alley where appellant was driving with Bertha, and Gonzalez saw appellant's car slowly going through the alley. She then saw Bertha in the alley, looking scared, and with a cut on her leg. (27 RT 2689-2692.) Gonzalez went out to help Bertha and appellant sped away. (27 RT 2693.)

By the time Gonzalez got Bertha into the building appellant was gone, and Gonzalez called the police. (27 RT 2693-2694.) Bertha was trembling, shaking, mumbling, incoherent and crying – Gonzalez had never seen someone so scared. (27 RT 2694-2695.) Bertha would not let Gonzalez leave her side, she could not drink water and was mumbling something about a check and money. (27 RT 2695-2696.) Bertha did tell Gonzalez she had been raped. (27 RT 2696.)

Approximately 10 minutes later, the police arrived and Bertha remained emotional, agitated, afraid and terrorized. (27 RT 2696-2697.) Eventually Bertha told how she had gotten into appellant's car on El Cajon Blvd., been taken back to his house, raped and driven around to various places where she was sexually assaulted. (27 RT 2697.) Approximately a week later Bertha related these events to Detective Allen Fragoso with the San Diego Police Department, Sex Crimes Unit. (27 RT 2701, 2711-2713.)

Monday, October 20, 1986, Attempted Murder Of Karen M

On October 20, [10] Karen was on her way to meet her boyfriend when appellant pulled up in a blue/gray 280Z,[11] and after she declined his offer to do drugs with him, appellant solicited her for an act of prostitution which she agreed to perform. (26 RT 2525-2528.) Specifically, appellant offered Karen $50 for a "half-and-half" – oral copulation and vaginal intercourse. (26 RT 2528-2530.) At this time, Karen had been using cocaine and heroin, and she committed prostitution and would steal to support herself. (26 RT 2524, 2528, 2567-2569, 2564-2569.)

Karen wanted to have a "car date" – commit the act of prostitution in appellant's car – because she thought it was safer, but appellant insisted on going back to his home. (26 RT 2530-2531.) Appellant took her to the Wilsie residence. (26 RT 2532.) Appellant brought Karen in the house through the backdoor (which had a wheelchair ramp) and she recalled the interior of the house looked as though whoever lived there was in the process of moving. (26 RT 2532-2534.) Karen also recalled seeing medical equipment and thought someone older lived there. (26 RT 2535-2536.)

Karen had been doing heroin and cocaine with her boyfriend the night before and also had a bottle of Jack Daniels, but because of her drug use, the Jack Daniels made her sick so she had not been drinking it. (26 RT 2524-2525.) Karen had the bottle of Jack Daniels with her. Karen offered some to appellant, which he declined, but when she took a sip of it, it made her sick to her stomach. (26 RT 2536.)

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10. Notice 38 RT 4220.

11. Karen identified a car which the appellant was known to drive. (26 RT 2525-2526.)

Appellant and Karen began undressing, and Karen asked about her money. (26 RT 2536-2537.) Appellant moved behind Karen, and began choking her, pulling her off the ground with his arm by her neck as she struggled. (26 RT 2537-2538.) Karen could not breathe, felt like she was going to pass out, and appellant told her he would kill her if she did not do what he wanted. (26 RT 2536-2538, 2549-2550.) Karen agreed to do what appellant wanted out of fear. (26 RT 2583-2584.) While Karen could not recall the exact sequence of events, appellant forced her to drink the Jack Daniels – making her drunk and sick – forced her to orally copulate him, he sodomized her, and attempted vaginal intercourse. (26 RT 2550-2556.) Eventually, Karen got dressed and passed out due to intoxication. (26 RT 2555-2556, 2584.)

The next thing Karen recalled was being awakened by the police, but she was still intoxicated. (26 RT 2556, 2586.) She was told she was being arrested for burglary and was taken to a detoxification center. (26 RT 2558-2559.) Karen recalled telling the police she was guilty of nothing more than prostituting and told them she had been raped. The police did not believe her. (26 RT 2558.)

Marjorie Wilsie, Tillie Wilsie's daughter-in-law, had called the police when she arrived at the home and found Karen passed out on a mattress. (26 RT 2609-2614.) She arrived at the house between noon and 1:00 p.m.. (26 RT 2626.) While Ms. Wilsie noticed a few things were amiss and found an empty whiskey bottle as well as a jacket, nothing was missing from the house and there was no sign of forced entry. (26 RT 2612-2613, 2617, 2628.)

At the time of trial, Karen was incarcerated in San Diego County Jail for grand theft and admitted having three or four felony convictions. (26 RT 2523, 2564.) Karen also stated she hoped to get favorable treatment as a result of her testimony but failed in that regard – rather than the two and one-

half years she hoped for, she received a three-year sentence. (26 RT 2588-2589, 2591-2592.)

Other Evidence

As a result of his investigations into the Bertha R. and Karen M. crimes, Detective Fragoso spoke with Tillie Wilsie's neighbor who stated he had seen a blue Datsun 280Z at that residence and believed it was owned by the son of the housekeeper who worked for Wilsie before she passed away. (27 RT 2702-2703.) Detective Fragoso eventually contacted appellant and told him he was investigating activities at the Wilsie home. (27 RT 2702-2703.)

Appellant told Detective Fragoso he had picked up Karen downtown, she was extremely drunk, and he took her to the house to give her a place to dry out. (27 RT 2705.) Detective Fragoso then asked appellant if he had taken anyone else back to the house, and appellant stated he had not. However, when confronted with facts and claims regarding Bertha, appellant stated that he had met Bertha at a check-cashing business and she agreed to have sex with him for $25. (27 RT 2706.) Appellant claimed they then had consensual sex at the Wilsie home, and he drove her to southeast San Diego and dropped her off at Ohio and El Cajon Boulevards.[12/] (27 RT 2706-2707.) Appellant produced the key to the Wilsie home. (27 RT 2706-2707.)

An expert on the phenomenon of sexual homicide testified on behalf of the prosecution. Dr. Meloy worked in private practice as a forensic pathologist, worked as the chief of court services for the Forensic Mental Health division for San Diego County and was a licensed psychologist in California as well as a licensed clinical social worker and board-certified forensic pathologist. (30 RT 3250-3253.) Dr. Meloy addressed a subfield of

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12. This location was approximately eight miles away from the alley where Bertha escaped from appellant. (27 RT 2707.)

psychology dealing with sexual homicides, having done research in the area and published papers on the topic. (30 RT 3254-3255.) The phenomenon of sexual homicide involves the intentional killing of another person where there was evidence of sexual activity by the perpetrator and the perpetrator was sexually aroused by committing violence in conjunction with the sexual act – either before, during, or after the act. (30 RT 3258-3260.)

Defense

Appellant presented evidence that the area where he and his mother lived together was known for prostitution and drug use. Appellant presented evidence detailing the violent, cruel underworld that existed where merciless drug dealers hooked women on drugs, turned them into prostitutes to pay for their habits, and life was cheap. Appellant attempted to link Carpenter and Sweets to this lifestyle and offered one witness who believed she saw the man who put Sweets' body into the dumpster and it was not appellant.

The alleyway where the dumpsters in which the bodies were found was known for having drug activity and prostitution. (32 RT 3348-3353.) At the end of the alley was a Travel Lodge Motel. (32 RT 3354.) Joyce Euwing lived at the Travel Lodge in 1986 for several months with her husband after moving out of her friend Donna's apartment. (32 RT 3363-3366.) Donna's husband, Ike Jones,[13] and Euwing had a violent altercation before they moved out. (32 RT 3366.)

Euwing stated that on May 9, 1986, as she was leaving the Travel Lodge at 5:30 a.m. she saw two men – one of whom she later identified as Ike Jones – putting what appeared to be a large rolled up carpet into a dumpster in the alleyway. (32 RT 3369, 3371 3373.) However, she was near-sighted and

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13. No relation to appellant.

was not wearing her glasses at the time. (32 RT 3372-3375.) Euwing did make a police report but made no mention of Ike Jones and claimed statements in the police report did not accurately reflect what she told police. (32 RT 3382-3385.) At trial Euwing described Ike Jones as 6 feet, 224 pounds and muscular, but the police report indicated she described one of the individuals as 6 feet, 185 pounds and the other as 5 feet 10 inches, 160 pounds with a medium build. (32 RT 3378, 3409-3410.) Euwing also acknowledged she did not like Ike Jones, that he had cost her $400, and she was still angry with him. (32 RT 3404-3405.)

Euwing's husband, Marvin Euwing, recalled living at the Travel Lodge following an altercation his wife had with Ike Jones and recalled his wife stating she had seen Ike Jones dumping a roll of carpet into a trash dumpster, and she reported this to the police. (32 RT 3431-3436.) Marvin also recalled an incident when he saw Glover being brutally beaten up by a man who was demanding money from her; this occurred a few days before seeing the story about her death. (32 RT 3440-3441, 3455-3456.) Marvin had not seen the man prior to the incident, and it was not appellant. (32 RT 3441, 3459.)

Appellant presented several witnesses who testified to drug activity which occurred on Bates Street, including the testimony of drug users who had been brutalized and brutalized others involved in the ruthless drug subculture (33 RT 3573-3576, 3582, 3593, 3600; 3610-3614), the enforcers in the subculture whom dealers used to beat people up (33 RT 3670-3671, 3673-3674), and the drug dealers themselves (33 RT 3713-3715). Many women who got involved with drugs turned to prostitution to support their habit. (33 RT 3577-3580, 3603-3604.) These women were often the target of violence by the drug dealer's enforcers. (34 RT 3887.) Bates Street was an epicenter of this activity.

In an apartment on Bates Street, Michelle Hicks, a drug-addicted prostitute, had been beaten up, shot at and sexually assaulted, and threatened with being put into a dumpster and burned like another girl she had heard about. (33 RT 3612-3616, 3627, 3642.) On the night of this ordeal, Hicks was being brought to El Cajon Boulevard to prostitute herself to pay her drug debt when police pulled over the car she was in, she began screaming and made a report to the police about what happened to her. (33 RT 3616-3619, 3625-3626, 3639.) The police made arrests as a result of her report. (34 RT 3851-3856, 35 RT 4005-4006, 4011.) Hicks did not recognize appellant as someone involved with the drug underworld on Bates Street. (33 RT 3622.)

Hicks stated that she knew Trina Carpenter (a.k.a. Nina Simmons) as one of the girls involved in the drug world of Bates Street. (33 RT 3636-3638.) Thomas Haines lived with Carpenter for a while and knew she used crack cocaine – because he used it with her –and knew she prostituted herself. (34 RT 3827-3829.) Haines and Carpenter went to Bates Street to buy drugs on occasion. (34 RT 3830.) Bates knew Carpenter to go by the aliases "Lady Capricorn" and Nina. (34 RT 3831.) This coincided with the name inside the Bible found in the dumpster with her – "Miss Capricorn." (34 RT 3831-3832.) Margret Walker also knew Carpenter as Lady Capricorn and knew she prostituted herself as well as bought drugs on Bates Street. (34 RT 3881-3882.) Walker had also seen Sweets on Bates Street several times. (34 RT 3883-3884.) Marion Evans knew Trina Carpenter and had seen her between 9:00 and 10:00 p.m. the night prior to her death. (32 RT 3475.) Evans saw Carpenter at an apartment on Bates Street, Carpenter did not look good, and left after stating two men were waiting for her. (32 RT 3476, 3485, 3493.)

Randy Lockwood, a Bates Street drug dealer enforcer, was present during the brutalization of Michelle Hicks. (33 RT 3670-3671, 3680 3685, 3687-3688.) Lockwood stated he was feared on Bates Street because he

was heavily armed and was known to take care of his business. (33 RT 3690-3691.) However, Lockwood did not know anyone known as Lady Capricorn. (33 RT 3691.)

La-Jon Van Reed (a.k.a. Little John, a.k.a. Boogieman) testified he was a drug dealer on Bates Street. (33 RT 3713-3714.) Van Reed acknowledged being involved in the brutalization of Hicks and firing a gun at her. (33 RT 3718-3722, 3726-3727, 3734.) Van Reed acknowledged telling Hicks that if she did not pay the drug money she owed, she would end up burned up in a dumpster. (33 RT 3725-3726.) Van Reed also acknowledged always carrying a firearm. (33 RT 3718.) Van Reed stated that he kept large sums of money at his apartment along with drugs, jewelry and weapons. (33 RT 3735.) Van Reed did not know anyone known as Lady Capricorn. (33 RT 3734-3736.)

Officer Mark Marcos had responded to the Wilsie residence on Mississippi on October 20, 1986, and found an intoxicated woman – Karen M. – on the living room floor. (33 RT 3645, 3648-3649.) The woman was taken to detox. (33 RT 3649.) Officer Marcos did not recall or report that the woman claimed to have been raped or physically assaulted because if she had she made such a claim, she would have been taken for a rape examination. (33 RT 3649, 3651-3652.)

Danya Cate knew Simpson when she lived in Portland, Oregon, and Simpson moved from Portland to San Diego in 1985. (34 RT 3777.) Before leaving Portland, Cate did not believe Simpson was involved with drugs, but after Simpson moved to San Diego she began using drugs and became involved with prostitution. (34 RT 3777-3779, 3785, 3790-3791, 3799-3800.) Cate recalled an incident when she was visiting Simpson and after Simpson used drugs, Simpson had difficulty breathing so Cate called an ambulance. (34 RT 3782-3783.)

Appellant's mother, Ann Jones, testified that the afghan which covered Sweets was made with colored yarn similar to colors she had worked with but she did not recognize the afghan as one she had made. (34 RT 3927-3929.) Regarding the mattress pad in which Sweets had been wrapped, she stated it was just like the ones she used but that all mattress pads were basically the same. (34 RT 3931-3932, 35 RT 3995-3996.)

Jones moved out of the apartment where she lived with appellant in either April or May of 1986 and appellant's girlfriend moved in. (34 RT 3932-3933.) Jones testified that while she worked for Tillie Wilsie, appellant would sometimes cover her shifts for her, and after Wilsie died, appellant stayed at the house. (34 RT 3936, 3939.) Jones also recalled a woman being found on fire in a dumpster behind her apartment, but she was working at that time and had not been home for a few days at the time the body was discovered. (35 RT 3978-3980.)

A stipulation was entered into that PCR DQ-Alpha testing was done on Ike Jones, Van Reed, Prince Johnson (one of the individuals involved in the brutalization of Hicks) and Lockwood and none of them could be eliminated as potential sperm contributors to the sperm on the cotton balls found with Carpenter. (34 RT 3867-3868.) Van Reed, Johnson and Lockwood were not potential sources of sperm regarding Glover. (34 RT 3868.)

Appellant presented his own DNA expert who believed the prosecutor's DNA expert, Dr. Blake, was the foremost expert in the field, and appellant's expert analyzed the sperm specimens using the same technique as Dr. Blake; dot intensity analysis. (37 RT 4088-4096.) Appellant's expert conducted additional testing and in the Glover sample found an extra allele but stated it could be a nonspecific allele that is present in all sperm – a pseudo-gene. (37 RT 4102-4104.) Otherwise, Glover's specimen showed PCR DQ Alpha-DNA consistent with appellant's DNA and Glover's DNA along with

the pseudo-gene. (37 RT 4105-4107.) Likewise, appellant's expert's results of the Carpenter specimens were similar to Dr. Blake's results but not identical. (37 RT 4108-4110.)

Prosecution's Rebuttal

The prosecution presented two witnesses, the girlfriend of Ike Jones and her sister, who accounted for Ike Jones' whereabouts during May 1986. During this time, Ike Jones and his girlfriend were "crazy about each other" and spent most of their time together. (38 RT 4229.) In May 1986 Jones and his girlfriend spent every night together either at his place or her place, and they would take her two children to the bus stop together every morning at 7:00 a.m. to catch the bus for school. (38 RT 4222-4223, 4227-4229, 4232-4233.) Both women recalled May 9 because Ike Jones and his girlfriend had intended to go to San Francisco on vacation but canceled because of Mother's Day weekend. (38 RT 4222-4223, 4228-4229.)

Another witness addressed the Bible with the name "Miss Capricorn." Michelle Jones' astrological sign was Capricorn, and she had gone to school with Trina Carpenter in 1979. (38 RT 4239-4240.) Michelle identified the Bible found with Carpenter in the purse in the dumpster as her Bible, identifying her handwriting inside the cover which stated "Better known as Miss Capricorn." (38 RT 4240-4241.) Michelle had never been known as "Lady Capricorn" and had not given the Bible to Carpenter. (38 RT 4242.) However, she no longer possessed the Bible some time before 1980; at that time, she moved and did not have it. (38 RT 4242-4243, 4245.)

The officer who interviewed Joyce Euwing initially, and then several times subsequently, recalled Euwing describing the two individuals as follows: one as 6 feet 1 inch, 185 pounds, muscular build, 20 to 30 years old; and the second as 5 feet 10 inches, 160 pounds, medium build and

approximately 24 years old. (38 RT 4247-4248, 4252, 4269.) However, Ike Jones was 5 feet 11 inches, 224 pounds and 43 years old. (38 RT 4258, 4269.) In interviews on May 9, May 10, and May 14, Joyce never gave the officer any name for either of the individuals. (38 RT 4251-4252, 4254.) It was not until much later when the officer showed Joyce a photographic lineup which included Ike Jones that she identified him as one of the individuals. (38 RT 4256-4257.) Another officer interviewed Joyce after she identified Ike Jones as one of the individuals in the alley, and Joyce related that a friend of hers had told her that Ike Jones was one of the men in the alley. (38 RT 4290.)

Kevin Bryant met Carpenter three weeks before her murder and knew her as "Nina." (38 RT 4278.) He knew she was a prostitute because they talked about how she made money. (38 RT 4280.) On the date she was murdered, Bryant spoke to her on the phone and they talked about "hooking up". (38 RT 4281-4282.) Carpenter stated she would be over in an hour after she made some money which Bryant understood as prostituting herself on the street. (38 RT 4281, 4284-4285.) Carpenter never showed up.

Dr. Edward Blake again testified concerning DNA. Dr. Blake discussed another technique of analyzing genetic material – Polymarker analysis which involves comparison of five genes rather than the one gene looked at in DQ-Alpha analysis. (43 RT 4779-4790.) Dr. Blake tested the samples from Ike Jones, Lockwood, Van Reed, Prince Johnson, and appellant. (43 RT 4790-4792.) Polymarker testing was also done regarding the semen on the cotton ball associated with Carpenter, the sheets associated with Sweets, and the sperm in the Glover samples. (43 RT 4807-4809.) Regarding Carpenter, Sweets, and Glover, appellant could not be eliminated as a contributor, but appellant was not the only contributor with regard to the Glover sample. (43 RT 4810-4812.) Because there was a co-contributor to the Sweets sample, the population frequency analysis was different than that for the DQ-Alpha testing, and this

would change the population frequency analysis to 15.1 percent. (43 RT 4843-4846.)

Regarding the Sweets sample, Ike Jones was eliminated as a contributor. (43 RT 4813-4814.) Regarding the Carpenter sperm, Lockwood, Van Reed, and Johnson were eliminated as contributors. (43 RT 4814-4819.)

Defense Rebuttal

Appellant presented two different expert witnesses who challenged whether Dr. Blake's Polymarker results could be accurately read. (43 RT 4898-4920; 4924-4955.)

Penalty Phase

People's Case

The prosecution presented four witnesses. They included appellant's sister and Bertha R., both of whom testified at the guilt phase of the trial. Three of the witnesses described encounters with appellant involving violence and/or sexual assault. Bertha R. described how the sexual assault she endured affected her life.

Appellant's sister, LaVern Allen, recalled living with appellant and her family in Barstow until she was 16 years old when her family moved to San Diego. (50 RT 5393-5394.) Allen's father began molesting her while she was in elementary school. He continued to molest her until they moved to San Diego when she was 16 years old.[14/] (50 RT 5394.)

When Allen was in fifth or sixth grade appellant began sexually molesting her. (50 RT 5395-5396.) Appellant would tell Allen he wanted to

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14. When she was 16 years old, Allen reported her father to the police. (50 RT 5405.)

"play the game" which meant fondling her, having sexual intercourse and oral sex. (50 RT 5395-5398.) Allen did not know what incest, childhood abuse or sexual molestation were, so she did not think what they were doing was wrong. (50 RT 5405-5406.) However, she did not want to play the game, it hurt when they had sex, and appellant would threaten to tell her father she had done something wrong which meant suffering severe corporal punishment.[15/] (50 RT 5396-5397, 5407.) Her father was a career Marine and used extreme force when disciplining them. (50 RT 5397.) Allen could not estimate how many times appellant had sexual intercourse with her. (50 RT 5398.) Appellant had sex with her in her bedroom, the den, and the swimming pool. (50 RT 5399.) The molests ended when appellant was 11 or 12 years old. (50 RT 5403.)

Tracy Davidson met appellant when she was 15 years old and they were both in the Job Corps in San Diego. (50 RT 5420.) Even though their days at the Job Corps were regimented and relationships between participants were forbidden, Davidson became pregnant with appellant's son. (50 RT 5421, 5423.) She gave birth to their son and lived with appellant until their son was approximately three years old. (50 RT 5423-5424.) While she lived with appellant, there were occasions when he would get violent and choke her with both hands around her neck, one-time choking her to the point of unconsciousness. (50 RT 5424-5425.)

After she broke up with appellant and moved out, she married David Entzminger. On one occasion when Entzminger made appellant mad, appellant threw him up against a car. (50 RT 5426-5429.) Davidson also recalled an incident on October 1, 1985, when appellant assaulted her and chipped her tooth. (50 RT 5437-5439.)

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15. Allen stated that manipulation was a way of life in her family, and the way you got what you wanted from other members of the family was to either bribe them or coerce them by threatening to expose them to discipline. (50 RT 5403-5404.)

Davidson recognized a picture of Trina Carpenter; a prostitute she knew on the street but Davidson did not know Carpenter's name. (50 RT 5440, 5443.) Davidson recalled an incident when appellant became angry with Carpenter and said, "Bitch, get my money." (50 RT 5441.) The incident occurred sometime between September 1985 and July of 1986. (50 RT 5442-5443.)

Aida L. recalled an incident with appellant on February 13, 1986. (50 RT 5046-5487.) Aida was a prostitute. While walking home from a friend's house between 11:30 p.m. and midnight, appellant pursued her, grabbed her, told her he wanted a blow job, dragged her down an alley into a parking garage, forced her to her knees, forced her to orally copulate him, and ejaculated. (50 RT 5489-5492.) Aida did not attempt to scream because she was afraid. (50 RT 5490.) After Aida orally copulated appellant, a car drove into the garage and startled appellant. (50 RT 5492-5493.) Appellant forced Aida to a location near a low fence, pulled down one leg of her pants, lifted her up against the fence, and attempted to insert his penis into her vagina. (50 RT 5492-5494.) When appellant could not insert his penis into her vagina, he slid his penis through her buttocks until he ejaculated. After he ejaculated, he adjusted his clothing. When Aida started to put her leg back into her pants, appellant grabbed her by the throat and choked her, telling her she better not say anything, scream, or tell the police because he would kill her. (50 RT 5495-5496.)

Aida contacted the police, nonetheless, but they did not believe her when she said she had been raped and refused to do anything. (50 RT 5496-5497, 5503-5504.) However, the next day while she was in a grocery store with her boyfriend, they saw appellant in the store and confronted him. (50 RT 5497-5500.) Appellant escaped from the store before the police arrived. (50 RT 5499-5500.) Aida was contacted by the police in January 1990, but she

did not want to talk to the officers at that point and did not recall any statements she gave them during that interview. (50 RT 5504-5506.)

Aida acknowledged having one felony conviction and misdemeanor convictions. (50 RT 5500-5501.) She also acknowledged that when appellant sexually assaulted her she had a $200 a day drug habit. (50 RT 5401.)

Bertha R. described how the sexual assault she suffered destroyed the relationship between her and her boyfriend and sent her life into a downward spiral. Bertha's boyfriend blamed her for the attack, she began drinking to excess on a daily basis which led to the loss of her job, she neglected her young son, she started using cocaine and crystal methamphetamine, and even though she eventually went to a therapist, she lied to her therapist about how she was doing because she was ashamed. (50 RT 5512-5515.) Ultimately, Bertha turned to prostitution to support her drug habit. (50 RT 5515-5516.) However, Bertha entered a detox program 19 months prior to trial and was free from alcohol and cocaine. (55 RT 5516-5517.)

Defense Case

The defense presented 13 witnesses who testified to appellant's positive qualities; his leadership abilities, his helpfulness, and his desire to be productive and be a positive influence. These witnesses included two Job Corps employees who worked with him, his mother, his son, two fellow inmates, and seven correctional employees who worked with appellant. Appellant also presented the testimony of Tracy Davidson's sister who claimed Tracy was a horrible mother who abused appellant's son.

Appellant's Job Corps counselor and one of his teachers testified on his behalf. (51 RT 5658-5660; 51 RT 5687-5688.) The Job Corps was a vocational training program for teens and young adults that provided financial

support while they participated, and it had a good job placement program. (51 RT 5658, 5669-5670.) Appellant did well in a structured environment and did not present any behavioral problems. (51 RT 5661.) Appellant was in the Job Corps in the 1980s. During this time there had been racial problems, with a dozen participants being removed from the program, but appellant was part of a peace-keeping committee that was formed. (51 RT 5661-5666.) In fact, appellant was present when a fight broke out and helped to break it up and handle the situation. (51 RT 5689-5691.) Appellant was considered a "natural leader" and was made a superintendent in the welding program because he had a good rapport with other students. (51 RT 5692-5693.) Appellant received a certificate of completion for the welding program, and his instructor considered him a good welder with a marketable skill for an entry-level welding position. (51 RT 5660-5661, 5696-697.)

Linda Tate, Tracy Davidson's older sister by eight years, recalled Tracy having problems at the age of 15 and going to the Job Corps where she met appellant. (50 RT 5523-5525, 5542-5543.) Tracy became pregnant with appellant's child, and they moved into an apartment together. (5525-5527.) When Tate would visit them, appellant was a loving father to their son and usually was the one caring for him. (50 RT 5527.) Tracy moved in with Tate and away from appellant, but appellant still visited his son. (50 RT 5527-5528.)

Tracy then entered into an abusive relationship with David Entzminger, who Tate believed also abused appellant's son even though she never witnessed any abuse, and Tracy began neglecting her children. (50 RT 5529-5532, 5535-5536, 5537-5539.) Eventually, Tracy's children were taken away from her. (50 RT 5535-5536.)

Ann Jones, appellant's mother, described their family life in Barstow as normal, if not idyllic, until her husband went to Okinawa for 13 months with the Marines in the early 1970s. (50 RT 5554-5558, 5566-5567.)

After his return, he changed and became "strange." (50 RT 5557-5558.) Even though her husband had always been the disciplinarian in the family, Ann recalled incidents after his return from Okinawa when he became violent: Ann returned home to find her husband severely beating 13-year-old LaVern (50 RT 5558-5560); her husband attacked Ann and attempted to kill her but appellant stopped him (50 RT 5562-5563); and appellant went away for a long weekend with friends without telling his parents and her husband became so angry he broke appellant's arm (50 RT 5564-5565). When her husband began gambling and lost all of the family's money, Ann sold their house and moved to San Diego. (50 RT 5562, 5566-5570.) Appellant was 17 years old at the time they moved.

Appellant was small when they lived in Barstow. (50 RT 5570.) He was bored with school and did not do well. (50 RT 5558-5559.) In fact, she was unaware how poorly appellant performed in school and admitted appellant deceived her about his grades and about his high school graduation – he told her he had graduated from high school when, in fact, he had not. (51 RT 5618-5621, 5631-5633.) While in Barstow, appellant had become involved with athletics and played some sports, but he also got caught burglarizing homes in the neighborhood and ended up in juvenile hall for two weeks. (50 RT 5565-5566, 51 RT 5622-5626.)

Ann had been unaware appellant had been arrested several times in San Diego or that he had been convicted of raping Bertha R. (51 RT 5610-5613.) Appellant told Ann he had been falsely accused and she believed him. (51 RT 5612-5614.) Ann said that after they moved to San Diego, appellant was instrumental in bringing her together with her daughter when her daughter ran away from home because she was being sexually molested by her husband. (50 RT 5571-5574.) However, Ann did not believe appellant had ever sexually molested her daughter because appellant denied it. (51 RT 5628-5630.) While

appellant lived with her, Ann encouraged appellant to get a job after he completed the Job Corps program, but appellant did not get a job, so Ann eventually moved out because she felt appellant was taking advantage of her. (51 RT 5633-5641.)

Ann recalled appellant going into the Job Corps and getting Tracy pregnant, but after his son was born, appellant was a good father and took care of him. (50 RT 5575-5578.) On the other hand, Tracy would beat appellant's son. (50 RT 5579-5580.) When Ann's grandson was five years old, he was taken away from Tracy, and at that point Ann took custody of the boy because appellant was in jail. (50 RT 5581-5586.) Even though appellant was in jail, he kept in contact with his son by sending cards and letters. (50 RT 5586-5587.) Appellant's son would visit him while appellant was in jail and would try to be an encouragement to him. (50 RT 5589-5592; 51 RT 5605-5608.) Ann stated appellant was a stabilizing factor in her grandson's life. (51 RT 5606-5608.)

At the time of trial, appellant's son was 11 years old and testified on appellant's behalf. (51 RT 5650.) Appellant was a source of encouragement to him, sending him letters and talking with him on the phone. (51 RT 5650-5651.) Appellant encouraged him to do well in school, to practice the instrument he played in band, and to practice the sports he played, i.e. football. (51 RT 5651-5656.) Appellant's son loved appellant and the fact that his father was behind bars did not lessen the importance of his relationship with him. (51 RT 5652-5654.)

Two inmates who were in county jail with appellant testified on his behalf. One had never been in jail before and was very scared, but appellant, who was the tank captain, reassured him nothing would happen and protected him for the five hours the inmate was there. (51 RT 5674-5677, 5680-5683.) The other inmate was placed in the same tank as appellant and

recalled appellant, as tank captain, kept it in good condition. (51 RT 5769-5770.) In fact, when the inmate was put in the tank, appellant gave him soap and deodorant. (51 RT 57 69.) Appellant treated people with respect and while they were in the tank they never lost their TV or phone privileges. (51 RT 5770.)

Seven employees of the California prison system and one deputy sheriff with the San Diego county jail system testified to their positive experiences with appellant as an inmate. The supervisor of inmates at the San Diego County Jail appointed appellant as the tank trustee, and on one occasion when an inmate had a seizure, appellant had been very helpful calming him down and getting him on a gurney so the inmate could get medical assistance. (52 RT 5833-5836.) While in prison, appellant successfully completed five separate units in the vocational machine shop training program over a period of approximately four months; the program typically takes inmates anywhere from one month to three months to complete.[16/] (51 RT 5800-5802.) Appellant worked in the metal furniture shop, sign shop, and on the landscaping crew, impressing his supervisors with his good work, positive attitude, and self-motivation. (51 RT 5702-5705, 5728-5731, 5740-5741, 5755-5756, 5758-5760.) While working in the metal furniture shop, appellant frequently spoke about his son in a positive way and did not complain or present any behavioral problems. (51 RT 5705-5706, 5708-5710.) Appellant did landscaping for seven months and was responsible for being accountable for the tools and for the inmates when the supervisors were away. (51 RT 5741-5742.) Appellant had a positive influence on other inmates and helped others when they needed it. (51 RT 5710-5712.) Appellant did not associate with inmate cliques or start trouble. (51 RT 5731-5732.) However, appellant was involved in an

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16. A welding program was also available to appellant but he did not participate in it. (51 RT 5807.)

altercation with another inmate which resulted in a minor disciplinary infraction and counseling session. (51 RT 5717-5725, 5727.) When appellant entered the prison system, he was a level four – maximum security – prisoner. (51 RT 5777-5779.) While appellant's categorization level was reduced to level two by a committee of four correctional counselors, this was because the institution was going from a level four institution to a level two institution and to make appellant eligible for transfer. (51 RT 5811-5814.)

ARGUMENT

Appellant makes numerous claims attacking both the guilt and penalty phases of the trial. Regarding the guilt phase, appellant attacks jury selection, joinder of the offenses, admission of the evidence, instruction of the jury, and the sufficiency of the evidence. Regarding the penalty phase, appellant attacks the admission of certain evidence, instruction of the jury, and the death penalty in general. However, appellant does not address these issues in a chronological order or the order in which they were addressed at trial. Therefore, respondent will not necessarily address appellant's claims in the order in which he raises them but, rather, to the extent possible, in the order in which they were raised at trial.

I.

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY EXCUSING A POTENTIAL JUROR BASED SOLELY UPON HIS ANSWERS IN THE QUESTIONNAIRE BECAUSE HIS ANSWERS UNEQUIVOCALLY DISQUALIFIED HIM AS A JUROR

In argument 22, appellant claims the sentence must be reversed in the instant case because the court excused a prospective juror for cause based

solely upon that prospective juror's questionnaire without questioning the juror.[17] (AOB 485-489.) Appellant notes the trial court excused for cause 10 other prospective jurors without questioning them but does not object to these, noting these were stipulated to. (AOB 485, fn. 142.) Appellant's claim lacks merit because such challenges were only granted if both parties stipulated the excuse for cause was appropriate, and appellant did not object to the excuse for cause of the juror about which he now complains. Assuming arguendo appellant issomehow deemed to have objected, the record supports the trial court's decision.

The trial court initially expressed a desire to streamline the jury selection process by having the defense and prosecution agree to stipulate to excusing for cause those jurors whose questionnaires established cause on their face based upon their answers in the questionnaire. (19 RT 1204-1206; 20 RT 1245-1247.) When the court initially proposed doing this, neither counsel objected but the prosecutor did question whether all parties would have to stipulate to the excuse for cause. (19 RT 1205.) After the parties had a chance to review the questionnaires and the court stated its intent to excuse potential jurors based on their questionnaires, the prosecutor interposed an objection to the trial court suggesting which juror's to consider excusing for cause and asked that they follow the statutory procedure by first having the defense make their challenges to excuse potential jurors for cause, followed by the prosecution, rather than the court making suggestions. (20 RT 1245-1246.) Appellant joined in this objection. (20 RT 1247.)

Even though the court initially suggested a potential juror which both appellant and the prosecutor agreed should be excused for cause – number 17 – the prosecutor suggested that counsel first make their initial challenges for

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17. In order to maintain jury unanimity, respondent will reference the jurors by number for purposes of this argument.

cause with the court making any other suggestions after that. (20 RT 1248.) The court agreed to this procedure, and counsel agreed appellant would go first with suggestions of potential jurors to excuse for cause. Specifically, this dialog went as follows:

> Mr. Dusek [the prosecutor]: . . . Perhaps if counsel were to go first and make our challenges, then the court could come in later and clean up ones maybe we haven't met.
>
> The Court: Fine. I don't have any problem with that.
> Mr. Varela [defense counsel]: If he wants to go first or us?
> The Court: If there is no objection to excusing [Number 17] for cause, [Number 17] will be excused.
>
> [¶] . . . [¶]
>
> Normally the defense would begin the questioning and their cause challenges might go first. So if the defense has any that they would like to suggest for cause, please do so.

(20 RT 1248.)

Appellant then proceeded to make 10 suggestions of potential jurors who could be excused for cause, six of whom the prosecutor agreed with, and the court granted those six challenges for cause both parties agreed to. (20 RT 1248-1260.) However, the court did not grant challenges for cause regarding those potential jurors that the prosecutor believed required further inquiry based upon ambiguity in their questionnaires.[18] (20 RT 1248-1254.) Next, the prosecutor made seven suggestions of potential jurors to excuse for cause, the defense agree to three of these – one of whom is the juror about whom appellant complains – and the court granted those challenges for cause that both parties agreed to. (20 RT 1261-1271.) Again, however, the court did not excuse for cause those jurors whom the defense believed required further

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18. Specifically, the court did not excuse for cause the following potential jurors: number 18, number 38, number 40, and number 43.

questioning.[19] Finally, the court excused a juror based on hardship. (20 RT 1273.)

Generally, a juror may be excused for cause if his views would prevent or substantially impair performance of his or her duties as a juror in accordance with his instructions and his oath. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].) The trial court has discretion to deny all questioning by counsel when "a prospective juror gives 'unequivocally disqualifying answer[s].' [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 823.) In *Samayoa*, this Court noted several jurors were excused for cause by the trial court based upon their answers in the written questionnaire. (*Id.* at p. 824.) Furthermore, joining in an excuse for cause of a potential juror forfeits the issue for purposes of appeal. (*People v. Hill* (1992) 3 Cal.4th 959, 1003, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046.) Even if defense counsel objects to the trial court excusing for cause prospective jurors based solely upon responses in their jury questionnaire, this Court will uphold the trial court's decision if that decision is supported by a de novo review of the record. (*People v. Avila* (2006) 38 Cal.4th 491, 529.)

In the instant case, while both counsel initially objected to the court's proposition that the court suggest who should be excused for cause based upon their questionnaires (20 RT 1245-1247), the record establishes that both counsel agreed to such challenges so long as they were initiated by either appellant or the prosecutor (20 RT 1248). Indeed, after the first stipulation to a potential juror being excused for cause, appellant moved to excuse those

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19. Specifically, the court did not excuse potential jurors number 8 (20 RT 1261-1265), number 44 (20 RT 1266-1267), number 45 (20 RT 1267-1268), number 51 (20 RT 1268-1270).

potential jurors whom he believed should be excused for cause followed by the prosecutor.

No potential juror was excused whom either appellant or the prosecutor wanted to question further about their beliefs and ability to be a juror – including number 4, the juror about whom appellant complains on appeal. (20 RT 1248-1272.) After the prosecutor brought up number 4 and gave reasons why he thought the juror should be excused for cause, counsel for appellant stated "With regard to – well, he indicates that he – we will submit on this one, your honor." (20 RT 1261.) This hardly constitutes an objection, so appellant's failure to object to the excusal for cause of potential juror number 4 results in appellant's forfeiture of this argument on appeal. (*People v. Hill*, *supra*, 3 Cal.4th at p. 1003.) Appellant had ample opportunity to express a desire to further question potential juror number 4 and declined to do so. He should be precluded from arguing otherwise on appeal.

A de novo review of the record supports the trial court's determination. *(People v. Avila*, *supra*, 38 Cal.4th at p. 529.) In *Avila*, this Court distinguished its decision in *People v. Stewart* (2004) 33 Cal.4th 425, upon which appellant relies (AOB 485-487, 489), by considering the questions and responses in the written questionnaire given by the three potential jurors whom Avila objected to the court excusing for cause. (*People v. Avila*, *supra*, 38 Cal.4th at pp. 531-533.) This Court pointed out it was the questionnaire which was defective in *Stewart* and not the process of excusing potential jurors based upon their answers. (*Id.* at p. 530.)

In the same respect as *Avila*, the instant case differs significantly from *Stewart*. In *Stewart*,

> defense counsel objected to each of the prosecutor's motions for excusal for cause on the ground that the checked answers and brief written comments left ambiguity as to whether each prospective juror would be able to serve and follow the instructions of the court, notwithstanding his or her personal

> opposition to the death penalty. As to each objection, the court found the juror's checked answer and brief written response to be clear and unambiguous, and granted the challenge for cause.

(*People v. Stewart*, *supra*, 33 Cal.4th at p. 445.) Appellant made no such objections in the instant case. Also, this Court in *Avila* specifically stated "we now hold that a prospective juror in a capital case may be discharged for cause based solely on his or her answers to the written questionnaire if it is clear from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law." (*People v. Avila*, *supra*, 38 Cal.4th at p. 531.) In fact, this Court found the dispositive factors in *Stewart* were the defense's objection to the potential jurors being excused (*People v. Stewart*, *supra*, 33 Cal.4th at pp. 449-450) as well as consideration of the challenged jurors' questionnaires which showed ambiguity regarding whether their views would prevent or substantially impair the performance of their duties (*Id.* at pp. 447-449).

Assuming arguendo appellant's equivocal response constituted an objection, a review of the checked and written answers on prospective juror number 4's questionnaire are not ambiguous and taken together, reflected opposition to the death penalty that would prevent him from performing his duties as a juror. (*People v. Avila*, *supra*, 38 Cal.4th at p. 533.) Appellant concedes and references some of potential juror number 4's answers but not all of them, and appellant does not recite the questions. (AOB 487.) Several of potential juror number 4's answers leave no room for ambiguity in light of the question asked.

In fact, even before the questions about the death penalty, potential juror number 4 indicated his unequivocal inability to impose the death penalty. Question 66 asked, "Do you feel you can be an impartial juror?," and while he checked "yes," he wrote in the space after "Why?" "Except for the

penalty part." (46 CT VD[20] 8821.) In response to question 76 "Would you like to be a juror in this case?," he checked "no" and after "Why?" he wrote "I have a real problem with the death penalty life comes from God I don't feel I could be a party to killing another person regardless of the justification." (46 CT VD 8823.) In the section immediately below this question entitled "MISCELLANEOUS" question 77 asked, "Everyone has biases, prejudices or preconceived notions. Do you have any that would affect the way you decide this case? Explain:," and he wrote, "Yes see above." (46 CT VD 8823.) Question 88 asked," Do you have any religious or other beliefs that might conflict with the duties of a juror? If so, explain," and he responded, "Yes I don't think I could be a party to taking life because life is a gift from God."

In the section on views about the death penalty and life without possibility of parole, question 90 asked "What is your opinion regarding the death penalty?" and he checked the blank next to "Strongly Oppose." (46 CT VD 8826.) Throughout this section, potential juror number 4 stated that his beliefs in God and the Bible would preclude him from considering imposing the death penalty. (46 CT VD 8826 -8030.)

Unlike in *Stewart*, several of the questions and answers left no ambiguity about his inability to impose the death penalty under any circumstances. Question 93.B. asked "If the jury reached the penalty phase would you automatically vote against the death penalty regardless of the evidence?" and he answered "Yes." (46 CT VD 8827.) Question 93.C. asked, "Would your opposition to the death penalty substantially impair your ability to impose the death penalty even in the appropriate circumstances?" and he wrote, "There are no appropriate circumstances to kill." (46 CT VD 8827.)

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20. The clerk's transcripts containing the jurors' voir dire questionnaires were separately numbered from the clerk's transcripts of the trial, so references to these transcripts will be to "CT VD" preceded by the volume number and followed by the page number.

Question 97 asked, "The law provides several different kinds of special circumstances that make first-degree murder a possible death penalty crime. These include: multiple murder, murder committed in the course of forcible rape or sodomy. Would any of these circumstances make you **unable** to consider any sentence less than the death penalty? Please explain." and he responded "Can not consider the death penalty regardless." (46 CT VD 8828; emphasis in original.) Question 98 asked, "Do you agree with the law that the death penalty is a worse penalty than life without possibility of parole?" and he checked "No" and then explained, "The death penalty is not an option and I think living with one's crimes is a form of punishment." (46 CT VD 8828.) In part, question 99 asked "Do you feel that death is a severe punishment?" and after checking "Yes" he wrote "To severe for me to be a party too" even though there was no request for an explanation. (46 CT VD 8828.) (Appellant does not mention questions 97 or 99 or the written responses.) Question 100 asked where his feelings about the death penalty came from and he responded, "Bible," and Question 100.A. asked "Are you aware that Robert Alton Harris was executed in California's gas chamber?" and he not only checked "yes," he responded to the question "What was your reaction to what you heard?" by stating "I disagree with this punishment." (46 CT VD 8829.) Not only had his views not changed in the last 10 years (Question 101) but he answered Question 102, which asked "Are you comfortable with the procedures you have heard concerning the jury's duties in a death penalty trial?" by checking "No" and after the portion asking "If not, why not?" responded, "I cannot be a party to killing anyone." (46 CT VD 8829.)

Finally, appellant erroneously asserts potential juror number 4 was never asked if he could temporarily set aside his feelings in deference to the law. (AOB 487.) Question 104 specifically asked, "Having heard the court's orientation and procedures for a death penalty trial, can you follow the

instructions of the court given to you in this case?" and he responded "Not the penalty part." (46 CT VD 8830.) Finally, Question 105 asked" Is there **any** reason you would not like to be a juror on this case?" and he responded "if life without parole is okay to find him guilty then I'm okay with this." (46 CT VD 8830, emphasis in original.)

Potential juror number 4's answers to these questions make it unambiguously clear that his views would prevent him from performing his duties as a juror in accordance with the instructions and his oath as a juror. (*Wainwright v. Witt, supra*, 469 U.S. at p. 424.) Because of his unequivocal, disqualify answers, the court was not required to question him. (*People v. Avila, supra*, 38 Cal.4th at p. 533.) What's more, appellant neither objected to excusing him for cause nor requested further questioning of him, so his claims challenging this excuse should be deemed forfeited for purposes of this appeal. (*People v. Hill, supra*, 3 Cal.4th at p. 1003.) Appellant's arguments to the contrary should be rejected because they are neither supported by the law nor the facts of the instant case.

II.

APPELLANT'S ARGUMENTS CHALLENGING THE TRIAL COURT'S DENIAL OF HIS *WHEELER* MOTIONS LACK MERIT[21]

In two separate arguments (arguments 1 and 2), appellant claims the trial court committed error by not finding the prosecutor made peremptory challenges predicated on three potential jurors' race and gender (African-American women) in violation of the prohibition against excusing potential jurors based solely on group bias, pursuant to *People v. Wheeler*

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21. Because appellant raises the issues of race and gender, respondent will reference the jurors by Mr. or Ms., as appropriate, followed by an initial or initials rather than by number.

(1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69]. (AOB 45-132.) Indeed, every time the prosecutor exercised a peremptory challenge involving an African-American or dark skinned potential juror, appellant made a *Wheeler* motion; a total of four motions involving five potential jurors. Ultimately, two African-American males and one African-American woman were seated on the jury panel and an African-American male as an alternate. On appeal appellant only contests the trial court's denial of two of his four *Wheeler* motions.

Appellant first addresses his fourth and last *Wheeler* motion which the court denied because appellant failed to make the requisite, step-one prima facie showing regarding the prosecutor's exercise of a peremptory challenge to excuse Ms. N.S. who was Puerto Rican. (AOB 45-113.) Next, appellant challenges the trial court's denial of his second *Wheeler* motion which the court denied because appellant failed to carry his burden of establishing that the prosecutor exercised two peremptory challenges on the basis of group bias. (AOB 114-132). Appellant fails to establish the trial court abused its discretion when denying either of the *Wheeler* motions.[22/] The issues will be addressed chronologically rather than in the order in which appellant presents them.

A. Voir Dire Procedural History

An overview of the jury selection process establishes that after excusing jurors for cause, there were 53 potential jurors. Of the 53 potential jurors, 39 were non-minority white people.[23/] Fourteen potential jurors

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22. Since appellant does not challenge the trial court's denial of his first or third *Wheeler* motions, these will only be addressed to the extent they are necessary to give context to the issues appellant raises on appeal.

23. Appellant erroneously asserts 41 of the potential jurors were "non-minority whites" who were eligible to serve. (AOB 46-47.) As will be

identified themselves ethnically in the jury questionnaire. The prosecutor exercised a total of 17 peremptory challenges during jury selection; 15 to select the 12 jurors and 2 to select the alternates.[24/]

Nine potential jurors were African-American; Mr. R. (40 CT VD 7438), Ms. H. (41 CT VD 7678), Mr. W. (41 CT VD 7702), Mr. P. (41 CT VD 7726, 7731), Ms. G. (43 CT VD 8086), Mr. H. (43 CT VD 8206), Ms. J. (45 CT VD 8919), Mr. B. (45 CT VD 8739), Ms. Y.(48 CT VD 9244). Five other potential jurors identified themselves as follows: Ms. G. G. – Hispanic (40 CT VD 7510, 7515); Ms. F. C. – Mexican (41 CT VD 7630, 7632); Ms. R. E. – Mexican (42 CT VD 8038, 8043); Ms. N. S. – Puerto Rican (44 CT VD 8450); Mr. J. Q. – Guamanian (47 CT VD 9124, 9126).

Though Ms. N. S. was born in Puerto Rico, she responded in her juror questionnaire to the question "How would you describe your feelings toward African-Americans?" as follows: "I consider myself African-American." (44 CT VD 8455.) The issue of her ethnicity came up during the selection of the alternates after the prosecutor excused her. (23 RT 1989-1995.) While appellant argued she was a "black female" (23 RT 1989), the court questioned whether she was black (23 RT 1993). Appellant's trial

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demonstrated from the jury questionnaires themselves, appellant failed to include two nonwhite minority jurors in his calculations.

24. Appellant erroneously asserts the prosecutor only exercised a total of 16 peremptory challenges. This necessarily incorrectly skews appellant's percentage comparison analysis. (AOB 46-47.) The prosecutor's peremptory challenges were as follows: 1st, Ms. E. (21 RT 5119); 2nd, Mr. P. (21 RT 1519); 3rd, Ms. J. (21 RT 1520); 4th, Ms. P. (21 RT 1520); 5th, Ms. L.S. (22 RT 1639); 6th, Ms. G. (22 RT 1640); 7th, Ms. K.S. (22 RT 1651); 8th, Ms. Y. (22 RT 1746); 9th, Mr. L. (22 RT 1746); 10th, Ms. G. (22 RT 1746-1747); 11th, Ms. P. (22 RT 1747); 12th, Ms. L.A.S. (23 RT 1856); 13th, Ms. F. (23 RT 1856); 14th, Mr. D. (23 RT 1857); 15th, Mr. H. (23 RT 1857); 16th, Ms. N.S. [potential alternate], (23 RT 1967); 17th, Ms. H. [potential alternate] (23 RT 1967).

counsel pointed out she was Puerto Rican, and the prosecutor noted she was born in Puerto Rico, spoke Spanish as her first language, spoke English with a Spanish accent, her nose and facial features were Hispanic, and while she thought of herself as African-American, she was Hispanic. (23 RT 1993.) These facts are not disputed.

1. Statistical Breakdown Of Peremptory Challenges

Appellant purports to do a statistical analysis which indicates the prosecutor was disproportionately excusing African-Americans and African-American women. (AOB 46-47, 108-110.) Appellant cites *Miller-El v. Cockrell* (2003) 537 U.S. 322 [123 S.Ct. 1029, 1036, 154 L.Ed.2d 931], as authority supporting his claim the percentage of peremptory challenges used to excuse African-Americans corroborates his claim that this was done on the basis of group bias. Respondent does not concede the viability of statistical analysis advanced for the first time on appeal. This Court has acknowledged *Miller-El* but did not decide whether comparative analysis must be done for the first time on appeal. (See *People v. Avila* (2006) 38 Cal.4th 491, 546.) While this Court has engaged in comparative analysis asserted for the first time on appeal, respondent is unaware of any authority by this Court engaging in a statistical analysis asserted for the first time on appeal. Nonetheless, respondent disputes appellant's statistical analysis.

Statistically, African-Americans constituted 17 percent (9/53) of the potential jurors, 25 percent (4/16) of the sworn jurors plus the alternates, and 25 percent (3/12) of the sworn jurors, not including the alternates. The prosecutor's use of four peremptories to excuse African-Americans constituted 23 percent (4/17) of his total peremptory challenges. Considering statistically the number of African-Americans available to serve on the jury with the

number of peremptory challenges excusing African-Americans and the number of African-Americans who actually served on the jury a statistical comparison does not support appellant's argument.

Appellant counts Ms. N. S. among the African-Americans, even though she clearly was Puerto Rican, simply because she considered herself to be an African-American. While the record indicates the court did not necessarily consider Ms. N. S. African-American, if she is considered as one statistically, then the prosecutor used 29 percent (5/17) of his peremptories to excuse African-Americans. Non-minority whites constituted 74 percent (39/53) of the potential jurors, and the prosecutor exercised 65 percent (11/17[25]) of his peremptory challenges excusing non-minority whites. The statistics comparing African-Americans eligible to serve and those who actually were selected to serve are in parity, and, in fact, the percentage of African-Americans who actually served is higher than those who were eligible to serve.[26] Furthermore, the number of peremptory challenges exercised to excuse non-minority people is in parity with the percentage of non-minority people who were eligible to serve on the jury.

Appellant also takes into account the number of women the prosecutor excused; particularly, African-American women.[27] (AOB 45-48, 112.) Appellant does not challenge the prosecutor's exercise of a peremptory

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25. The prosecutor excused Ms. E., a Mexican-American, so she would not be counted among the "non-minority white" potential jurors. (21 RT 1591.)

26. It may be noted that appellant's statistics differ because he did not include the total number of peremptory challenges made by the prosecutor and misstates the total number of "non-minority white" potential jurors as 41 rather than 39. (AOB 46-47, 108-109.)

27. This Court has concluded that African-American women constitute a cognizable jury for purposes of an improper exercise of a peremptory challenge (*People v. Cornwell* (2005) 37 Cal.4th 50, 70-71, fn. 4; *People v. Young* (2005) 34 Cal.4th 1149-1173.)

challenges involving non-African-American women, so the only issue ripe on appeal is African-Americans and African-American women. Because of the low number of eligible African-American women to serve on the jury (5), any statistical analysis other than a general one necessarily appears skewed. Appellant notes the statistical breakdown of the prosecutor's exercise of peremptory challenges involving women as opposed to men. (AOB 46.) However, as established, appellant never challenged the prosecutor's exercise of peremptory challenge(s) based on gender, so any claim based on gender is forfeited for purposes of appeal. Nonetheless, comparing the statistics of women potential jurors who were excused with those who were African-American women potential jurors who were excused establishes no significant statistical disparity.

There were either four or five African-American women eligible to serve on the jury, depending upon whether Ms. N. S. is considered African-American. Nonetheless, as previously established, Ms. H., an African-American woman, served on the jury. Of his 17 peremptory challenges, the prosecutor used 13 peremptories to excuse women; 76 percent (13/17). The prosecutor exercised three peremptory challenges to excuse four African-American women: his third, Ms. J. (21 RT 1520); his sixth, Ms. G. (22 RT 1640); and his eighth, Ms. Y. (22 RT 1746). This constituted 75 percent (3/4) of the eligible African-American women potential jurors. If Ms. N. S., his 16th peremptory challenge, is included as an African-American women, then the prosecutor exercised four peremptory challenges to excuse five African-American women potential jurors or 80 percent (4/5). Regardless of whether Ms. N. S. is included among the African-American women, the prosecutor's exercise of peremptory challenges excusing them is in parity with the number of peremptory challenges exercised to excuse women in general; 76 percent to excuse women in general and either 75 percent or 80 percent to

excuse African-American women.

2. Factual Background

The prosecutor exercised four peremptory challenges to excuse African Americans and another to excuse Ms. N. S. Specifically, the prosecutor exercised his third peremptory challenge to excuse Ms. J. (21 RT 1520), his sixth to excuse Ms. G. (22 RT 1640), his eighth to excuse Ms. Y. (22 RT 1746), his fifteenth to excuse Mr. H. (23 RT 1857) and his sixteenth to excuse Ms. N. S. (23 RT 1967). The defense excused one African-American. The jury as ultimately composed included four African-Americans – Mr. R., Ms. H., Mr. W., and Mr. P. (an alternate) – as well as two Mexican-Americans, Ms. G. G. and Ms. F. C.

When the prosecutor excused Ms. J., appellant made an objection, presumptively a *Wheeler* motion, which the court summarily rejected stating there had been no prima facie showing. (21 RT 1520.) Shortly thereafter, there was a proceeding in chambers during which defense counsel again asserted a *Wheeler* motion based solely on the fact Ms. J. was African-American. (21 RT 1522-1523.) While the court found that the exercise of one peremptory challenge could violate the dictates of *Wheeler*, it found no prima facie showing based upon the prosecutor excusing Ms. J. (21 RT 1523-1524.)

Jury selection continued, and after appellant exercised his fifth peremptory challenge, the prosecutor accepted the jury as then constituted. (22 RT 1639.) At this point, two African-Americans remain in the jury panel; Mr. R. and Ms. H. The defense exercised its sixth peremptory challenge which placed Ms. G. on the jury panel. (22 RT 1640.) The prosecutor exercised his sixth peremptory challenge to excuse Ms. G., and appellant made his second *Wheeler* motion. (22 RT 1640.) At this point, Mr. R. and Ms. H. remained on the panel, and the court heard appellant's *Wheeler* motion and denied it after

finding a prima facie showing had been established and making a reasoned decision that the prosecutor's reasons for excusing Ms. J. and Ms. G. were not racially motivated. (22 RT 1640-1650.)

During the *Wheeler* motion, the court stated it was uncertain regarding the requisites necessary to establish a prima facie showing. (22 RT 1642.) Nonetheless, the court required the prosecutor to state his reasons for excusing Ms. J. and Ms. H. after finding appellant had made a prima facie showing. (22 RT 1642.) The parties discussed agreeing to defer *Wheeler* motions until outside of the jury's presence, that *Wheeler* issues would not be waived if not asserted immediately after the exercise of a peremptory challenge, and the prosecutor offered to provide the court with points and authorities concerning *Wheeler* motions. (22 RT 1646-1650.) Later, the prosecutor provided the court with points and authorities on *Wheeler* motions, and the parties agreed that future *Wheeler* motions would be made out of the jury's presence at the first opportunity. (22 RT 1669-1670; 31 CT 5813.)

After the alternates were picked and the jury was sworn, appellant brought another *Wheeler* motion based upon the prosecutor's exercising peremptory challenges to excuse Mr. H. and Ms. N. S. (23 RT 1989-1995.) First, appellant stated the reasons for his motion based on the prosecutor excusing Mr. H. (23 RT 1990-1991.) Then appellant stated the reasons for his motion based upon the prosecutor excusing Ms. N. S. (23 RT 1991-1992.)

The court denied the motion based on a lack of a prima facie showing. The trial court noted the four African-American jurors remaining on the panel – three plus an alternate – and questioned whether Ms. N. S. was black. (23 RT 1992-1994.) The court noted the record indicated obvious reasons for excusing Mr. H. and Ms. N. S.; Mr. H. had two very serious experiences involving miscarriages of justice and Ms. N. S. was married to a presently incarcerated convicted murderer. (23 RT 1994.) The prosecutor

added that Mr. H. had not been forthcoming with information regarding one of the injustices. (23 RT 1995.)

B. The Law Regarding Peremptory Challenges And Objections To The Exercise Of A Challenge Believed To Be Based Upon Discrimination Supports The Trial Court's Denial Of Appellant's *Wheeler* Motions

Established law from this Court and the United States Supreme Court addresses the issue raised by appellant. Both the California and the United States Constitutions prohibit the use of peremptory challenges to excuse prospective jurors based on a presumed group bias because of membership in a racial or other cognizable group. (*People v. Cornwell* (2005) 37 Cal.4th 50, 66-67; *People v. Young* (2005) 34 Cal.4th 1149, 1172, citing *People v. Wheeler* (1978) 22 Cal.3d 258, 257-276 and *Batson v. Kentucky*, *supra*, 476 U.S. at p. 89.) When the defendant believes the prosecution's sole reason for exercising a peremptory challenge is based upon such discrimination, a timely motion must be made. (*People v. Young*, *supra*, at p. 1172.) Such motions are typically referred to as "*Wheeler*" or "*Batson*" motions, and even though appellant only referred to *Wheeler* when making his motions, this Court reviews such motions in the context of the federal law as articulated in *Batson* and its progeny. (*People v. Cornwell*, *supra*, 37 Cal.4th at p. 66, fn. 3.)[28]

A *Wheeler* motion involves a three-step process, and the defendant carries the burden of establishing that the prosecutor exercised a peremptory challenge based solely upon group bias. (*Rice v. Collins* (2006) ___ U.S. ___ [126 S.Ct. 969, 973-974, 163 L.Ed.2d 824]; *Purkett v. Elem* (1995) 514 U.S. 765, 767-768 [115 S.Ct. 1769, 131 L.Ed.2d 834].) First, the

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28. For purposes of consistency and simplicity, references will simply be made to "*Wheeler* motions" but this term refers to both the state and federal law for purposes of this argument.

defendant must establish a prima facie case that the exercise of a peremptory challenge was based upon racial or gender discrimination. (*Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 2416, 162 L.Ed.2d 129]; see also *People v. Panah* (2005) 35 Cal.4th 395, 438.) Second, if a prima facie showing has been established, the prosecutor whose strike was challenged must provide a race-neutral explanation for exercising the challenge. (*Purkett v. Elem*, *supra*, at p. 768.) Third, the trial court must make a sincere and reasoned determination as to whether the defendant carried his burden of establishing purposeful discrimination. (*Id.* at pp. 767-768, see also *People v. Silva* (2001) 25 Cal.4th 345, 385 [trial court's ultimate determination unreasonable in light of facts at proceedings; death penalty reversed].)

If the trial court determines a prima facie showing has been made, the prosecutor must then carry the burden of showing "genuine nondiscriminatory reasons for the challenge at issue . . . and the trial court must then decide whether the opponent of the strike has proved purposeful . . . discrimination. [Citations.]" (*People v. Ward* (2005) 36 Cal.4th 186, 200.) The trial court's decision is then reviewed for substantial evidence. (*Ibid.*) Such review is done by this Court with "great restraint," presuming that a prosecutor uses peremptory challenges in a constitutional manner, giving great deference to the trial court's ability to distinguish between bona fide reasons from sham excuses. (*Ibid.*, citations omitted.) So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, the trial court's conclusions are given deference on appeal. (*Ibid.*) The trial court need not make specific or detailed comments on the record to justify each of the prosecutor's non-discriminatory reasons for exercising a peremptory challenge to be accepted as genuine; especially, when the reason is based upon a prospective juror's demeanor or similar intangible factor. (*Ibid.*)

The prosecutor's acceptance of three African-American jurors was an indication of the prosecutor's good faith in exercising peremptory challenges in *People v. Huggins* (2006) 38 Cal.4th 175, 236. Similarly in *Ward*, this Court noted the number of African-American jurors ultimately impaneled was a factor that, while not conclusive, was a good indication of the prosecutor's good faith in exercising peremptory challenges. (*People v. Ward, supra*, 36 Cal.4th at p. 203.) Also considered was the fact that the trial court stated on the record that it had paid attention to several of the challenged juror's responses and had them "marked as potential peremptory" challenges based upon their manner of responding to questions. (*Id.* at p. 205.) This contradicted Ward's claim that the trial court failed to conduct a sincere and genuine inquiry into the prosecutor's stated reasons for his challenges. (*Ibid.*) Both of these factors are present in the instant case.

Just like the trial court in *Ward*, the court in the instant case during the final *Wheeler* motion involving Mr. H. and Ms. N. S. specifically stated it had been paying close attention to the voir dire. (23 RT 1992.) Similarly, during the *Wheeler* motion involving Ms. J. and Ms. G., the court was aware two African-Americans remained on the jury and which African-American jurors the prosecutor had excused. (22 RT 1641.) Nonetheless, despite reservations about whether appellant established the *Wheeler* step one prima facie showing after the prosecutor excused Ms. G., the trial court required the prosecutor to state his reasons for excusing Ms. J. and Ms. G. (22 RT 1642-1643.)

Substantial evidence supports the trial court's denial of appellant's *Wheeler* motions. Appellant's arguments to the contrary should be rejected.

1. Substantial Evidence Supports The Trial Court's Rejection Of Appellant's *Wheeler* Motion Regarding Ms. J.

In accordance with step two of the *Wheeler* motion process, the prosecutor gave his reasons for excusing Ms. J. The prosecutor stated that he and his assistant had a rating system for ranking the jurors based upon answers in their questionnaires, and he had rated Ms. J. "13th lowest of the whole group" and his assistant (who was a female in a minority racial group) rated Ms. J. even lower. (22 RT 1643.) The primary reason for this low rating was Ms. J. affiliation and work experience with the Job Corps and appellant's ties to the Job Corps; specifically, the prosecutor was concerned that the defense would present evidence of appellant's experiences with the Job Corps and "she will have a link to this man because of her employment and his connection to the Job Corps." (22 RT 1643.)

The prosecutor asserted several other reasons why Ms. J. rated low as a potential juror based upon her questionnaire, and these assertions are supported by the record; i.e., her questionnaire. They are as follows: she was twice divorced and her daughters were divorced which showed instability (45 CT VD 8620); she wanted to be a counselor, "a helping person, a person to get everyone better," but the prosecution was going to be asking her to impose the death penalty (45 CT VD 8622); she appeared to be a "loner" because she listed no clubs in which she was involved and stated that she was "choosy about her friends" indicating she might not be able to get along with others (45 CT VD 8623); she indicated police officers shoot too quickly, indicating an anti-law-enforcement background (45 CT VD 8627); she weakly supported the death penalty and disliked having to make the decision to impose it (45 CT VD 8634); and she had seen a television program depicting defendants sitting in a room waiting for execution, indicating a leaning towards the defendant rather than the victims (45 CT VD 8637). (22 RT 1643 -1644.)

Appellant spends considerable time dissecting the prosecutor's stated reasons for excusing Ms. J., claiming the reasons were pretextual. (AOB 115-123.) However, unlike appellant's analysis, this Court must review the prosecutor's reasons with great restraint, presuming the prosecutor exercised peremptory challenges in a constitutional manner. (*People v. Ward*, *supra*, 36 Cal.4th at p. 200.) Also, this Court must give great deference to the trial court's ability to determine bona fide reasons from sham reasons, and since the record indicates the trial court made a sincere and reasoned effort to evaluate the justifications offered, the trial court's determination should be given great deference on appeal. (*Ibid.*)

Appellant contends the prosecutor was disingenuous and simply created a "shopping-list" of traits. (AOB 116.) Appellant claims the prosecutor's concerns about Ms. J.'s affiliation with the Job Corps was "plainly implausible" and "demanded more from the trial court than unquestioned acceptance" because it was not reasonable to assume that Ms. J. knew someone at Job Corps who remembered appellant. (AOB 116-117.) However, appellant misstates the obvious legitimate concern with Ms. J.'s affiliation with the Job Corps. Ms. J. was working for the Job Corps program which appellant had completed – this "link" is obvious. (22 RT 1643; 45 CT VD 8619.) Ms. J.'s work with and understanding of the Job Corps and affinity for her work were an understandable concern for the prosecution. Given her employment experience at the Job Corps, her favorable working knowledge of the program[29] which other potential jurors did not have, her link with the Job Corps was a legitimate concern. Whether she or one of her coworkers knew of appellant was not the point.

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29. She respond to the question "How do you feel about supervising others?" by stating, "I enjoy it and they enjoy helping me." (45 CT 8619.)

Appellant claims the prosecutor's concerns over Ms. J.'s two divorces and the fact that her daughters were both divorced was pretextual because other jurors acceptable to the prosecution had been married several times. (AOB 117.) Appellant did not do a comparative analysis at trial. This Court has previously rejected such analysis as appropriate on appeal when not raised below but, while acknowledging *Miller-El* and still not deciding the propriety of such analysis, has found comparative analysis supported the trial court's determination, nonetheless. (*People v. Avila*, *supra*, 38 Cal.4th at pp. 546-548.) Appellant should be precluded from making this claim on appeal.

Moreover, this was simply one factor of many listed by the prosecutor as a concern, and all five jurors listed by appellant were very different from Ms. J. in other significant respects. (*People v. Schmeck* (2005) 37 Cal.4th 240, 271; *People v. Ward*, *supra*, 36 Cal.4th at p. 203 [comparative analysis done for first time on appeal established jurors were not similarly situated].) In *Schmeck* this Court considered jurors whom Schmeck claimed were similarly situated and found they were not. (*People v. Schmeck*, *supra*, 37 Cal.4th at pp. 271-273.) So too in the instant case.[30/]

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30. Appellant claims the prosecutor accepted five other jurors who had been married multiple times, but the record does not indicate any of these had been divorced twice, and there were other significant differences between these five jurors and Ms. J. At the time of trial Ms. F. had been married for two years and her prior marriage lasted 42 years. (CT 40 VD 7487.) Unlike Ms. J., all of her children were married (40 CT VD 7488), she had prior jury service where verdicts were reached (40 CT VD 7496), and she supported the death penalty (40 CT VD 7501). Regarding juror Ms. L.A.S., at the time of trial she had been married for nine years and only had one prior marriage with no indication that it ended in divorce. (40 CT VD 7583.) Unlike Ms. J., she had favorable experiences with law enforcement (40 CT VD 7591) and supported the death penalty (40 CT VD 7597). Juror A. had been married twice; she divorced in 1964 when she was 24 years old, and had been married for 29 years even though she was separated at the time of trial. (41 CT VD 7655, 7662.)

Similarly, appellant claims the prosecutor's concerns over Ms. J.'s desire to be a counselor were pretextual because other acceptable jurors to the prosecutor included an emergency medical technician (EMT), two elementary school teachers, and a special-education technician. (AOB 118.) There is a significant difference between a counselor and an EMT or someone in a school setting – they are not comparable, especially given Ms. J.'s current work with the Job Corps program which appellant attended. Specifically, the prosecutor stated his concern that she was "someone to get everyone better. I see that as opposition or at least contrary views towards what I will be asking them to do; that is, to kill the defendant." (22 RT 1643.) An EMT and those working in a scholastic setting are not necessarily trying to "get everyone better." Someone working in a scholastic setting is simply trying to educate. While an EMT may be trying to prevent someone from dying who is in physical distress, they are not trying to make "everyone better" in the same respect as a counselor.

Appellant also claims some of the reasons for excusing Ms. J. were not related to a "specific bias . . . reasonably relevant to particular case on trial or its parties or witnesses [Citations.]" (AOB 118.) Particularly, appellant criticizes the prosecutor's concerns about Ms. J.'s divorces and the divorces of

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Furthermore, unlike Ms. J., two of her three children were married (41 CT VD 7656), and she supported the death penalty (41 CT VD 7669). Juror P. was 59 years old at the time of trial, had been married for one year, and had two prior marriages, one of which ended with divorce. (41 CT VD 7750-7751, 7758.) Unlike Ms. J., there was no indication of divorce amongst any of his five children (41 CT VD 7752), he served honorably in the military for two years (41 CT VD 7756), and he strongly supported the death penalty (41 CT VD 7765). Potential juror B.G., who was excused by the defense, had been married four times, but at the time of trial had been married for 17 and one-half years. (46 CT VD 8860.) At the time of trial she was approximately 59 years old, nothing in the record indicated how two of her marriages ended; whether by death or divorce. Unlike Ms. J., all three of her children were married (46 CT VD 8861), she was a member of three different clubs (46 CT VD 8863), and she supported the death penalty (46 CT VD 8874).

her children as indicating a sign of instability, the fact she was a "loner," and the fact that she had seen a psychiatrist after losing her job. (AOB 118-120.) However, "factors indicating a difficulty or inability to focus on the evidence may serve to justify a peremptory challenge." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124.) This Court in *Gutierrez* upheld the denial of a *Wheeler* motion based upon the prosecutor's concerns over the emotional stability of a prospective juror even though that juror stated they would not have a problem serving. (*Ibid.*)

Also, a peremptory challenge may legitimately be based upon the juror's appearance or a subjective mistrust of a juror's objectivity. (*People v. Wheeler, supra*, 22 Cal.3d at p. 275.) It is well accepted that the demeanor and appearance of a potential juror, a perceived reluctance to impose the death penalty, and hostility towards the prosecutor are legitimate reasons to exercise a peremptory challenge. (*People v. Ward, supra*, 36 Cal.4th at p. 202.) In *Ward*, this Court accepted the prosecutor's reason that a juror's "unconventional appearance" suggested she might not fit in with other jurors. (*People v. Ward, supra*, 36 Cal.4th at p. 203.) Contrary to appellant's assertions, the prosecutor's reasons for exercising the peremptory challenge to excuse Ms. J. rest with accepted trial strategy.

Appellant also argues the prosecutor accepted another juror who weakly supported the death penalty and, therefore, reasons that the prosecutor's claims that Ms. J.'s views on the death penalty "scared" him actually showed purposeful discrimination and disparate treatment. (AOB 121-122.) Appellant questions the prosecutor's concern over Ms. J.'s mention of having seen the chamber where the death penalty was imposed. (AOB 122.) However, comparing Ms. J. to the other juror who weakly supported the death penalty establishes why the other juror was a more favorable juror than Ms. J. (*People v. Ward, supra*, 36 Cal.4th at p. 203.) Not only did Ms. J. weakly support the

death penalty, but she also stated she would "dislike making this very crucial decision." (45 CT VD 8634.) In contrast, the juror who also weakly supported the death penalty stated that "the punishment should fit the crime" (40 CT VD 7477) and was a firefighter who regularly worked with members of the Police Department (40 CT VD 7471).[31] Ms. J., on the other hand, thought some law enforcement officers were "too quick in drawing their guns and shooting" and when she was burglarized, did not understand why the police did not take fingerprints (45 CT VD 8627-8628); i.e., her view of the police was less than favorable. A reluctance to impose the death penalty and skepticism constitute legitimate reasons for exercising a peremptory challenge. (*People v. Panah*, *supra*, 35 Cal.4th at p. 441.)

The trial court accepted the prosecutor's reasons for excusing Ms. J. (22 RT 1646.) Despite appellant's attempt to pick apart the prosecutor's reasons, they are all supported by the record and must be given deference. Appellant's analysis to the contrary should be rejected.

2. Substantial Evidence Supports The Trial Court's Denial Of Appellant's *Wheeler* Motion Based On The Prosecutor's Exercise Of The Peremptory Challenge Excusing Ms. G.

As with Ms. J., the prosecutor gave several reasons for exercising the peremptory challenge to excuse Ms. G. (22 RT 1645 –1646.) Again, appellant attempts to dissect each one of the prosecutor's reasons but, as the trial court found, the prosecutor's reasons were supported by the record. Therefore, this Court should give substantial deference to the trial court's denial of the *Wheeler* motion as to Ms. G. Appellant's arguments attacking the trial

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31. In further contrast with Ms. J., he had been married for five years (was not divorced) (40 CT VD 7463) and served in the Navy for four years with an honorable discharge (40 CT VD 7468).

court's determination lack merit.

Ms. G. was questioned during voir dire by the court about some of her answers in the jury questionnaire. (21 RT 1543-1545.) Her jury questionnaire indicated she believed a person was innocent "until proven guilty beyond a shadow of a doubt" (43 CT VD 8096) and when the court asked her about this, she stated she had been "educated" about the standard being "beyond a reasonable doubt" and could live with that standard. (21 RT 1544.) She also stated she was currently seeing a therapist and was on medication for high blood pressure; her questionnaire indicated she was being treated for depression. (21 RT 1544-1545; 43 CT VD 8099.) Later, Ms. G. disclosed to the court in a note that she suffered from sickle cell anemia and needed blood transfusions on a quarterly basis but did not believe this would interfere with her service as a juror. (22 RT 1616.) Her note stated "I do not feel that this will impact my service as a juror, but I'm not sure beyond a shadow of a doubt, only beyond a reasonable one." (22 RT 1616.) The sarcasm in this answer is self-evident.

The prosecutor questioned Ms. G. during voir dire as well. (22 RT 1627-1631.) The prosecutor questioned Ms. G. about the reasonable doubt standard, and while she stated she understood the reasonable doubt standard, she also stated she would "like to be as certain as possible before passing a judgment, whether that judgment be for guilty or for innocent . . . then I would like to be comfortable in my mind which penalty." (22 RT 1627-1628.)

After further questioning concerning the reasonable doubt standard, the prosecutor asked about Ms. G.'s statement in her questionnaire that she thought circumstantial evidence could be deceiving. (22 RT 1628-1629; 43 CT VD 8098.) She had also written in her questionnaire she would "like something a little more substantial." (43 CT VD 8098.) Ms. G. explained a story she recalled from grade school in which an innocent man was

convicted based on circumstantial evidence and told the prosecutor "the hero of the story was saying, 'listen, always remember these words: circumstantial evidence can be deceiving.'" (22 RT 1629.) Ms. G. acknowledged she had not been very trusting of circumstantial evidence prior to orientation.

The last topic about which the prosecutor questioned Ms. G. was her statement in the jury questionnaire about the counseling she was currently receiving. (22 RT 1629-1631.) Ms. G. explained she had been in counseling since October due to several difficult events which had occurred in her life over the previous four years; she lost a dog that had been like a child to her, she lost a boyfriend of 10 years, and she had suffered a stroke. (22 RT 1630.) She was still seeing her therapist approximately twice a month and believed she was over her "grieving period." (22 RT 1630.) Ms. G. was told she could not talk to her therapist about the case, and she stated that she would keep a journal, so she did not believe it would be a problem to not talk to her therapist. (22 RT 1630-1631.) When the prosecutor expressed concern that the case would be depressing, Ms. G. stated that her work as a park ranger supervisor was depressing. (22 RT 1631.) When the prosecutor inquired further, Ms. G. stated, "supervising can sometimes be very rough." (22 RT 1631.)

After excusing Ms. G., the prosecutor explained his reasons for doing so. Just as with Ms. J., the prosecutor had rated Ms. G. with a score below his "acceptable level" and there were other potential jurors who were "better than her." (22 RT 1645.) The prosecutor's reasons are supported by the record and, therefore, should be given great deference. The prosecutor believed the organizations with which she was involved showed "liberal tendencies ", she did not read the newspaper and was unaware of the Robert Alton Harris execution (43 CT VD 8090, 8104) indicating she was isolated,[32/] she stated she

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32. Appellant claims this reason was "inaccurate" because in other places in her questionnaire she mentioned receiving information from

was "dissatisfied" with the response she received by the police to two burglaries of her home (43 CT VD 8094-8095), her questionnaire and voir dire addressing burden of proof indicated in her mind that "beyond a shadow of a doubt" and "beyond a reasonable doubt" were not that far apart even though she could "parrot back the appropriate answer" regarding their distinction, she stated distrust of circumstantial evidence, and, most importantly, the fact that she was seeing a counselor for depression and the facts of the case were going to be depressing. (22 RT 1645-1646.)

The court found the prosecutor's reasons were supported by the record and not related to race. (22 RT 1646.) The court further noted that it appeared Ms. G. appeared to be in tears when explaining the tragedies she had personally gone through over the years. Appellant's attempted dissection of the prosecutor's stated reasons for excusing her fail in light of the record and deference which this Court must accord the trial court's determination.

Initially, appellant challenges the prosecutor's reliance upon the organizations Ms. G. was involved with as a reason for exercising a peremptory challenge and claims this reason was pretextual, showing discriminatory intent, and not related to the particular case to be tried. (AOB 124-125.) The three particular organizations were the Friends of the Formosa Slough, the San Diego Environmental Project, and the Federal Equal Employment Opportunity Council of San Diego. (43 CT VD 8090.) Appellant does not dispute that these organizations show liberal tendencies but, rather, simply argues they were worthy causes consistent with someone who worked for the park service.

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newspapers. (AOB 126.) However, Ms. G. checked the box stating she did not read a newspaper on a regular basis (43 CT VD 8090), so even though she answered inconsistently with this response in other portions of her questionnaire, the questionnaire supports the prosecutor's assertion. Furthermore, inconsistencies about reading newspapers in Ms. G.'s questionnaire support the prosecutor's concerns about her as a juror rather than defy them.

(AOB 124-125.) However, the prosecutor believed that these causes were "liberal," i.e., a source of a subjective mistrust. A subjective mistrust of a potential juror supports the peremptory challenge of a potential juror. (*People v. Wheeler, supra*, 22 Cal.4th at p. 275.) Moreover, Ms. G.'s involvement with these organizations was not the only basis of the prosecutor's mistrust in her ability to be an objective juror.

Particularly disturbing was Ms. G.'s confusion and word game over the burden of proof and her expressed skepticism of circumstantial evidence. Appellant argues the prosecutor was bound to accept at face value Ms. G.'s statements when she was questioned about her understanding of the burden of proof and circumstantial evidence. (AOB 127-129.) Such is not the case because this Court has acknowledged that even though a juror who initially states reservations about the death penalty later indicates they can impose the death penalty, neither the prosecutor nor the trial court are required to take the juror's answers at face value. (*People v. Panah, supra*, 35 Cal.4th at p. 441.) Likewise, even though Ms. G. could parrot back an understanding that there was a difference between proof beyond a reasonable doubt and beyond a shadow of a doubt, it was apparent from her questionnaire and dialogue with both the court and the prosecutor that she intended to hold the prosecutor to very high burden of proof – whatever she termed it. The prosecutor did not take Ms. G.'s answer addressing the reasonable doubt burden of proof or circumstantial evidence at face value, and the law did not require him to do so. (*Ibid.*) In fact, her questionnaire and discussion about reasonable doubt and circumstantial evidence hardly show her agreement with the law but only that she could "live with it." (21 RT 1543-1544; 22 RT 1616, 1627-1629.)

Finally, the prosecutor expressed that a "big factor" was a concern that Ms. G. would be "harmed" by the evidence to be presented; that is, a concern about Ms. G.'s ability to focus on the evidence, given her ongoing

treatment for depression. (22 RT 1646.) Without question, given the brutal nature of the crimes committed, the presentation of evidence in instant case would be depressing and difficult for anyone to focus on, let alone someone already suffering from depression. Emotional instability and a difficulty or inability to focus on the evidence justifies a peremptory challenge. (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1124.) While the prosecutor expressed his concerns in terms of Ms. G. being harmed, it is clear the harm the prosecutor was concerned about was a difficulty in focusing on the gruesome murder evidence as well as the evidence of the brutality suffered by both of the women appellant attempted to murder. The court found the prosecutor's concern was well-founded as the court observed Ms. G. looked like she was in tears when explaining the tragedies she had personally gone through. Contrary to appellant's argument otherwise (AOB 130-131), the prosecutor's concern directly related to the case at hand.

Because substantial evidence in the record supports the prosecutor's reasons for excusing both Ms. J. and Ms. G., appellant fails to establish that the trial court committed error when finding appellant failed to carry his burden of proof that the prosecutor exercised peremptory challenges based upon purposeful discrimination. Furthermore, the trial court was not required to make specific or detailed comments on the record addressing each of the prosecutor's reasons for exercising peremptory challenges. (*People v. Ward*, *supra*, 36 Cal.4th at p. 200.) Even though appellant attempts to piecemeal dissect each of the prosecutor's reasons for excusing Ms. J. and Ms. G., the fact is that the record supports the prosecutor's reasons and the trial court's denial of his *Wheeler* motion. Appellant's arguments to the contrary lack merit and should be rejected.

3. The Trial Court Properly Found Appellant Failed To Establish The Requisite Step One Prima Facie Showing When Appellant Made His Final *Wheeler* Motion After The Prosecutor Excused Ms. N. S.

The prosecutor's exercise of a peremptory challenge to excuse Ms. N. S. was part of the basis of appellant's fourth *Wheeler* motion and is appellant's first argument in his brief. Appellant argues the trial court committed reversible error by finding appellant failed to make the requisite *Wheeler* motion, step one prima facie showing regarding her dismissal. (AOB 45-113.) Appellant makes a lengthy argument claiming this issue should be reviewed de novo and be reversible per se because the court did not specify the standard for establishing a prima facie showing and the court did not require the prosecutor to state his reasons for excusing Ms. N. S. (AOB 53-85.) Appellant's analysis should be rejected because it is not supported by the law or the facts of the case.

There are several components to establish a step one prima facie showing. (*People v. Gray* (2005) 37 Cal.4th 168, 186; *People v. Young, supra,* 34 Cal.4th at p. 1172.) The movant must raise the issue in a timely fashion, make as complete a record as feasible, establish that the excused potential juror or jurors are a member of a cognizable class, and produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. (*People v. Gray, supra,* 37 Cal.4th at p. 186, citing *California v. Johnson, supra,* 125 S.Ct. at p. 2417.) When a *Wheeler* motion is denied because the movant failed to establish a prima facie showing that the peremptory challenge was exercised on the basis of group bias, this Court reviews the entire record of the voir dire for evidence supporting the trial court's ruling. (*People v. Gray, supra,* 37 Cal.4th at p. 186.) When the record suggests grounds upon which the prosecutor might reasonably have made the challenged peremptory, the trial

court's ruling is affirmed, and there is no need to review the adequacy of any of the prosecutor's justification for exercising the peremptory challenge. (*People v. Cornwell*, *supra*, 37 Cal.4th at p. 67; *People v. Young*, *supra*, 34 Cal.4th at pp. 1172-1173.) Also, the fact that the trial court found a prima facie showing had been made on a previous *Wheeler* motion does not relieve a defendant from having to establishing a prima facie showing when making subsequent *Wheeler* motions. (*People v. Avila*, *supra*, 38 Cal.4th at p. 556.)

In the instant case, reviewing the entire voir dire supports the trial court's determination that appellant failed to make the necessary prima facie showing. (*People v. Gray*, *supra*, 37 Cal.4th at pp. 186-187.) Initially, the trial court did not accept appellant's claim Ms. N. S. was African-American. (23 RT 1993.) In fact, Ms. N. S. was Puerto Rican even though she identified with African-Americans; i.e. she considered herself African-American. (23 RT 1993.) Appellant based his motion on the fact she was African-American, but she clearly was not a member of this cognizable class.[33/] Membership in a cognizable class is a requisite to establish a prima facie showing. (*People v. Gray*, *supra*, 37 Cal.4th at p. 186.) Respondent is unaware of any authority concerning *Wheeler* motions recognizing dark skinned people who consider themselves African-Americans as a cognizable class when the record clearly establishes they are not African-American.[34/] Therefore, appellant failed to

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33. On appeal, appellant strenuously argues that Ms. N. S. was African-American. (AOB 111-112.) However, even appellant's trial counsel acknowledged Ms. N. S. was Puerto Rican, not African-American. (23 RT 1993.)

34. Appellant cites a case involving a motion to dismiss in federal court which is not controlling in this Court in which two defendants sought recovery for damages after having been denied service at a restaurant. (AOB 105-106.) In a footnote, the court explained its use of the term "black" in reference dark skinned Puerto Ricans. The case appellant cites is not binding on this Court and simply involved a case of semantics whereas in the instant case, this was

establish this prong of the requisites necessary to establish a prima facie showing. Assuming arguendo Ms. N. S. was a member of a cognizable class, appellant fails to establish an inference that discrimination occurred.

In *Roldan*, this Court found the trial court's explanations for finding no prima facie showing made inferring the prosecutor's reasons for exercising peremptory challenges unnecessary, upholding the trial court's denial of the *Wheeler* motion. (*People v. Roldan* (2005) 35 Cal.4th 646, 703.) Similarly, in *Young* when the trial court found no prima facie showing, this Court considered the record and upheld the trial court's determination because it suggested grounds on which the prosecutor reasonably might have challenged the jurors. (*People v. Young*, *supra*, 34 Cal.4th at pp. 1173-1174.) Likewise, the trial court in *Ward* had "marked" jurors as potential peremptory challenges during the voir dire process that the prosecutor excused and who were the basis of Ward's *Wheeler* motion, and this Court upheld the trial court's finding that appellant failed to make a prima facie showing. (*People v. Ward*, *supra*, 36 Cal.4th at p. 205.) Just as in *Roldan*, *Young* and *Ward*, the trial court in the instant case paid close attention to the voir dire process and, when denying the motion, articulated the reasons why Ms. N. S. was excused. (23 RT 1992-1995.) Indeed, the trial court conducted extensive voir dire of Ms. N. S. because of statements in her questionnaire. (23 RT 1915-1928, 1936-1938.) The prosecutor also conducted voir dire with Ms. N. S. (23 RT 1954-1956.) Based on her voir dire, the trial court anticipated the prosecutor excusing Ms. N. S. (23 RT 1993-1995.)

The court specifically stated,

> Additionally, when I listened to Mr. [H.]'s discussions and Ms. [N. S.]'s, it was very evident to me that neither one of them was going to get past a prosecution peremptory, and it

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a burden which appellant needed to establish and which was contested.

> wouldn't have mattered what color they were. It was the answers that were coming from them.
>
> The caregiver situation . . . that is race neutral and we see that day in and day out in prosecutorial discretion. It's the same as the defense has certain types of individuals, the kind of mathematical minds, I think often we see that.
>
> To me, that's just the flip side of the prosecution desire to take away the care-givers, the nurturers, the sustainers. They typically do that to white, brown, doesn't matter what color it is, and typically you see the opposite with the defense. And those are a legitimate reasons for peremptories and that's okay and we see that with these two.
> [¶] . . . [¶]
>
> Ms. [N. S.], of course, had the fact that she had married an individual who was convicted of murder, that she had that incredible experience behind her. And she was, again, I think one of those individuals who came across rather weakly toward the penalty.

(23 RT 1993-1994.) In fact, Ms. N. S. disclosed during voir dire that she was a sponsor for AA and narcotics anonymous in the prison at Chino, and this is where she met her husband. (23 RT 1954-1955; 44 CT VD 8459.) She also disclosed that her husband, a convicted murderer, was currently incarcerated as a result of a probation violation involving drunk driving and "crack" cocaine. (23 RT 1916-1917.) While she stated during voir dire that her husband was responsible for his conduct, she also stated in her questionnaire she was not in agreement with his incarceration for parole violations and made other statements indicating she did not believe the system was fair. (44 CT VD 8457.)

Ms. N. S. did not know any of the facts concerning her husband's murder conviction. No other jurors were married to a convicted murderer, so no other jurors were similarly situated – she cannot be compared to other jurors. Ms. N. S. was a "care-giver" and a "nurturer" to a fault. That is, she decided

to marry – one of the most important decisions in someone's life – a convicted murderer without knowing any of the circumstances of the murder, establishing her willingness to make decisions without having all the facts. In her jury questionnaire she only "weakly" supported the death penalty and only if the crime involved "a totally brutal situation. . . " (44 CT VD 8465.) Even after extensive voir dire by the trial court, Ms. N. S. expressed reservations about being a juror. (23 RT 1955.) Certainly, she came across weakly for the penalty based upon these statements and others in her voir dire.

Substantial evidence supports the trial court's reasoned determination that appellant failed to establish the requisite, step one prima facie showing necessary to move on to step two of the *Wheeler* motion process. Furthermore, the trial court was in the best position to observe voir dire, the answers given by the prospective jurors, the interaction of the prosecutor with the prospective jurors, and the prosecutor's exercise of the peremptory challenges. While appellant selects portions of the record which he claims indicate Ms. N. S. would have been a good juror for the prosecution (AOB 106-108), he was not present during the voir dire and ignores the fact that the trial court stated, "it was very evident to me that neither one of them [Ms. N. S.] was going to get past a prosecution peremptory, and it wouldn't have mattered what color they were." (23 RT 1994.)

Appellant argues this Court should review the issue de novo. (AOB 53.) First, appellant reasons that because this Court only gives deference to the prosecutor's assertions for exercising a peremptory challenge if the trial court made a "sincere and reasoned attempt to evaluate" the prosecutor's explanations in steps two and three, it should not give deference to the trial court's finding that he failed to establish a prima facie showing because there was no "sincere and reasoned" finding of no prima facie showing in step one. (AOB 53-54.) Respondent is unaware of any authority supporting appellant's

position, and appellant cites none. In fact, the already referenced authority by this Court and United States Supreme Court as well as the facts in the instant case contradict appellant's assertion. The trial court, in fact, articulated its sincere and reasoned rationale for finding appellant failed to establish a prima facie showing.

Concerning the standard necessary to establish a prima facie showing for establishing a party is exercising peremptory challenges based on group bias, the United States Supreme Court addressed this specific issue in *Johnson v. California*, *supra*, 125 S.Ct. at page 2416.[35] The High Court in *Johnson* held California's "more likely than not" standard for establishing a prima facie showing was an inappropriate standard. (*Ibid.*) The proper standard to make a prima facie showing requires establishing facts about the peremptory challenge raising an inference that discrimination motivated the challenge. (*Ibid.*)

Appellant argues the trial court applied the wrong standard for determining whether a prima facie showing had been established and goes into a lengthy analysis claiming this Court should reject the trial court's determination, ignore the entire record of the voir dire, and find the prosecutor's exercise of the peremptory challenge excusing Ms. N. S. was based on prejudice. (AOB 54-85.) According to appellant's analysis, the trial court did not recite the proper legal standard when denying his motion (AOB 54-58), it should not be assumed the trial court understood or applied the proper standard (AOB 59-63), this Court is in the same position as the trial court to determine whether the prosecutor exercised the peremptory challenge on the basis of discrimination (AOB 63-69), and even if the record establishes reasons

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35. Because *Johnson* has decided this issue, respondent will not address appellant's analysis concerning the standard for establishing the *Wheeler* step-one prima facie showing. (AOB 85-102.)

justifying the peremptory challenge, this Court should assume the prosecutor did so with a discriminatory motive (AOB 69-85). In effect, appellate advocates this Court adopt a per se reversible error standard of reviewing the trial court's denial of his *Wheeler* motion. Under appellant's analysis, any denial of *Wheeler* motions based in the failure to establish a prima facie case constitutes reversible error, but such is not the state of the law, and appellant's analysis should be rejected.

Since the *Johnson* decision, this Court has addressed cases in which the trial court did not find a prima facie showing in accordance with step one of *Wheeler*. (*People v. Avila, supra,* 38 Cal.4th at 553-555; *People v. Gray, supra*, 37 Cal.4th at p. 186; *People v. Cornwell, supra*, 37 Cal.4th at pp. 67, 69.) These cases address and reject appellant's analysis. In these cases, this Court has consistently held that when the trial Court denies a *Wheeler* motion on the basis of the moving party failing to make an initial prima facie showing, it reviews the entire record of the voir dire to determine whether it supports the trial court's determination.

In *Gray*, this Court specifically referenced *Johnson*, finding this "view is consistent with the high court's recent reiteration of the applicable rules, which require the defendant to attempt to demonstrate a prima facie case of discrimination based on the 'totality of the relevant facts. [Citation.]'" (*People v. Gray*, 37 Cal.4th at p. 186.) In *Avila*, when the appellant challenged the standard applied when the trial court found a failure to establish a prima facie showing, this Court reviewed the ***legal question*** of whether the record supported an inference that the prosecutor excused a juror on the basis of group bias – the standard articulated in *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 2416, 162 L.Ed.2d 129] – and found none. (*People v. Avila, supra*, 38 Cal.4th at p. 553-556.) Therefore, appellant's argument and analysis claiming this Court should review de novo the denial of the trial court's

Wheeler motion without consideration of whether a review of the entire voir dire supports the trial court's determination should be rejected. Just as in *Gray* and *Avila*, regardless of the standard employed by the trial court – which is not stated on the record at the point appellant made his motion and the court denied it – a review of the record in light of the proper standard establishes that it does not support an inference Ms. N. S. was excused on the basis of race. (*Id.* at p. 187.)

Appellant fails to establish the trial court committed error by finding appellant did not establish a *Wheeler*, step one prima facie showing that the prosecutor exercised a peremptory challenge to excuse Ms. N. S. based on group bias. Similarly, appellant fails to establish the trial court committed error when denying appellant's *Wheeler* motions when he challenged the prosecutor's exercise of peremptory challenges to excuse Ms. J. and Ms. G. His claims and arguments to the contrary should be rejected.

III.

THE TRIAL COURT DID NOT COMMIT ERROR BY REFUSING TO SEVER THE MURDER COUNTS FROM THE ATTEMPTED MURDER COUNTS, BY ALLOWING THE ADMISSION OF THE BERTHA R. EVIDENCE OR WHEN INSTRUCTING THE JURY

In three separate arguments appellant challenges the trial court's decision to admit the evidence pertaining to crimes against Bertha R. pursuant to Evidence Code section 1101, subdivision (b), and the court's instruction of the jury prior to the admission of this evidence. (AOB 133 -177.) Specifically, in arguments 3 and 5, appellant claims the Bertha R. evidence was irrelevant in context of the murders of Glover and Sweets (Argument 3; AOB 133-166) and

the attempted murders of Karen M. and Maria R. (Argument 5; AOB 170-177), and in Argument 4, appellant claims the trial court erroneously instructed the jury prior to the admission of the Bertha evidence with regards to the Sweets and Glover murders (AOB 167-169). In separate but related arguments, appellant claims the trial court committed error by joining the murder counts with the attempted murder and sex offense counts (Argument 9; AOB 216-244) and instructing the jury that they could cross-consider the facts of the various counts as evidence to show identity, intent, motive, common characteristic, method, plan or scheme (Arguments 6-7; AOB 178-208). In Argument 8, appellant claims the instructions concerning the evidence involving Bertha, as well as the cross-consideration instruction, violated his federal constitutional right to due process. (AOB 209-217.) Because these arguments are interconnected, they have been joined together. The facts and the law belie appellant's claims.

The prosecution's theory of the case from the very outset was that appellant committed a series of distinctive, violent sex offenses over a 14-month period, including attempted murder and murder, starting with the attempted murder and sex offenses involving Maria on August 15, 1985, and ending with the attempted murder and sex offenses involving Karen M. on October 20, 1986. (3 CT 225-226[36].) Prior to trial the prosecutor argued, and the evidence established, the crimes involved distinctive characteristics including: (1) the victims were prostitutes (2) who were black and (3) worked El Cajon Boulevard (4) and each of the victims were sexually assaulted by appellant (5) and strangled (6) with the attacks occurring at appellant's home or the Wilsie residence and the bodies being found near these two locations. (3 CT 225-226.) The prosecutor presented the same basic theory of the

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36. Points and authorities in opposition to motion to set aside the information pursuant to Penal Code section 995. (3 CT 201.)

evidence to the jury.

Appellant's arguments lack merit for several reasons. First, all of the offenses were properly joined pursuant to the Penal Code because they were the same class of offense and because the evidence of the offenses was cross-admissible. Second, the crimes appellant committed involving Bertha occurred only four days prior to the offenses involving Karen and were strikingly similar to those involving appellant's other victims, so the evidence of the Bertha crimes was properly admitted pursuant to Evidence Code section 1101, subdivision (b). Third, the trial court did not commit error when instructing the jury regarding the Bertha evidence or the cross-consideration of the evidence.

Rather than addressing the arguments in the order in which they appear in the opening brief, they will be addressed in chronological order, starting with appellant's claims that the court improperly joined the attempted murder and murder counts.

A. The Counts Were Properly Joined Pursuant To Penal Code Section 954, And Appellant Fails To Establish The Trial Court Abused Its Discretion Or That Joinder Resulted In A Denial Of Due Process

In argument 9, appellant claims the trial court committed error by denying his motion to sever the attempted murder counts from the murder counts. (AOB 216-244.) Appellant claims there was no cross-admissibility of evidence between the attempted murder and murder counts (AOB 219), the attempted murder counts were inflammatory in comparison with the murder counts (AOB 220-222) and the evidence of the murder counts was weaker than the evidence of the attempted murder counts (AOB 222-224) which resulted in gross unfairness at appellant's trial (AOB 226-244). Such is not the case.

Joinder is governed by Penal Code sections 954 and 954.1. Whether a trial court properly joined crimes under Penal Code section 954[37] concerns a question of law and is subject to independent review on appeal, but whether severance was required in the interests of justice is reviewed for an abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155,188.)

Furthermore, Penal Code section 954.1[38] specifically provides that evidence concerning one offense need not be admissible as to any other

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37. Penal Code section 954 provides:

> An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count.

38. Penal Code section 954.1 specifically provides:

> In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, or where two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact.

offense before the offenses may be tried together; that is, cross-admissibility of evidence is not dispositive in determining whether to join offenses.

Appellant concedes that the charges against him – murder, attempted murder, and sexual assault – were properly joined under Penal Code section 954. (AOB 218.) Indeed, the crimes which appellant was charged with were of the same class, so as a matter of law, they were properly joined; of this, there is no dispute. (*People v. Stitely* (2005) 35 Cal.4th 514, 531 [first-degree murder with sodomy special circumstance properly joined with forcible rape of different victim].) The issue, therefore, is whether the trial Court abused its discretion by not severing counts. It did not.

Crimes against different victims committed at different times and in different places are properly joined when they are linked by common elements of substantial importance. (*People v. Mendoza* (2000) 24 Cal.4th 130, 160 [close proximity of offenses showed continuing course of criminal conduct]; *People v. Lucky* (1988) 45 Cal.3d 259, 276 [multiple robberies, attempted robberies, and murder properly joined considering underlying facts: "armed robber, usually joined by an accomplice, victimized small businesses which were managed by few employees, sold specialized merchandise, and were located in the same geographical area"].) In the instant case, there were common elements of substantial importance.

As the prosecutor asserted prior to trial, the evidence established the victims were black prostitutes[39] who worked El Cajon Boulevard, and each of the victims were sexually assaulted and strangled. (3 CT 225-226; 23 CT 4043,[40] 4047-4050.) Not only this, but the murder victims were found within

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39. Maria was Hispanic.

40. The motion in opposition to sever counts incorporated by reference the statement of the case and facts contained in the People's motion in opposition to dismiss the information. (23 CT 4043.)

close proximity of appellant's apartment and the Wilsie residence and appellant sexually assaulted and attempted to murder Maria and Karen in his apartment and the Wilsie residence. (23 CT 4050.) Without question, the charges were properly joined given these common elements of substantial importance, and appellant cannot establish error because he cannot establish a clear showing of prejudice. (*People v. Valdez* (2004) 32 Cal.4th 73, 119.) In fact, the trial court specifically and correctly held:

> Overall, in looking at this, first I have to say that the charges are initially properly joined under 954 because they are offenses of the same class and they are connected together by common elements of substantial importance, and I believe that severance is not warranted because I do not believe that this appears to be an unjustified negative impact by a joinder against the defendant. The probative value is extremely high, and the negative impact is not unfair, in my estimation, in looking at this overall.

(8 RT 470-471.)

Appellant acknowledges that he must make a clear showing of prejudice to establish that the trial court abused its discretion when denying his severance motion. (AOB 218.) That is, based upon the record before the trial court at the time of the motion, appellant must show a substantial danger of prejudice compelled severance such that the denial of severance was an abuse of discretion. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 531.) Factors for consideration include: whether the evidence was cross-admissible in separate trials; whether some of the charges were likely to inflame the jury; whether a weak case was being joined with a strong case so that a spillover effect would affect the outcome; and whether one of the joined crimes was a capital offense. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 120; *People v. Sapp* (2003) 31 Cal.4th 240, 258.)

If the trial court's pretrial ruling was correct, appellant's convictions cannot be reversed unless the joinder was so grossly unfair as to

deny due process. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 531.) Improper joinder does not, by itself, violate the federal Constitution, but raises a constitutional violation only if it results in prejudice so great as to deny a fair trial. (*People v. Sapp*, *supra*, 31 Cal.4th at pp. 259-260, citing *United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8 [106 S.Ct. 725, 88 L.Ed.2d 814].) Considering the facts before the court at the time appellant made his motion to sever, appellant fails to establish the trial court abused its discretion when refusing to sever the offenses. Appellant fails to establish the trial court's ruling fell outside the bounds of reason. (*People v. Manriquez* (2005) 37 Cal.4th 547, 574; *People v. Bradford* (1997) 15 Cal.4th 1229, 1315.) Neither can appellant establish the joinder of his offenses resulted in prejudice so great as to deny him a fair trial.

The evidence before the court at the time it denied appellant's motion to sever supports the denial of the motion. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 531.) The court expressly considered the appropriate factors – cross-admissibility of evidence, the potential of some of the offenses to inflame the jury, and the joining of a weak case with a strong case and the potential for spillover – when denying the motion. (8 RT 469-471.) Appellant fails to establish the court's decision constituted clear error or that the court abused its discretion. (*People v. Sapp*, *supra*, 31 Cal.4th at p. 258.) The trial court specifically found the evidence was cross-admissible for purposes of identity and motive. (8 RT 469-471.) The court found "the overwhelming marked distinctiveness of the M.O. in all the cases, and the proximity of the cases together . . ." justified joinder of the murder and attempted murder cases. (8 RT 469.) The court did note that the Simpson offense was weak in comparison to the other offenses but found this was not decisive given the cross-admissibility of the other offenses; "the clear proof that comes about as all these little pieces get put together." (8 RT 469-470.) The court also weighed the prejudicial

effect of joining the cases over the probative value and found the probative value weighed heavily in favor of joining the cases. (8 RT 469-470.) The facts before the court support the court's denial of appellant's severance motion.

The evidence was cross-admissible to establish intent and modus operandi. For evidence to be cross-admissible to demonstrate a distinctive modus operandi, the evidence must disclose common marks or identifiers, that, considered singly or in combination, support a strong inference that the defendant committed the crimes. (*People v. Maury* (2003) 30 Cal.4th 342, 392.) The trial court considered the evidence cross-admissible to establish modus operandi. (3 RT 469-471.)

This Court's decisions in *Stitely* and *Maury* support the trial court's determination in the instant case and defies appellant's claims that the counts were improperly joined. *Stitely* involved a murder victim who had been sexually assaulted and strangled as well as a second victim who had been raped. (*People v. Stitely*, *supra*, 35 Cal.4th at pp. 524-525, 527-528.) This Court found the fact that both victims were sexually assaulted and choked satisfied the similar criminal intent requirement under Evidence Code section 1101, subdivision (b), so the evidence was cross-admissible and the offenses properly joined. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 532.) The facts in *Stitely* mirror those in the instant case to establish identity. Moreover, they establish modus operandi because the number of common identifiers support a strong inference appellant committed the crimes. (*People v. Maury*, *supra*, 30 Cal.4th at p. 392.)

The preliminary hearing evidence established a number of common identifying factors: three of the murder victims – Carpenter, Glover, and Sweets – died from strangulation (1 RT Prelim 45-47, 86-87, 90-92) and appellant strangled and sexually assaulted both attempted murder victims – Maria and Karen (1 RT Prelim 151, 157; 3 RT Prelim 313-314). Even though

Simpson's body had been severely burned and she apparently died from an overdose of cocaine and alcohol, the autopsy also indicated signs of asphyxia or having been choked. (1 RT Prelim 81.) Just as in *Stitely*, the cross-admissibility of the evidence to establish similar criminal intent justified joining the cases because not only did all of the victims show signs of sexual assault and strangulation, but all of the victims were prostitutes; the murder victims' bodies were found near appellant's apartment or the Wilsie residence and appellant sexually assaulted and strangled the attempted murder victims either at his apartment or the Wilsie residence. Contrary to appellant's claim otherwise (AOB 219), the cross-admissibility of the evidence dispelled any inference of prejudice.

At the time the court made its determination, the facts were cross-admissible to establish identity, motive and modus operandi. As already discussed, appellant targeted specific types of victims – prostitutes – assaulting them in the same way, and doing this in close proximity to where he was staying. Detective Hatfield testified during the preliminary hearing that Simpson, Carpenter, Sweets and Glover made their living as prostitutes. (3 RT Prelim 401, 411-412.) On cross-examination, defense counsel brought up the fact that Hatfield obtained this information from reports, rap sheets and from people who were interviewed who knew the victims. (3 RT Prelim 433.) Likewise, Maria and Karen had agreed to engage in acts of prostitution with appellant. (1 RT Prelim 162; 3 RT Prelim 309.) Simpson,[41/] Carpenter[42/] and

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41. Simpson's body was in a dumpster in an alley approximately 20 yards from the rear of appellant's apartment. (3 RT Prelim 400, 408.)

42. Carpenter's body was found burning in a dumpster approximately 1.5 blocks from appellant's apartment building. (1 RT Prelim 196; 3 RT Prelim 402.)

Sweets'[43] bodies were all found in dumpsters in alleys near appellant's apartment, and Glover's body was found near an alley close to the Wilsie residence. Likewise, appellant sexually assaulted Maria and Karen at his apartment and the Wilsie residence, respectively. (1 RT Prelim 147-149; 3 RT Prelim 311-312.) As previously mentioned, all of the victims were choked or strangled and all were sexually assaulted. Therefore, the facts before the court at the time it made its determination were similar enough to establish modus operandi. (*People v. Maury, supra*, 30 Cal.4th at pp. 395-396 [murder victims and rape victim evidence cross-admissible to establish modus operandi because offenses occurred in same area, involved strangulation, murders occurred within short period of time and victims shared similar characteristics].)

Furthermore, none of the offenses were particularly more inflammatory than any of the others. While Maria and Martinez graphically described being choked and sexually assaulted, this evidence was hardly inflammatory in light of the forensic evidence which establish the brutal beatings the murder victims suffered and the fact that Simpson and Carpenter were literally thrown with the trash into a dumpster and set on fire; Sweets being thrown in a dumpster, too. The court articulated its consideration of the inflammatory nature of the various offenses when making its determination. (8 RT 470-471.) Appellant fails to establish the court abused its discretion when doing so.

Appellant only summarily addresses the issue of cross-admissibility, referencing "Argument 5" as demonstrating that the attempted murder counts were not cross-admissible under Evidence Code section 1101 on the issues of identity, motive, intent, and plan in the context of the murder counts. (AOB 219, 241.) However, appellant's Argument 5 concerns the

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43. Sweets' body was found in a dumpster in an alley immediately behind appellant's apartment building. (1 RT Prelim; 3 RT Prelim 403.)

admission of the Bertha evidence admitted pursuant to Evidence Code section 1101 in the context of the attempted murder counts involving Maria and Karen and does not address the cross-admissibility of evidence. (AOB 170-177.) In Argument 6, appellant addresses *instructing* the jury on the cross-admissibility of evidence. (AOB 178-190.) However, Argument 6 addresses the issue in the context of the evidence admitted at trial, not upon the facts at the time the issue was addressed which is the context in which the issue must be reviewed. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 531.)

Appellant claims the offenses against Maria and Karen were inflammatory and joined with the weaker murder counts (AOB 220-222) and that the trial court failed to consider the "spillover" effect of the jury aggregating evidence on the weaker charges, altering the outcome of the other charges (AOB 222-224). However, as previously established, such is not the case. Appellant's entire argument is predicated upon the assumption that the evidence was not cross-admissible. Based upon the evidence at the time appellant made his motion to sever, the court clearly and correctly articulated why the evidence was cross-admissible, i.e., on the issues of identity and modus operandi. (8 RT 469-471.)

Furthermore, even if the evidence was not cross-admissible, the murder evidence – as discussed above – was no more inflammatory than the attempted murder evidence. Appellant's argument that the jury would aggregate the evidence of the offenses ignores two important considerations: First, the independent evidence of the proximity of Glover and Sweets' bodies to his home as well as the DNA, carpet fiber, fingerprint and blanket evidence tying him to the murders. Second, he was not found guilty of two of the four murders, concretely establishing the fact the jury did not aggregate the attempted murder offenses with the murder offenses. (*People v. Ruiz* (1988) 44 Cal.3d 589, 606-607 [jury verdicts strongly suggested jury was capable of

differentiating between various degrees of murder].)

Similarly, appellant fails to establish the joinder resulted in a denial of his right to a fair trial; that the joinder resulted in gross unfairness amounting to a denial of due process. (*People v. Mendoza, supra*, 24 Cal.4th at p. 162.) Appellant's lengthy, fact-based analysis claiming the joinder resulted in actual prejudice lacks merit. (AOB 227-244.[44]) While appellant dissects the People's case and highlights the defense, appellant ignores the fact he was not found guilty of two of the four murders. That is, the jury did not reach verdicts on the Simpson and Carpenter murder counts. It is obvious the jury considered each count separately – as instructed – and did not aggregate the offenses. (*People v. Ruiz, supra*, 44 Cal.3d at p. 607.) The joinder of the offenses did not result in a denial of due process. Appellant's argument to the contrary should be rejected.

B. The Bertha R. Evidence Was Properly Admitted Pursuant To Evidence Code Section 1101, Subdivision (b), Regarding The Attempted Murder And The Murders

In two separate arguments, appellant claims the trial court erroneously allowed the admission of evidence, pursuant to Evidence Code section 1101, subdivision (b), that appellant sexually assaulted Bertha R. on October 16, 1986 – two months after he murdered Sofia Glover, whose body was found near the Wilsie residence, and four days before sexually assaulting Karen at the Wilsie residence. (AOB 133 -166, 170-177.) In a third, related argument appellant claims the trial court improperly instructed the jury during

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44. Appellant uses this exact same analysis throughout his briefing, i.e., AOB pages 156-166 [admission of the Bertha R. evidence pursuant to Evidence Code section 1101, subdivision (b)], 199-207 [challenging the instruction allowing cross-consideration of the evidence]. Aspects of this analysis will be more fully addressed in subsequent arguments as necessary.

trial prior to the admission of this evidence in the context of the Glover and Sweets' murders. (AOB 167-169.) Appellant's claims lack merit because the court properly admitted the Bertha evidence to establish identity and intent and properly instructed the jury prior to the admission of the Bertha evidence.

1. Procedural Background

Prior to trial, the prosecutor filed a motion to admit the Bertha R. evidence pursuant to Evidence Code section 1101 on the issues of identity and intent. (6 CT 759-777.) Attached to the motion was the preliminary hearing testimony of Bertha. (6 CT 778-831.) Appellant opposed the motion. (7 CT 1055-1066.) Particularly, appellant argued the evidence was not admissible to establish identity based on modus operandi.[45/] (7 CT 1062-1063.) Appellant also argued the admission of this evidence was more prejudicial than probative. (7 CT 1064-1065.)

The trial court heard argument on the issue of whether to admit the Bertha evidence, pursuant to Evidence Code section 1101, subdivision (b), immediately after denying appellant's motion to sever the murder and attempted murder/sexual assault counts. (8 RT 471-475.) Appellant argued the uncharged offenses involving Bertha were distinctly different because (1) Bertha was driven around to various locations, (2) she was not a prostitute, (3) she was not placed in a dumpster, (4) and she was not unclothed "in the same type of manner that the other women were unclothed. . ." (8 RT 471-472.) As part of the holding, the court found the probative value of the evidence outweighed its prejudicial effect. (8 RT 473-474.) The court found the Bertha

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45. Appellant also argued evidence of incidents involving the sexual assault of Aida Lopez and the assault of Tracy Davison was inadmissible. (7 RT 1063-1064.) However, this evidence was not offered or admitted during the guilt phase trial.

evidence admissible, agreeing to instruct the jury about the limited purpose for which the evidence could be considered prior to its admission – identity, motive, and intent. (8 RT 472-475.)

During the testimony of Karen, the prosecutor informed the court that Bertha would be testifying that day and inquired into the court giving CALJIC No. 2.50 prior to her testimony. (26 RT 2546.) The court indicated it would give the instruction limiting consideration of the evidence to determining intent, identity and motive. (26 RT 2546-2547.) Contrary to his assertion otherwise, appellant did not object to the instruction but, rather, to Bertha's testimony in general.[46/] (AOB 168.) Just prior to Bertha's testimony, the court instructed the jury regarding the limited purpose for which the evidence was being admitted. (26 RT 2633-2634.)

Appellant claims the court erroneously instructed the jury regarding the Bertha evidence (CALJIC No. 2.50). (AOB 167-169.) Because appellant did not object to this instruction, his claim should be deemed forfeited for purposes of appeal. (*People v. Hawkins* (1995) 10 Cal.4th 920, 943, *abrogated on other grounds by People v. Lasko* (2000) 23 Cal.4th 101, 110.) Appellant argues that without proof Glover and Sweet were prostitutes, i.e. willing sexual partners, there was no basis to instruct the jury that the Bertha evidence could be considered to establish intent and identity in the context of the Glover and Sweets' murders. (AOB 168-169.) Assuming this issue is not forfeited, the legal and factual underpinnings of appellant's argument attacking the instruction are unsound and it should be rejected.

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46. Appellant also expressed concern about whether the prosecution would be allowed to put on additional witnesses regarding the offenses committed against Bertha, but this is not pertinent to the issues raised by appellant.

2. Bertha R. Evidence

The trial court had before it the preliminary hearing transcript of Bertha's testimony to consider as an offer of proof when deciding whether to admit the evidence of the offenses appellant committed against her, pursuant to Evidence Code section 1101. Bertha's preliminary hearing testimony substantially corresponded with the evidence at trial. (6 CT 778-831.) The Bertha evidence at trial was as follows:

On October 16, 1986, at approximately 8:00 a.m. Bertha left her North Park home and began walking to a check-cashing business. (26 RT 2636-2637.) While Bertha was looking up the address of the business in a phone book on El Cajon Boulevard, appellant drove up in a blue 280Z and offered to help. (26 RT 2637-2638, 2640; 27 RT 2697.) Though Bertha did not know appellant, he seemed nice, and she accepted his offer for a ride to the check-cashing business. (26 RT 2638-2639.)

However, when they arrived at the business the computers were down, so Bertha could not cash her check and was told to come back later. (26 RT 2639.) Appellant then drove her to her home and asked if she wanted to hang out with him. Bertha agreed to hang out with appellant, and he drove her to the Wilsie home on Mississippi. (26 RT 2639-2640.)

While at the Wilsie home appellant offered Bertha a marijuana cigarette, which they both smoked, while watching television. (26 RT 2642.) When appellant asked if he could have a kiss, Bertha said no.

While Bertha was watching television, appellant came from behind her, put his arm around her neck, put a knife to her throat and told her he would kill her if she did not do as he said. (26 RT 2643-2645.) Appellant told Bertha to remove her clothes, which she did while appellant held her around the neck, and then made her lay on the floor. (26 RT 2645.) Appellant sodomized Bertha, rolled her on to her back and raped her. (26 RT 2646-2647.)

Appellant then allowed Bertha to get dressed while he went through her purse, taking $65 and her check. (26 RT 2648-2650, 33 RT 3524.)

Appellant told Bertha, "I've got to find some place to put you." (26 RT 2650.) Appellant drove Bertha around to several places in San Diego – including Fiesta Island, Old Town and Golden Hill – at one point forcing her to orally copulate him in the car while holding her head down with his hand on her neck. (26 RT 2651-2653.) Even though they did stop at these various locations, Bertha was too frightened to attempt an escape. (26 RT 2653-2655.)

Appellant then drove Bertha to Southeast San Diego, going to a drive-through Burger King. (26 RT 2655.) By this time Bertha was a nervous wreck, and as they were driving in to an alley approximately a block away from the Burger King, she told appellant she was going to get sick. (26 RT 2656-2657.) Appellant told her not to get sick in the car, and when he slowed down, Bertha got out of the car and escaped. (26 RT 2656-2657.)

Olivia Gonzalez worked for Catholic Charities, and the back of the building faced the alley where Bertha got out of appellant's car. (27 RT 2688-2690.) Gonzalez saw appellant's light blue 280Z driving slower than normal through the alley (27 RT 2689-2690) and then saw Bertha in the alley, looking very scared and with a cut on her leg (27 RT 2692-2693). Gonzalez immediately rendered assistance, helping Bertha into the building and contacting the police as the 280Z continued heading north in the alley. (27 RT 2693.) Bertha was trembling, shaking, mumbling and crying, unable to talk coherently. (27 RT 2693-2695, 2696-2697.) Whenever Gonzalez attempted to walk away from Bertha, Bertha would clamp on to her arm and not let her leave. (27 RT 2695, 2697.)

After the police arrived, even though Bertha was still extremely emotional, she described being picked up by a man on El Cajon Boulevard, being raped and then being driven around to different places. (27 RT 2697.)

The police officer who spoke with Bertha at the crime scene – a witness called by the defense – recalled Bertha being extremely upset and emotional. (33 RT 3517-3518, 3522-3523.) The officer had to stop the interview so Bertha could calm down. Bertha was so upset, the officer had difficulty understanding her. (33 RT 3524-3525.) Bertha had a purse with her, but there was no money in the wallet when Bertha checked it. (33 RT 3524.) Bertha had hurt her leg escaping from appellant's car as he drove away at a high rate of speed after he attempted to make her orally copulate him in the alley. (33 RT 3528.)

3. The Bertha R. Evidence Established Identity And Intent Pursuant To Evidence Code Section 1101, Subdivision (b)

While evidence of uncharged conduct is not admissible pursuant to Evidence Code section 1101 to establish a defendant's bad character or predisposition to criminality, evidence of uncharged criminal conduct is admissible under subdivision (b) to prove some material fact at issue.[47] (*People v. Roldan, supra,* 35 Cal.4th at p. 705.) Evidence that a defendant previously committed a similar crime can be circumstantial evidence to prove identity, intent, knowledge, motive, common design, scheme or plan in the present crime(s) so long as the probative value is not outweighed by its prejudicial effect. (Evid. Code § 1101, subd. (b); *People v. Butler* (2005) 127 Cal.App.4th 49, 60.) The degree of similarity between the charged offense(s) and the prior

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47. Under Evidence Code section 1108, which was enacted after appellant's trial, uncharged sex offenses are admissible in cases such as appellant's so long as they pass Evidence Code section 352 muster. Therefore, the evidence about which appellant complains on appeal would be admissible, exclusive of Evidence Code section 1101, if appellant were retried. That is, the prosecution would not have to establish admissibility pursuant to Evidence Code section 1101, subdivision (b). (*People v. Britt* (2002) 104 Cal.App.4th 500, 505-506.)

criminal conduct depends upon the reason it is sought to be admitted. (*People v. Roldan, supra*, 35 Cal.4th at p. 705; see *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.) The highest degree of similarity between the uncharged and the charged offenses is required when the evidence is offered to establish identity and the least degree of similarity is required to establish intent. (*People v. Kipp* (1998) 18 Cal.4th 349, 369-371.)

Review of the trial court's decision to admit evidence under Evidence Code section 1101, subdivision (b), is reviewed for abuse of discretion. (*People v. Roldan, supra*, 35 Cal.4th at p. 705.) When reviewing the admission of evidence of other crimes, this Court considers the materiality of the fact, to be proved or disapproved, probative value of the evidence to prove or disapprove the fact, and the existence of any rule or policy requiring exclusion of the evidence. (*People v. Sully* (1991) 53 Cal.3d 1195, 1224.) The evidence must be viewed in a light most favorable to the trial court's ruling. (*People v. Carter* (2005) 36 Cal.4th 1114, 1148.)

Appellant's plea of not guilty put all issues in dispute. (*People v. Roldan, supra*, 35 Cal.4th at p. 706.) Therefore, identity and intent were material issues. The trial court did not abuse its discretion when finding the evidence of the offenses appellant committed against Bertha R. were admissible to establish identity, motive, and intent.

Appellant claims intent was not an issue regarding the Glover and Sweets murders because "it was not conceded or assumed [he] committed any act with respect to JoAnn Sweets or Sofia Glover" and asserts there is no disputed fact that Glover and Sweets were intentionally killed. (AOB 150.) Similarly, appellant asserts there was no issue of identity or intent regarding the offenses committed against Karen and Maria. (AOB 170-171.) Appellant is wrong. The prosecution did have to prove all elements of the offenses against Karen, Maria, Glover and Sweets which included identity and intent. (*People*

v. Kipp, *supra*, 18 Cal.4th at p. 371.)

Contrary to appellant's assertion, it was not contested that appellant picked up Karen and that he had sex with Maria. (AOB 170-171.) Rather, appellant claimed the sex was consensual. In fact, appellant concedes as much in the opening brief when claiming his defense to the charges involving Maria was that she "concocted a tale of 'attempted murder'" after voluntarily orally copulating appellant and then not receiving payment as promised by appellant. (AOB 174.)

For evidence of an uncharged crime to be admissible to prove identity, the charged and uncharged offenses must display a pattern and characteristic so unusual and distinctive as to be like a signature. (*People v. Carter*, *supra*, 36 Cal.4th at p. 1148; *People v. Kipp*, *supra*, 18 Cal.4th at pp. 369-370.) The strength of the inference depends upon two factors: (1) the degree of distinctiveness of individual shared marks, and (2) the number of minimally distinctive shared marks. (*People v. Carter, supra*, 36 Cal.4th at p. 1148.) When both the charged and uncharged offenses involve a highly unusual and distinctive nature, the possibility that anyone other than the defendant committed the charged offense is virtually eliminated. (*People v. Roldan*, *supra*, 35 Cal.4th at p. 706.) However, the charged and uncharged crimes need not be "mirror images" of each other. (*People v. Carter*, *supra*, 36 Cal.4th at p. 1148.) Consideration of the common marks of the charged and uncharged offenses, singly or in combination, logically operate to set apart the offenses from other crimes of the same general variety and tend to suggest that the perpetrator was the same. (*People v. Miller* (1990) 50 Cal.3d 954, 987.) But the inference of identity does not depend on one or more unique or nearly unique common features because features of substantial but lesser distinctiveness may result in a distinctive combination when considered together. (*People v. Miller*, *supra*, 50 Cal.3d at p. 987.)

Regarding intent, this Court recognizes that if a person acts similarly in similar situations, the same intent is probably harbored in each instance, so such prior conduct may be relevant circumstantial evidence of intent regarding the offense in question. (*People v. Roldan, supra*, 35 Cal.4th at p. 706.) To be admissible to show intent, the uncharged conduct and the charged offense need only be sufficiently similar to support the inference that the defendant probably harbored the same intent in each instance. (*People v. Yeoman* (2003) 31 Cal.4th 93, 121.) The least amount of similarity between the uncharged conduct and the charged offense is required when it is admitted to establish intent. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.)

This Court's decisions in *Sully*, *Kipp*, and *Carter* are directly on point with the instant case because the facts are substantially similar; in each case this Court found the other crimes evidence admissible on the issues of identity and intent. (*People v. Sully, supra*, 53 Cal.3d at pp. 1224-1225; *People v. Kipp, supra*, 18 Cal.4th at pp. 370-372; *People v. Carter, supra*, 36 Cal.4th at pp. 1148-1149.) *Sully* involved the murder of several prostitutes. Evidence of other sexual and violent offenses which did not result in the murder of the victims was admissible to establish identity and intent. (*People v. Sully, supra*, 53 Cal.3d at pp. 1224-1226.) Several of Sully's murder victims were found nude and showed signs of having been bound and physically abused, so this Court found evidence that Sully freebased cocaine while handcuffing, gagging and committing multiple sex acts on one woman and stringing up by the wrists, choking and punching another woman while freebasing cocaine was admissible to establish identity and intent. (*Id.* at pp. 1224-1225.)

Kipp involved the strangulation murder of a 19-year-old woman who was found under a blanket in her own car with her blouse pulled up, exposing her breasts, and with her pants and panties around her ankles. (*People v. Kipp, supra*, 18 Cal.4th at p. 360.) It was apparent the murder had occurred

in another location. ((*People v. Kipp*, *supra*, 18 Cal.4th at p. 370.) The trial court allowed into evidence facts indicating that three months prior to the murder for which Kipp was on trial, he murdered another 19-year-old woman whose body was found in her hotel room covered with a sheet but the bedding otherwise undisturbed (indicating the murder occurred elsewhere), with a belt around her neck, her blouse pulled above her head (wearing no other clothing), and with semen and sperm in her vagina and genital area. (*Id.* at pp. 360-361.) This Court found the two offenses displayed highly distinctive features – strangulation of 19-year-old women, the murders occurring in a location other than where the body was found, the bodies being covered with bedding – and upheld the trial court's admission of this evidence to establish identity, intent, and common design scheme or plan. (*Id.* at pp. 370-372.)

Carter involved the murder of five women; Carter was charged with three of the murders. Regarding the two uncharged murders, the jury heard evidence that one of the victims lived in Alameda County, was seen with Carter and found several days later decomposed in her bathroom to the point that the cause of death could not be determined, but she had a cord beneath her neck. (*People v. Carter*, *supra*, 36 Cal.4th at pp. 1128-1129.) The other victim, Janette Cullins, who lived in San Diego had met appellant in a bar and several days later was found dead in her closet from strangulation. (*Id.* at pp. 1132-1133.) A car resembling that of one of the murder victims was also seen near Cullins' apartment within days of Cullins' body being found. (*Ibid.*) While the three murder victims had all been sexually assaulted and strangled, there was no evidence either Cullins or the other victim had been sexually assaulted. Also, there was only circumstantial evidence tying two of the murder victims to appellant. This Court held the evidentiary links between the charged offenses and the uncharged offenses – the combination of fatal strangulation and placement of the bodies in a closed bedroom closet – were highly

distinctive as to the identity of the perpetrator as well as to the perpetrator's murderous and larcenous common plan and intent. (*People v. Carter, supra,* 36 Cal.4th at pp. 1148, 1150.)

Just as in *Sully*, *Kipp*, and *Carter* the uncharged offenses involving Bertha supported the inference that appellant harbored the same intent regarding the offenses which he was charged with committing against Maria and Karen. (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 121; *People v. Sully*, *supra*, 53 Cal.3d at pp. 1224-1225.) All three women were alone on the street in the morning when appellant approached them; Bertha at 8:30 a.m. on El Cajon Boulevard (26 RT 2637-2638, 27 RT 2697), Maria downtown at 11:00 a.m. on Broadway (24 RT 2021-2043), and Karen M. at 11:00 a.m. on 48th and L Streets (26 RT 2524). Appellant approached Bertha in the same car he picked up Karen – a light blue 280Z. Bertha willingly went with appellant to the Wilsie residence. Karen and Maria also voluntarily went with appellant, albeit for the purpose of engaging in an act of prostitution. Appellant took all three women to where he was staying, taking both Bertha and Karen to the Wilsie residence. After arriving, Bertha and appellant shared a marijuana cigarette. Similarly, appellant offered Karen rock cocaine and eventually forced her to drink alcohol. (26 RT 2527, 2550-2551.) Maria used heroin and intended to buy drugs with the money appellant was to pay her. (24 RT 2069, 2073.)

Appellant grabbed Bertha around the neck from behind and forced her to remove her clothing, just as he did Karen (26 RT 2537-2538). While Maria and Karen both initially engaged in willful sex acts with appellant, appellant choked all three women into submission, threatened to kill them and forced them to perform non-consensual sex acts. These acts included oral copulation, sodomy and vaginal intercourse; so too with Bertha. These common features – morning pickups off the street, the use of drugs, being

brought to appellant's home or Wilsie residence, strangulation with threats to kill – were sufficiently distinctive to support the inference that appellant harbored the same intent in each instance; an intent to commit the sexual offenses and attempt to murder. (*People v. Sully*, *supra*, 53 Cal.3d at pp. 1224-1225; *People v. Yeoman*, *supra*, 31 Cal.4th at p. 121.)

Regarding the Glover and Sweets murders, there was evidence appellant had sex with them, so the issue of intent regarding these offenses was an issue for purposes of establishing the special circumstance of murder committed while engaged the commission of rape and sodomy (Pen. Code, § 190.2, subd. (a)(17)). (*People v. Sully*, *supra*, 53 Cal.3d at pp. 1224-1225.) Also, the Bertha evidence along with that of Maria and Karen helped establish identity. Just as in *Sully*, the fact appellant murdered some of his victims but not others was not pivotal to the admission or relevance of this evidence.[48] (*Ibid.*)

Regarding the murders, there were four unique and distinctive facts common to the Glover, Sweets, Maria, and Bertha offenses for purposes of establishing identity. First, Sweets and Glover were both found in close proximity to where appellant stayed; Sweets by appellant's apartment and Glover by the Wilsie residence. Second, DNA evidence established Glover and Sweets had sex, and appellant could not be ruled out as the sperm contributor – Bertha, as well as Maria and Karen all had forced sex with appellant. Third, Glover and Sweets had drugs in their systems, and Bertha smoked marijuana with appellant. Maria and Karen admitted being drug users, and Karen had

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48. Throughout the briefing, appellant attempts to establish prejudice and distinguish the offenses against Glover and Sweets from those committed against Karen, Maria, and Bertha by pointing out that Glover and Sweets were murdered while the others were not. (AOB 147, 174, 184, 213.) However, this does not establish a meaningful distinction either factually or legally. (See *People v. Sully*, *supra*, 53 Cal.3d at pp. 1224-1225.) Also, it does not comport with the law of attempt discussed more fully, *infra*.

used drugs in close proximity to her encounter with appellant; appellant offered Karen rock cocaine, though she turned it down. (26 RT 2524-2525, 2527 2536.)

Fourth, appellant choked or strangled all of his victims and threatened to kill them. Appellant forced Bertha to remove her clothing while holding her by the neck and grabbed Karen from behind by the neck while she was removing her clothes, strangling her almost to the point of unconsciousness. (26 RT 2536-2538.) Appellant strangled Maria with a leather rope to a point of unconsciousness after she got out of the shower. (24 RT 2046-2048.) Glover was found nude (except for a scarf around her neck), wrapped in a blanket with her clothing in an alley nearby, and Sweets was found nude in a dumpster with only a shirt and bra, wrapped in a sheet and mattress pad and covered with a blanket; both were found to have been severely beaten and strangled. Just as in *Sully*, the fact that Glover and Sweets were strangled and left nude suggested sexual motivations and the offenses committed against Bertha, Karen, and Maria were pertinent to the issue of identity because appellant strangled and threatened each of them. (*People v. Carter*, *supra*, 36 Cal.4th at pp. 1149-1150; *People v. Sully*, *supra*, 53 Cal.3d at p. 1225.)

Considered together, the facts in the instant case are at least as distinctive – if not more so – as those in *Sully*, *Kipp*, and *Carter*. (*People v. Sully*, *supra*, 53 Cal.3d at pp. 1224-1225; *People v. Kipp*, *supra*, 18 Cal.4th at p. 378; *People v. Carter*, *supra*, 36 Cal.4th at pp. 1149-1150.) These facts – proximity to appellant's home; evidence of sex with appellant; the use of drugs; being found nude, having been beaten and strangled – were distinctive in nature and when considered in combination logically operated to set apart the offenses from other murders and support the trial court's decision to admitt the Bertha evidence. (*People v. Sully*, *supra*, 53 Cal.3d at pp. 1224-1225; *People v.*

Carter, supra, 36 Cal.4th at pp. 1149-1150.) This, especially in light of the fact that Bertha, Maria and Karen were all convinced by appellant to voluntarily go with him and both Sweets and Glover were known to have been on the streets and, therefore, likely to have been easily convinced to voluntarily accompany appellant to his apartment or the Wilsie's home; close to where their bodies were found. Appellant's arguments to the contrary lack merit. (AOB 146-149.)

According to appellant's analysis, the strangulation murder of women whose bodies were found in dumpsters or near an alley within close proximity to where he lived with evidence those victims recently had sex with him is such a common occurrence that the fact there is evidence he sexually assaulted and strangled two prostitutes and another woman whom he picked up off the streets is of no significance, even though the attacks occurred where he lived or a residence where he had access. (AOB 146-149.) Not only the law but logic fails to support such analysis. This is so especially in light of the other common factors in this case such as drug use and unique evidence common to the offenses such as the fact that the blanket which covered Sweets' was made by appellant's mother, the carpet fibers found matched appellant's apartment's carpet fibers, and appellant's fingerprint being on one of the plastic bags in which Sweets was found.

Appellant attempts to diminish the similarities and highlight the differences of the various offenses, but appellant's arguments fail to consider the similarities in their totality rather than individually and fail to take into consideration the cross-admissibility of the Maria and Karen evidence. (AOB 146-149.) As this Court has recognized, "the charged and uncharged crimes need not been mirror images of each other." (*People v. Carter, supra*, 36 Cal.4th at p. 1148.) The similarities, as already set forth above, were distinctive when considered in concert with each other even though each crime was not identically committed.

Appellant also asserts Bertha was not a prostitute like Glover and Sweets, and the court erroneously reasoned all three women were willing sexual partners. (AOB 142-146, 167, 169.) Appellant makes multiple arguments based upon the assumption that the court's determination to admit the Bertha evidence was primarily based upon the fact that Sweets and Glover were prostitutes and Bertha initially agreed to have sex with him and that this was pivotal to the trial court's holding. Appellant argues the court improperly instructed the jury about the Bertha evidence since Glover and Sweets were not willing sexual partners or prostitutes. (AOB 167-169.) However, the premise of appellant's arguments – that it was pivotal to the trial court's ruling and the instruction of the jury that Glover and Sweets were prostitutes – is erroneous.

Indeed, ***prior to trial*** the court stated that "the clear mark of distinction that stands out in this case, the Bertha [R.] case, is the force used on an otherwise willing sexual partner." (8 RT 472.) However, immediately after this, the court stated, "she may not have been a prostitute, but she was willing to go with defendant to the house on Mississippi Street four days before the [Karen M.] case." (8 RT 472.) The court then went on to discuss the charge of attempted murder involving Karen. Clearly, the mark of distinction which the court found compelling was that Bertha, Karen and Maria willfully accompanied appellant to the house, but this was in the context of the attempted murder counts and not the murder counts. ***During trial***, the court stated that "the real issues that I had in mind I know were intent and motive, because of that 'why would you kill a willing prostitute for sex'. . . ." (26 RT 2599.) But this query addressed the Carpenter and Simpson murders more than the Glover and Sweets murders since the Carpenter and Simpson murders, unequivocally, involved prostitutes as did the attempted murders of Maria and Karen. The court properly instructed the jury regarding the Bertha evidence both prior to its admission and during the final instructions.

Appellant argues the Bertha offense was distinguishable because she was not a prostitute or willing sex partner (AOB 143, 169), there was no evidence Glover and Sweets were willing sex partners even if they were working prostitutes (AOB 143-144), force and violence directed towards willing sexual partners and prostitutes is commonplace (AOB 144-145[49]), and it is possible the murders were "copycat" prostitute murders (AOB 145-146). Appellant also asserts, in two separate arguments, that the prosecutor misstated that Glover and Sweets were prostitutes. (AOB 143-144, fn. 38, 167.) Appellant claims the prosecutor made this misrepresentation to both the court and the jury and the prosecutor "had an ethical duty to disclose the failure of proof to the court" so Bertha's testimony could be stricken or a mistrial declared. (AOB 143-144, fn. 38, see also 167.) However, such is not the case. Appellant's arguments are flawed for several reasons.

Appellant's arguments focusing on prostitution, willing sexual partners, violence towards prostitutes and "copycat" prostitute murders are not persuasive in the context of the Glover and Sweets murders and whether the Bertha evidence was properly admitted pursuant to Evidence Code section 1101, subdivision (b). (AOB 142-146, 167, 169.) Appellant bases his arguments on discussion by the court whether the Bertha evidence bore "the mark of Zorro," but this discussion was not limited to the murders of Glover and Sweets; it concerned all the offenses – the murders of Carpenter, Simpson, Glover, and Sweets as well as the attempted murders of Maria and Karen. As already established above, the Bertha evidence was properly admitted for purposes of establishing identity and intent.

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49. Throughout the arguments appellant references studies and materials which were not cited to the court or jury nor asked by this Court to take judicial notice, so there is no basis for referencing them. Therefore, these materials should not be considered for purposes of appellant's argument.

Appellant's assertions that the prosecutor introduced no evidence prior to or at trial that Glover and Sweets were prostitutes – implying the prosecutor misrepresented the facts to the court and jury – is not accurate. (See AOB 143, fn. 38, 167.) As established above, evidence at the preliminary hearing established that both Glover and Sweets were prostitutes. (3 RT Prelim 401, 411-412.) Therefore, the prosecutor made no misrepresentations to the court in the pretrial motions referenced by appellant. In fact, appellant's pretrial moving papers acknowledge Glover and Sweets were prostitutes. (See 7 CT 1057-1058, 1068, 1076, 28 CT 5009-5010, 5023; 29 CT 5293-5294.) While there was no evidence during the prosecution's case in chief that Sweets was a prostitute, Bettie Davis testified she did not know firsthand whether Glover was a prostitute, even though she heard she was; she only knew that Glover lived on the streets. (25 RT 2288, 2292.)

Furthermore, while cross-examining Dr. Blake, the People's DNA expert, appellant's counsel asked "in this particular case were you provided information that ***all of the females*** in this case, Ms. Carpenter, Ms. Simpson, ***Ms. Glover and Ms. Sweets, were known and active prostitutes*** at the time of their death?" (29 RT 2006-3007, emphasis added.) Dr. Blake answered affirmatively. Also, while discussing the jury instructions near the close of evidence, on two occasions appellant's trial counsel made statements that all the victims were prostitutes.[50] Given the fact that appellant's own trial

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50. The parties discussed at length whether the instructions should include language that proof of ejaculation is not required to establish rape and oral copulation. (39 RT 4383-4395.) In this context, appellant's counsel asserted "I think the defense can argue that that [sic] sexual contact is not necessarily illegal sexual conduct, ***given the nature of the profession of the victims in all these cases***," i.e., all of the victims – including the murder victims – were prostitutes. (39 RT 4395, emphasis added.) Later, appellant's counsel again referred to all of the victims – including Sweets and Glover – "Well, the concern is that ***this involves prostitutes***. I think except for Ms. [R.] -- and she's not charged -- most all of them, if you believe the witnesses that testified, that

counsel acknowledged this was the state of the evidence during the trial, appellant's assertions that the prosecutor misrepresented the facts, requiring a mistrial or striking Bertha's testimony, is unfounded. (AOB 144, fn. 38, 167.)

Appellant claims the prosecutor "repeatedly" stated to the jury that Glover and Sweets were prostitutes. (AOB 143, fn. 38.) Again, appellant is wrong. Whether evidence was properly admitted does not depend on how it was later argued to the jury. (*People v. Harrison* (2005) 35 Cal.4th 208, 230 [in the context of evidence submitted pursuant to Evidence Code section 1101, subd. (b)].) Furthermore, appellant only cites one reference to the opening statement, one from closing arguments from the guilt phase, and one from the opening statement during the penalty phase. The record establishes one of the references is ambiguous, in another reference the prosecutor stated the opposite (Glover was not a prostitute), and none of the statements were important to the prosecution's case or, more importantly, to the court's decision to admit the other crimes evidence involving Bertha.

The referenced statement from closing argument does not mention either Glover or Sweets by name but, instead, the prosecutor simply stated "Now, ***if*** these women are prostitutes, and there is a pretty good indication that ***most of them*** were, you would think -- well, I will leave that one alone." (45 RT 5001, emphasis added.) This statement accurately describes the evidence before the jury. What the prosecutor repeated and emphasized during closing arguments was that each of the women were alone and would not be missed by anyone. (45 RT 4988-4989, 4991, 4994-4995, 4999, 5004, 5009.)

During opening statements of the penalty phase, the prosecutor discussed the testimony of Bettie Davis about Glover. The prosecutor stated,

> Sofia Glover had some worth. Bettie Davis thought she did. Bettie Davis was the lady who came in here and identified the

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they in fact consented to it . . . ." (39 RT 4394- 4395, emphasis added.)

> clothing that was found. She liked Sofia Glover. She was a friend. Someone she would look out for, try to care for. You could see the hurt she had for Sofia Glover. A real person. A real person. ***Not just a prostitute, a street bum***.

(53 RT 5932-5933, emphasis added.) Based on the record, it is clear the prosecutor did not "repeatedly [state] to the . . . jury that Sofia Glover and JoAnn Sweets were prostitutes" as claimed by appellant. (AOB 143, fn. 38.) Furthermore, this was not integral to the admission or consideration of the Bertha evidence in the context of the murder charges.

Claiming the Bertha evidence was inadmissible regarding the murders of Sweets and Glover, appellant claims Bertha was driven around, whereas there is no evidence Sweets or Glover were driven anywhere. (AOB 148.) However, the offenses need not be identical but, rather, share distinctive, common marks. (*People v. Carter*, 36 Cal.4th at p. 1148; *People v. Miller*, *supra* 50 Cal.3d at pp. 980-981, 990-991 [evidence defendant attacked heterosexual man with a pipe and physically assaulted another man, a willing homosexual partner, both admissible other-crimes evidence to establish murder and attempted murder of homosexual men].) This Court in *Miller* found an assault involving a similar weapon and an assault associated within a particular area and victim were admissible other crimes evidence. (*People v. Miller*, *supra*, 50 Cal.3d at p. 991.) In *Carter*, this Court found the death of two women who were not sexually assaulted was admissible to establish the murders of three women who were raped and murdered.

In the instant case, the distinction that Bertha was driven around is irrelevant, considering she was strangled into submission while Sweets and Glover were strangled to death, evidence supported the fact all three had sex with appellant, the proximity of appellant's apartment and the Wilsie residence where their bodies were found. Before driving Bertha around, appellant told her "I've got to find some place to put you." and then after taking her to various

locations and forcing her to orally copulate him, he turned down an alley where she fortuitously escaped. (26 RT 2650, 2656-2657.) Sweets was found in a dumpster in an alley and Glover on a grassy area not far from an alley (25 RT 2249). Therefore, given appellant's statement to Bertha, his drive with her was not a fact which rendered the offenses which he committed against her irrelevant for purposes of establishing intent or identity but, rather, the opposite.

The trial court did not commit error by admitting the evidence of the offenses appellant committed against Bertha for purposes of establishing the murders of Glover and Sweets and the attempted murders and sexual offenses against Maria and Karen. The court carefully considered the Bertha evidence and found its probative value outweighed the prejudicial effect. Appellant's arguments to the contrary lack merit and do not establish the trial court's decision was beyond reason. Even if the issue was a close call, the trial court considered all the arguments by both sides and weighted the probative value of the Bertha evidence over its prejudicial effect, so this Court can properly defer to the trial court's determination. (*People v. Early* (2004) 122 Cal.App.4th 542, 548.)

4. Even If The Bertha R. Evidence Was Erroneously Admitted, The Error Was Harmless Under Any Standard

Assuming the trial court did commit error by allowing the Bertha evidence, it was harmless. Contrary to appellant's claims otherwise (AOB 156 -166, 172-177), it is not reasonably probable that he would have received a more favorable result if the Bertha evidence had not been admitted. (*People v. Carter, supra*, 36 Cal.4th at p. 1152; *People v. Cole* (2004) 33 Cal.4th 1158, 1195.) Likewise, any error was harmless beyond a reasonable doubt. (*People v. Cole, supra*, 33 Cal.4th at p. 1159 citing *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

The evidence that appellant murdered Sweets and Glover and sexually assaulted and attempted to murder Maria and Karen was strong. Appellant analyzes each offense individually without taking into account the cross-admissibility of the evidence of the other offenses with which he was charged and convicted. Appellant also offers alternative explanations for the circumstantial evidence – DNA evidence, fingerprint evidence, fiber analysis, the fact Sweets' body was covered with a blanket his mother made – but these were issues of credibility for the jury to determine. Also, to the extent appellant did not make these arguments below, they are forfeited.

The evidence establishing appellant murdered Sweets was not weak and was not dependent upon the Bertha evidence. Sweets was found nude with only a black shirt and bra,[51] strangled to death in the dumpster directly behind appellant's apartment, covered by a blanket made by appellant's mother which had carpet fibers matching appellant's apartment's carpet, wrapped in a sheet with semen stains consistent with appellant's DNA, and in a plastic bag with appellant's fingerprints on it. (29 RT 3059.) Appellant offers speculative explanations for all of this compelling circumstantial evidence. (AOB 158-164, 199-207.[52]) But when this substantial circumstantial evidence is considered with the fact that appellant sexually assaulted and attempted to murder Maria by strangulation at the same apartment and Glover was found nude with semen consistent with appellant's DNA in her anus,

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51. The officer who testified to how Sweets was found could not recall if she was nude but did recall a black shirt and bra were found with the body. (29 RT 3059.)

52. The reference to AOB pages 199-207 are from appellant's argument claiming prejudice regarding the jury instructions where appellant makes the same factual analysis. Rather than repeating the same analysis when addressing the jury instructions, respondent simply references the page numbers where appellant makes the dual analysis when asserting prejudice in the context of the jury-instruction issue and incorporates this by reference.

wrapped in a blanket near the Wilsie residence, the evidence that appellant sexually assaulted and murdered Sweets is not weak.

Ignoring the evidence from the other offenses, appellant argues the only evidence tying him to the Glover murder – besides the Bertha evidence – was the proximity of Glover's body to the Wilsie residence where his mother worked as well as DNA evidence which indicated he, along with 15 percent of the population, could have deposited the semen stains on the blanket and in her anus. (AOB 156-158.) Appellant claims the DNA evidence was weak because it indicated another individual deposited the semen too. (AOB 157.) Appellant erroneously asserts the Bertha evidence is the only other evidence tying him to the Wilsie residence in the murder of Glover; appellant fails to consider the fact that he also violently sexually assaulted and strangled Karen at the Wilsie residence two months after Glover's body was found. Furthermore, Glover was found nude, wrapped in a blanket near an alley, in much the same way Sweets was found nude in the dumpster in the alley directly behind appellant's apartment. The fact the Wilsie residence and appellant's apartment were not close to each other is not significant in light of the fact appellant is concretely tied to both residences; i.e., he lived at the apartment and had keys to the Wilsie residence so he could stay there and watch over it. The Bertha evidence was no more inflammatory than any of the other evidence in the instant case and clearly was not critical to establishing appellant's guilt in Glover's murder.

The evidence establishing appellant sexually assaulted and attempted to murder Maria and Karen was substantial and compelling. Both Maria and Karen positively and unequivocally identified appellant. Contrary to appellant's complaints otherwise, even if the Bertha evidence was erroneously admitted, it was not prejudicial under any standard. Ample evidence supported appellant's convictions for attempted murder and sexual assault.

In fact, appellant concedes on appeal he had sex with Maria but claims it was consensual and claims she was merely angry because he did not pay her for the sex. (AOB 174.) In this vein, appellant asserts "the attempted murder charge was legally untenable" because he would have killed her if he so intended. (AOB 174.) However, appellant's argument defies the law regarding attempt. The fact appellant was capable of strangling Maria to death does not negate the fact he committed attempted murder when, for whatever reason, he failed to do so.

Penal Code section 664[53] provides that every person who attempts any crime, but fails, is subject to punishment. (See *People v. Toledo* (2001) 26 Cal.4th 221, 229-230.) Penal Code section 21a defines attempt as follows: "An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." The act committed need not be the last proximate or ultimate step toward commission of the offense. (*People v. Kipp*, *supra*, 18 Cal.4th at p. 376.) In the instant case, appellant choked Maria at least twice to the point of unconsciousness with a leather cord. (24 RT 2049-2051.) It was not until after Maria regained consciousness from being strangled that appellant demanded she orally copulate him or he would kill her. (24 RT 2050-2051.)

It is clear that appellant's act of choking Maria multiple times to the point of unconsciousness established the specific intent to murder her – especially in light of the fact that this occurred before appellant demanded to be orally copulated but after they had sex – and that choking her was a direct but ineffectual act towards the commission of murder even though it was not the ultimate step – her death. The evidence definitively established appellant committed an act causing significant danger of harm, so it is immaterial that for

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53. Penal Code section 664 provides in part, "Every person who attempts to commit any crime, but fails, . . . shall be punished . . ."

some collateral reason he did not commit the intended crime, i.e., murder. (*People v. Toledo, supra*, 26 Cal.4th at p. 230.) In any event, the fact that Maria survived appellant's attack does not make appellant's conviction of attempted murder "untenable" (AOB 174) or the admission of the Bertha evidence prejudicial; especially in light of the fact Maria had bruising around her neck consistent with being choked as she described.

Appellant spends considerable time explaining the bruising on Maria's neck and challenging the credibility of Maria's testimony. (AOB 174-175.) But this analysis does not establish the admission of the Bertha evidence was prejudicial. Karen described the same experience as Maria, albeit at a different location. However, both locations were places appellant had access and control – his apartment and the Wilsie residence.

Appellant's claim of prejudice regarding the offenses involving Karen are much the same as his other arguments of prejudice. (AOB 175-177.) Appellant challenges the credibility of Karen, claiming she was intoxicated when the police found her, the police never took a report that Karen complained appellant had sexually assaulted her, and Karen did not make her claims until three years later. However, Karen accurately described how appellant picked her up, solicited her for an act of prostitution and drove her in the 280Z to the Wilsie residence. While appellant claims he simply took her to the Wilsie residence to "dry out" because she was drunk, Karen accurately described the car appellant drove, the area outside the Wilsie residence and the inside of the Wilsie residence – someone drunk to the point of passing out would not have such accurate recollections. Furthermore, Karen's testimony was credible and consistent with how appellant picked up Maria, solicited her for an act of prostitution, brought her back to his home and committed the acts charged.

Assuming arguendo the trial court erroneously admitted the Bertha evidence, no prejudice resulted under any standard. It is clear that the

jury was capable of deciding each of the counts individually because they did not reach verdicts on the counts involving the Simpson and Carpenter murders. Contrary to appellant's claims, the Bertha evidence was properly admitted and he was not convicted based upon improper propensity evidence.

C. Appellant Has Forfeited His Claims Attacking The Instruction Of The Jury; Nonetheless, The Jury Was Properly Instructed Concerning The Bertha R. Evidence And That They Could Cross-Consider The Evidence

Appellant makes a total of three arguments – arguments 6, 7, and 8 – challenging the instruction of the jury regarding the jury's consideration of other counts evidence and consideration of the Bertha evidence. (AOB 178-217.)[54/] In arguments 6 and 7, appellant challenges the cross-consideration instruction (i.e., instruction allowing the jury to cross-consider evidence admitted regarding one count for purposes of establishing another count) as applied to Glover and Sweets. (AOB 178-190.) In argument 8, appellant argues that the cross-consideration instruction, combined with the instruction addressing the Bertha evidence, permitted inferences which violated his right to due process because there was no rational connection between the crimes. (AOB 209-215.) Appellant's claims attacking the instructions should be deemed forfeited and lack merit.

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54. Argument 4 also challenges the instruction of the jury regarding the Bertha evidence as applied to Glover and Sweets (AOB 167-169), but these claims have already been addressed and require no further analysis; as previously established, the issue was forfeited for lack of objection, the factual predicate upon which appellant bases the argument is faulty, and the evidence was properly admitted.

1. Factual Background Concerning Jury Instructions

The court discussed the instructions with counsel at length, including the cross-consideration instruction. (40 RT 4456-4457.) Concerning the cross-consideration of the evidence of the other charged offenses, the court stated it intended to instruct the jury regarding common method, plan, or scheme. When the court asked for comments or observations, appellant stated "so long as both instructions the court has crafted are going to be introduced, there would be no objection." (40 RT 4457.) However, appellant did object to the trial court's denial of his motion to sever, stating "I just want to make sure the continuation of -- that objection continues through these other evidence instructions, as well." (40 RT 4457.) The prosecutor referenced authority supporting the proposed instructions; particularly, *People v. Ruiz* (1988) 44 Cal.3d 589, 607, and *People v. Diaz* (1992) 3 Cal.4th 495, 529.

Later, when the court and counsel were again going over the instructions, the court acknowledged that its initial proposed instruction addressing the cross-consideration of evidence of the other charged offenses had been "awkward" and "a little bit repetitive," so some of the language was changed and the court intended to keep working on it. (42 RT 4767.) The court then went through several changes it made to the initial proposed instruction. (42 RT 4767-4769.) At no time did appellant object to any of the language the court proposed changing. Appellant had ample opportunity to object to any of the language or to propose alternate language but did not do so.

The court ultimately instructed the jury about considering both the evidence of the uncharged offenses involving Bertha (45 RT 5114-5115) as well as the cross-consideration of the evidence of the charged offenses (45 RT 5122-5124). The court's instruction addressing the Bertha evidence was consistent with CALJIC Nos. 2.50 and 2.50.1. (See 34 CT 6366-6368.)

2. Because Appellant Specifically Told The Court He Did Not Object To the Instructions About Which He Now Complains, His Arguments Are Forfeited For Purposes Of Appeal And, Assuming They Are Not Forfeited, They Lack Merit

Because the trial court discussed the cross-admissibility/cross-consideration instruction at some length with the prosecutor and appellant, appellant's claim should be deemed forfeited for purposes of appeal. The trial court did not have a sua sponte duty to give a limiting instruction on cross-admissible evidence in a trial charging multiple offenses. (*People v. Maury, supra*, 30 Cal.4th at p. 394.) Nonetheless, appellant neither objected to nor requested any modification or amplification to the instruction. In fact, appellant specifically stated there was no objection to the court giving this instruction or the instruction concerning the Bertha evidence. (40 RT 4457.) Therefore, appellant's complaints about the instruction should be deemed forfeited for purposes of appeal. (*People v. Jones* (2003) 29 Cal.4th 1229, 1258 [expressly agreeing to modifications of instruction waived issue for purposes of appeal].)

Nonetheless, assuming appellant has not forfeited his complaints about these instructions for purposes of appeal, they lack merit because appellant fails to consider the instructions as a whole but, rather, parses them and makes his claims based upon certain portions in isolation. Considering the instructions as a whole rather than in their isolated parts, it is apparent the instructions did not suffer the defects purported by appellant.

The correctness of the jury instructions is determined from the entire charge by the court and not from a consideration of parts of an instruction or from a particular instruction. (*People v. Harrison* (2005) 35 Cal.4th 208, 252.) Jurors are credited with intelligence and common sense and it is assumed that these virtues "'will [not] abandon them when presented with the court's

instructions.' [Citation.]" (*People v. Coddington* (2000) 23 Cal.4th 529, 594.) The jurors in the instant case were instructed to consider the instructions as a whole and are presumed to have understood and correlated them. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

In pertinent part, the court instructed the jury as follows: to consider the instructions as a whole and each in light of all the others. (45 RT 5106.) The jury had to determine the facts based on the law as stated by the court, regardless of the arguments by counsel; attorneys' statements were not evidence. (45 RT 5105-5106.) Facts essential to complete a set of circumstances necessary to establish guilt had to be proved beyond a reasonable doubt. (45 RT 5108-5109.) The evidence establishing the offenses against Bertha could not be considered as establishing appellant had a bad character, had a disposition to commit crimes, or for any other purpose except for determining whether it tended to show intent, identity, or motive and that before the jury could consider the evidence, they had to determine whether appellant committed the crimes against Bertha by a preponderance of the evidence. (45 RT 5114-5115.) Appellant was presumed innocent, and the prosecution had the burden of establishing appellant's guilt beyond a reasonable doubt of each crime with which he was charged. (45 RT 5118-5119.) The court began the cross-admissibility instruction by stating, "As you have been instructed, each count charged must be decided separately." (45 RT 5122-5124.) In the concluding instructions, the court told the jury each count charged a distinct crime to be decided separately, and appellant could be found guilty or not guilty of any or all of the crimes charged. (45 RT 5145.)

This Court addressed and rejected arguments challenging an instruction allowing cross-consideration of evidence admitted to establish three different murders. (*People v. Ruiz* (1988) 44 Cal.3d 589, 607.) Ruiz was charged with three separate counts of murder; the victims were his third wife,

his fifth wife, and his fifth wife's son. (*People v. Ruiz, supra,* 44 Cal.3d at pp. 601-604.) This Court upheld the trial court's instruction that evidence as to one count could be considered together with any other count for purposes of establishing intent, identity, or motive.[55] (*Id.* at p. 607.) This is precisely what the instruction the court gave in the instant case allowed the jury to do. (45 RT 5122-5124.)

Similarly, this Court has upheld the trial court's rejection of an instruction that, "Evidence applicable to each offense charged must be considered as if it were the only accusation before the jury." (*People v. Catlin* (2001) 26 Cal.4th 81, 153.) Particularly, *Catlin* held the jury could consider evidence relevant to one of the charged counts as it considered the other charged counts. (*Ibid.*) In a different case this Court held the trial court ***improperly*** restricted the prosecutor from arguing the cross-admissibility of evidence for purposes of establishing the different charged crimes. (*People v. Ochoa* (1998) 19 Cal.4th 353, 410 ["As we have explained, evidence of each assault could be used under Evidence Code section 1101, subdivision (b), to show defendant's mental state for each other assault, namely his intent."].)

In argument 6, appellant claims that the crimes were too dissimilar for purposes of cross-consideration of the evidence on the issues of identity and motive to establish the Sweets and Glover murders. (AOB 180-187.) In argument 7, appellant asserts the instruction was prejudicial because it was confusing and the evidence was insufficient to establish his guilt of murdering Glover and Sweets, making similar assertions as those in

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55. Just as in the instant case, the instruction in *Ruiz* also told the jury that the evidence could not be considered to prove Ruiz's bad character or criminal disposition. (*Id.* at p. 607.)

argument6.[56] (AOB 192-208.) In argument 8, appellant claims the instructions were unconstitutional because the cross-admissibility instruction and Bertha evidence instruction allowed permissive inferences for which it cannot be said with substantial assurance that the presumed fact was more likely than not to flow from the proved fact on which each inference was made to depend. (AOB 209-210, quotations and citations omitted.) In argument 8, appellant reasons the instructions permitted multiple inferences from the evidence of the various offenses, despite the fact that the offenses were dissimilar from each other. (AOB 210-215.)

Breaking the instruction down without consideration of the other instructions, in argument 7 appellant claims the cross-admissibility instruction was confusing, failed to mention the prosecution's burden of proof, did not elaborate on the concepts of using the evidence to establish intent, motive, or identity, and allowed the jury to convict appellant of all the offenses based upon finding him guilty of just one of the offenses. (AOB 192-200.) Indeed, if this was the only instruction given, appellant's arguments might have some validity. However, the instructions must be considered in their totality and not in isolation. When the instructions are considered in their totality, appellant's claims lack merit. (*People v. Harrison*, *supra*, 35 Cal.4th at p. 252.) Similarly, in argument 8, appellant not only ignores the instructions as a whole but alsoignores the totality of the evidence. As previously established, the counts were properly joined and the evidence was cross-admissible.

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56. To the extent appellant simply repeats the same prejudice argument, respondent will not readdress the claims already addressed in argument 3 and which will be addressed in argument 6. Respondent in no way concedes the validity of any of appellant's claims or analysis asserting prejudice in argument 7. Furthermore, respondent incorporates the analysis rejecting appellant's claims of prejudice asserted in arguments 3 and 6 which are appropriate to appellant's claims of prejudice in argument 7.

Besides the instruction about which appellant complains, the court instructed the jury that the prosecution carried the burden of proving each offense beyond a reasonable doubt and each offense had to be separately established. The jury was instructed on the elements of each offense the prosecution had to establish before appellant could be found guilty beyond a reasonable doubt. It is assumed the jury was capable of understanding and collating these instructions as a whole and applying them to the facts. (*People v. Sanchez*, *supra*, 26 Cal.4th at p. 852.) Therefore, appellant's postulations about how the jury might have misconstrued the instruction lacks merit when the cross-admissibility instruction is considered in context with the other instructions. Appellant's analysis in argument 7 considering the instruction in isolation should be rejected.

This Court rejected arguments in *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016, similar to those made by appellant in argument 7. *Reliford* attacked an instruction that jurors could consider prior sex offenses pursuant to Evidence Code section 1108. (*People v. Reliford*, *supra*, 29 Cal.4th at pp. 1012-1016.) This Court rejected claims that the instruction lowered the prosecution's burden of proof, was too complicated to apply and found no federal constitutional error. (*Id.* at pp. 1015-1016.) For the same reasons, appellant's claims should be rejected. In the instant case, the trial court properly instructed the jury that the prosecution had the burden of proving appellant guilty beyond a reasonable doubt, that they could consider evidence of the Bertha R. offense only if it established he committed the offense by a preponderance of the evidence, the charged offenses were cross-admissible with regard to the other offenses for the limited purpose of establishing identity, intent, or motive, and neither the Bertha evidence nor evidence of the charged offenses could be considered as establishing that appellant had a propensity for committing crimes.

Appellant's analysis in argument 6 that the crimes were dissimilar (AOB 180-187) and appellant's claim of prejudice in argument 7, that there was insufficient evidence to establish he murdered Glover and Sweets (AOB 200-208), both lack merit. Also, contrary to appellant's analysis in argument 8, there were numerous connections and reasonable inferences which could be drawn between the murders and the attempted murders when the instructions are considered in their whole rather than in part. The offenses were properly joined and, as the trial court found, the evidence was cross-admissible at the time the trial court made that determination. (*People v. Ruiz*, *supra*, 44 Cal.3d at pp. 606-607.) While the decision to join offenses is reviewed based upon the record at the time the decision was made, the evidence at trial was substantially the same as that on which the trial court based its decision to join the offenses prior to trial.

Appellant argues that because his identity as the murderer of Carpenter, Simpson, Sweets, and Glover was "hotly disputed and nowhere clearly established," the evidence was not cross-admissible for purposes of establishing identity. (AOB 181.) Indeed, the prosecution was required to establish appellant's identity as the perpetrator of these offenses. (*People v. Kipp*, *supra*, 18 Cal.4th at p. 371.) The similarities between the offenses is exactly why the evidence was cross-admissible for purposes of establishing intent and identity. The evidence tying appellant to the offenses and the offenses to each other helped establish appellant's identity as the murderer of Glover and Sweets. Appellant's analysis is flawed in three primary respects: first, erroneously asserting the offenses were "linked to no *one* at all."[57]; second, erroneously asserting their were "striking *dissimilarities* . . ."[58] in the

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57. AOB 181, italics in original.

58. AOB 182, italics in original.

evidence establishing the offenses; and third, appellant erroneously segregates the murders from the attempted murders. (AOB 181-187.)

The murders of Sweets and Glover were linked to appellant, and there were a high degree of distinctive individual shared marks as well as minimally distinctive shared marks. (*People v. Kipp*, *supra*, 18 Cal.4th at pp. 369-370.) Sweets was found nude except for a black shirt and bra[59/], strangled to death with a crushed neck[60/] in the dumpster directly behind appellant's apartment[61/], covered by a blanket made by appellant's mother[62/] which had carpet fibers matching appellant's apartment's carpet[63/], wrapped in a sheet with semen stains consistent with appellant's DNA[64/], and stuffed in a plastic bag with appellant's fingerprints on it[65/]. Similarly, Glover's body was nude, except for a scarf wrapped around her neck. (25 RT 2309.) Glover had been strangled[66/], had semen in her anus consistent with appellant's DNA[67/] and was wrapped in a blanket with semen stains[68/] in much the same way Sweets was found strangled and wrapped up in the dumpster. Likewise, the bodies of

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59. (25 RT 2398.)

60. (30 RT 3212-3214, 3216-3218.)

61. (25 RT 2302, 2362, 2367.)

62. (25 RT 2351, 28 RT 2783-2785, 2794-2797, 2802-2005, 2007-2011.)

63. (29 RT 3093-3095, 3130-3134.)

64. (29 RT 3038-3039.)

65. (28 RT 2820, 2823-2825, 2827, 2847-2851.)

66. (30 RT 3244.)

67. (26 RT 2458-2462, 28 RT 2929-2936.)

68. (26 RT 2488, 2515-2517.)

Simpson and Carpenter were found in dumpsters in the alley behind appellant's apartment; albeit, set on fire.

Appellant attempts to make much of the minor differences in how the murder victims were found (AOB 182-183), but the similarities far outweigh the differences. To be relevant for purposes of establishing identity, offenses need not be "mirror images" of each other. (*People v. Carter*, *supra*, 36 Cal.4th at p. 1148.) The fact that Glover was not found in a dumpster is insignificant in light of the fact she was found nude, strangled and wrapped up in bedding similar to the way Sweets was found, and both Glover and Sweets were found in locations closely associated with appellant – appellant's apartment and the Wilsie residence. The Wilsie residence is where appellant sexually assaulted and strangled Karen and Bertha two months after Glover's body was found nearby.

Appellant asserts there were significant dissimilarities regarding the murder offenses: the fact that Carpenter and Simpson were burned, Simpson's cause of death was alcohol and cocaine poisoning and she had a cut to her abdomen, and Simpson and Carpenter had no signs of sexual assault. (AOB 183, 211-212.) These assertions do not accurately reflect the evidence or consider it in the totality.

Simpson's body was burned beyond recognition such that it had to be identified by dental records,[69] it was impossible to determine whether she had been strangled or sexually assaulted before she was incinerated but her heart showed signs of asphyxia,[70] the lack of smoke in her lungs established she was murdered before being set on fire,[71] and it was impossible to accurately test

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69. (29 RT 3074-3075.)

70. (30 RT 3190-3191.)

71. (30 RT 3191 -3192.)

seminal fluids or obtain conclusive readings from her vaginal slides regarding the presence of spermatozoa to determine whether she had sex.[72] Simpson's remains showed no signs of sexual attack because her body was so severely burned such signs were destroyed with her body.

Carpenter's nude and partially burned body was also in a dumpster which was on fire; her body stuffed into a lightweight duffel bag[73] with items in the dumpster having been soaked with a fire accelerant.[74] (25 RT 2298-2300, 2322, 30 RT 3200-3201.) It was apparent Carpenter had sex shortly before she died,[75] she died of manual strangulation,[76] and two cotton balls were found with spermatozoa on them – one in her hand and the other in the duffel bag[77] into which she had been stuffed. Furthermore, the dumpsters in which Simpson, Carpenter, and Sweets were found were all in the alley behind appellant's apartment. (25 RT 2302.) Contrary to appellant's claim otherwise, all four murders were sufficiently similar to justify giving the instruction.

Nonetheless, the jury did not reach a verdict on the charges involving Simpson and Carpenter. It is, therefore, obvious the jury was capable of following the court's instructions to consider each count separately, and they did not find the prosecution carried the burden of proof of establishing guilt beyond a reasonable doubt the facts essential to complete the circumstances

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72. (26 RT 2495-2498, 2505.)

73. The duffel bag had the name "D. Belman" on it as well as the initials "DB." (25 RT 2412-2413.)

74. (27 RT 2736-2738, 2740.)

75. (30 RT 3203, 3225.)

76. (30 RT 3205 -3206, 3225-3226.)

77. (25 RT 2419, 26 RT 2478.)

necessary to establish appellant murdered Simpson and Carpenter.

Appellant erroneously asserts there was no evidence Sweets or Glover were prostitutes while the evidence established Maria, Karen, Simpson, and Carpenter were prostitutes. (AOB 183-184, 212-213.) As previously established, appellant cross-examined one of the prosecution's experts: "Let me ask you this: in this particular case you were provided information that all the females in this case, Ms. Carpenter, Ms. Simpson, ***Ms. Glover*** and ***Ms. Sweets***, were known and active prostitutes at the time of their death?," and the expert answered affirmatively. (29 RT 3006-3007, emphasis added.)

Addressing identity, motive, intent, and plan in the context of the attempted murders, appellant claims the attempted murder counts were dissimilar to the murder counts, so the evidence was not cross-admissible. As previously established in subdivision A., *supra*, the evidence was cross-admissible for purposes of all the offenses; and so the court found. Appellant focuses on irrelevant facts and minor inconsistencies between the Glover and Sweets murders and the Maria and Karen attempted murders and sex offenses; the fact Maria and Karen did not die, Maria and Karen were not "connected to a dumpster," and how Maria and Karen were brought to locations where he committed the offenses against them. (AOB 184-185.)

Appellant's analysis forgets the big picture, the totality of the evidence – all the murder victims were found near his apartment or the Wilsie residence which were the locations where the offenses involving Maria and Karen occurred; all of the victims were strangled; the sperm DNA evidence indicated Sweets and Glover had sex with appellant; Maria and Karen were forced to have sex with appellant; and all of appellant's victims either used drugs or alcohol with appellant or had drugs or alcohol in their system. The fact that Maria and Karen did not die nor were connected with a dumpster was irrelevant; murder and attempted murder offenses can be considered for

purposes of establishing identity and intent. (See *People v. Sully*, *supra*, 53 Cal.3d at pp. 1224-1225.) Evidence that appellant strangled and had sex with his victims was sufficient to establish a common intent. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 352.) Contrary to appellant's claims, the offenses with which he was charged were sufficiently similar to give the cross-admissibility instruction.

D. The Admission Of The Bertha R. Evidence And The Instruction Of The Jury Regarding The Consideration Of This Evidence As Well As The Instruction Of The Jury Allowing Them To Cross-Consider The Evidence Of The Other Offenses Did Not Violate Appellant's Constitutional Right To Due Process Of Law

Throughout his arguments attacking the Bertha evidence and instruction of the jury (arguments 6-8) appellant references *McKinney v. Rees* (1993) 993 F.2d 1378 as well as *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 775, *cert. granted sub nom. Woodford v. Garceau* (2002) 536 U.S. 990 [123 S.Ct. 32, 153 L.Ed.2d 893], claiming the admission of the Bertha evidence and the instructions violated his right to due process of law. (AOB 152-153, 165, 169, 187-189.) Not so. These cases are inapposite and do not support appellant's claims that his rights to due process were violated.

Initially, regarding instruction of the jury, appellant not only failed to object to the instructions about which he complains but specifically stated he did not object. (40 RT 4457.) Therefore, appellant's contention that the instructions on the other-crimes evidence violated his state and federal constitutional right to a fair trial is forfeited because it was not raised below. (*People v. Jones*, *supra*, 29 Cal.4th at p. 1258; *People v. Catlin*, *supra*, 26 Cal.4th at p. 122.)

This Court has already addressed and rejected arguments based upon *McKinney v. Rees*, *supra*, 993 F.2d at page 1378, that the admission of

other-crimes evidence violated due process. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 122; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 921-922.) *McKinney* involved irrelevant character and criminal propensity evidence, whereas the Bertha evidence in the instant case was admitted to establish identity and intent; the evidence was not admitted as character or propensity evidence. (*Ibid.*) Also, unlike *McKinney*, the jury was specifically instructed not to consider the Bertha evidence or evidence of the other crimes as establishing bad character or disposition to commit a crime. (45 RT 5114-5115, 5122-5124.) *McKinney* does not support appellant's claims.

Similarly, appellant's references to *Garceau v. Woodford*, 275 F.3d at page 775, are inapposite. In *Garceau*, the Ninth Circuit found that an instruction that other-crimes evidence could be considered for any purpose, including the defendant's character, violated due process. But here there was no instruction affirmatively advising jurors that they should consider the evidence of other offenses for any purpose, including defendant's character. And further unlike *Garceau* (where the defendant preserved his challenge by objecting to the erroneous instruction), appellant here did not ask for the desired instruction but, in fact, specifically stated he did not object to the instructions about which he now complains. He thus did not preserve his challenge, as noted above.

Finally, as to the instruction allowing the jury to cross-consider the evidence of the other joined charged offenses, guilt of all the offenses was at issue so the problem of confusing the jury with collateral matters did not arise. (See *Frank v. Superior Court* (1989) 48 Cal.3d 632, 640.) "The other-crimes evidence does not relate to an offense for which the defendant may have escaped punishment." (*Ibid.*) The jury was instructed they could not consider the fact that appellant had been charged with other counts of murder to prove that appellant was a person of bad character or had a disposition to

commit crimes. (45 RT 5123-5124.) Regarding the cross-consideration of evidence, neither *McKinney* nor *Garceau* have relevance to the instant case for two reasons: first, the instant case involved offenses for which appellant was on trial, while *McKinney* and *Garceau* involved the admission of the evidence of criminal conduct for which they were not on trial; and second, because the court specifically instructed the jury they could not consider the other-counts evidence as establishing disposition whereas the juries in *McKinney* and *Garceau* did not did not receive such an instruction.

Appellant fails to establish a violation of his constitutional right to due process as a result of the admission of the Bertha evidence or instruction of the jury. *McKinney* and *Garceau* are distinguishable and do not apply. Therefore, his claims relying upon them should be rejected.

E. Summary

Appellant's claims that the trial court committed error by joining the offenses, allowing the admission of the Bertha R. evidence, instructing the jury regarding the Bertha evidence, and by instructing the jury that they could cross-consider the evidence lack merit. Considering the similarities in the way the offenses were committed, the offenses were properly joined and the jury was correctly instructed that they could cross-consider the evidence. Considering the law regarding the admission of evidence pursuant to Evidence Code section 1101, subdivision (b), the Bertha evidence was properly admitted and the jury was correctly instructed regarding its consideration. Appellant's arguments claiming the contrary should be rejected.

IV.

THE TRIAL COURT DID NOT COMMIT ERROR BY ALLOWING THE ADMISSION OF THE DNA EVIDENCE

Appellant makes a multifaceted claim asserting the trial court committed error by allowing the admission of DNA evidence; i.e., Polymerase Chain Reaction (PCR) DQ-Alpha character trait evidence and PCR Polymarker evidence. (AOB 245-286.) Appellant contends the trial court improperly admitted the results of the PCR DQ-Alpha testing of a sperm mixture based upon "dot intensity" analysis which indicated more than two contributors because such analysis was not generally accepted within the scientific community. (AOB 258-267.) Appellant also contends the trial court improperly permitted the use of population frequency results since the PCR DQ-Alpha results indicated a possible mixture of sperm contributors (AOB 267-270) and, in any event, the population frequency data was erroneously computed (AOB 270-274). Appellant additionally argues the trial court committed error by allowing Polymarker DNA evidence on rebuttal concerning Trina Carpenter and JoAnn Sweets. (AOB 274-276.) Respondent disagrees. The trial court properly admitted the DNA evidence.

In determining the admissibility of evidence derived from a new scientific method or technique, trial courts must apply the three-prong analysis discussed in *People v. Kelly* (1976) 17 Cal.3d 24. Under this approach, courts consider whether: (1) the technique has gained general acceptance in its field; (2) the testimony regarding the technique and its application is offered by a properly qualified expert; and (3) correct scientific procedures were used in the particular case. (*People v. Morris* (1991) 53 Cal.3d 152, 206, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1, citing *People v. Kelly*, *supra*, 17 Cal.3d at p. 24.)

The trial court in the instant case applied the three-pronged *Kelly* test when appellant challenged the admission of a PCR DQ-Alpha evidence and the PCR Polymarker evidence. As established by the record and applicable law, appellant's claims challenging the court's determination lack merit.

A. DNA Basic Overview

Basic principles pertaining to DNA were well explained by the court in *People v. Axell* (1991) 235 Cal.App.3d 836:

> DNA, deoxyribonucleic acid, is a fundamental material which determines the genetic properties of all living things. . . . The molecule is composed of two parallel chain-like structures, a double helix, which has been described as a spiral staircase. The handrail and balustrade of the staircase is made up of repeated sequences of phosphate and deoxyribose sugar. Attached to the sugar links are four types of chemical bases -- Adenine (A), Cytosine (C), Guanine (G), and Thymine (T). Pairs of these bases or 'base pairs' form the steps of the spiral staircase. [Citations.] Each A on a chain-like structure always pairs with each T on the other strand and each C on one strand always pairs with each G on the other. [Citations.] It is the order or sequence of the base pairs (the steps) that determines genetic traits of an individual life form and each human. No two human beings have identical sequences in all of its base pairs in its DNA except for identical twins.
>
> In a single molecule of DNA, there are approximately three billion of these base pairs. Within an individual, the DNA from the nucleus of every cell is identical.[78/] Thus, the sequence of base pairs in a cell from a strand of hair will be identical to the sequence of base pairs found in a skin cell from the same individual. [Fn. omitted.]
>
> Most of the DNA does not vary from person to person, thus creating such shared features as arms and legs. Other regions of DNA, however, vary distinctly from one person to

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78. A red blood cell does not have a nucleus, therefore it does not contain DNA. (*People v. Axell, supra*, 235 Cal.App.3d at p. 845, fn. 1.)

> another and it is these regions of the DNA molecule where the base pairs are arranged differently which make it possible to establish identity and differences between individuals. These variable regions of the DNA molecule are called 'polymorphic loci' or 'polymorphic sequences.' Every locus that is known has an official name and symbol assigned by the international Human Gene Mapping Workshop. At the time of the hearing, there were 1,500 polymorphic DNA loci known.
>
> The human DNA molecule has 23 pairs of chromosomes, 22 from each parent and 2 sex-typing chromosomes, one chromosome in each pair inherited from each parent. Each chromosome has thousands of genes and each gene is located on a particular site on the chromosome. [Fn. omitted.] Each gene or segment of DNA material that produces a trait is called an allele. Thus, an allele is one of several forms of a gene, occupying a given locus on the chromosome. In variable regions of DNA, a pair of chromosomes is distinguished by different alleles -- one from the mother and one from the father. If the mother and father each contribute the same general information for a particular trait, that locus is *homozygous*; when the genetic information differs, the locus is *heterozygous*.

(*People v. Axell* (1991) 235 Cal.App.3d at pp. 844-846.)

"California courts have recognized that two methodologies are widely used in forensic DNA testing: restriction fragment length polymorphism (RFLP) and PCR." (*People v. Hill* (2001) 89 Cal.App.4th 48, 57, citing *People v. Venegas* (1998) 18 Cal.4th 47, 57-58 & fn. 6.) When the DNA sample available is small and/or degraded, the PCR methodology is used, and this methodology involves small pieces of DNA being copied or amplified. (*People v. Venegas*, *supra*, 18 Cal.4th at p. 58, fn. 6.) The instant case involves the PCR methodology. There are three subtypes of PCR testing: DQ-Alpha, which tests a single genetic marker; Polymarker, which tests five genetic markers; and the STR, which tests three or more genetic markers. (*People v. Hill*, *supra*, 89 Cal.App.4th at p. 57.) The instant case involves DQ-Alpha and Polymarker testing. The RFLP and PCR methodologies, including the PCR subtypes, have acquired general acceptance in the scientific community. (*Ibid.*)

Regarding PCR DQ-Alpha, the DQ-Alpha gene is targeted and multiplied. (*People v. Morganti* (1996) 43 Cal.App.4th 643, 662.) The court in *Morganti* described this process as follows:

> The DQ alpha gene codes for proteins found on the surface of the white blood cell and is known to have alternate genetic forms, i.e., the gene does not look the same in all people. Six variations (or alleles) have been identified and labeled as 1.1, 1.2, 1.3, 2, 3 and 4. Because alleles are inherited in pairs, one from each parent, there are twenty-one possible combinations which are referred to as genotypes.
>
> In the forensic setting, PCR analysis of DQ alpha involves three general steps. First, DNA is extracted from the nucleus of cells present in an unknown bloodstain. Second, the DQ Alpha is replicated or amplified by a process which involves combining the DNA with a commercially available solution or 'cocktail' and then subjecting the solution to a series of controlled temperature cycles. Finally, the amplified gene is typed in order to identify the alleles present in the amplified DNA.

(*Ibid.*, fn. omitted.) While *Morganti* involved PCR DQ-Alpha testing for a blood stain, this process is also used to test semen. (See *People v. Reeves* (2001) 91 Cal.App.4th 14, 25.)

B. Procedural History Of The Instant Case

On approximately October 23, 1993, appellant filed an opening brief in opposition to the admission of DNA evidence. (8 CT 1276-9 CT 1570.) It included exhibits comprised of newspaper articles and articles from various publications. (8 CT 1341-9
CT 1570.)

On November 1, 1993, in response to appellant's brief, the prosecution filed transcripts in support of a motion to be filed countering appellant's opposition to the admission of DNA evidence. (10 CT 1592-23 CT 3926.) On November 2, 1993, the prosecutor filed points and authorities in

response to Jones' opposition to the admission of DNA evidence, which included exhibits in addition to those filed on November 1. (25 CT 4336[79]-27 CT 4788.) With the points and authorities, the prosecutor filed a "SUMMARY OF DNA RESPONSE EXHIBITS." (27 CT 4730-4732.) In all, the exhibits which the prosecutor filed included transcripts from seven *Kelly* hearings in San Diego County and one from Riverside County which found admissible PCR DQ-Alpha evidence, the transcript from appellant's preliminary hearing in which the court found the PCR DQ-Alpha evidence admissible over appellant's objection, four articles validating the use of DNA testing which included PCR DQ-Alpha typing, and four appellate court cases from other jurisdictions upholding the lower court's admission of PCR DQ-Alpha evidence.

On Monday, January 31, 1994, the court informed the parties it was prepared to announce a tentative ruling regarding admission of the DNA evidence after considering the points and authorities as well as the exhibits filed with them. (19 RT 1198-1199.) Neither side sought to admit other testimony, exhibits or evidence at this point, implicitly agreeing that the court could decide the issue based upon the exhibits. The court acknowledged argument would have to be heard but the tentative ruling was "that there is no problem with its admission." (19 RT 1198-1199.)

On Monday, February 7, 1994, the court heard argument by counsel and made its decision to allow the admission of the proffered PCR DQ-Alpha evidence based upon the motions and exhibits.[80] (20 RT 1223-1238.) Specifically, prior to hearing argument by counsel the court stated it had

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79. The points and authorities are at 25 CT 4336-4359. The remaining page citations are to the additional exhibits filed by the prosecutor.

80. All of the cases which the court specified as having relied upon, which are set forth in more detail to follow, were submitted by either the prosecution or defense in the form of Superior Court transcripts, articles, and holdings from other jurisdictions.

considered the "mounds of material" submitted. (20 RT 1223.) The prosecutor argued Dr. Blake, the prosecution's primary witness, would testify that the procedures utilized in the instant case were the same as those utilized in *People v. Moffett* (12 CT 1948-15 CT 2629), and these procedures were correct scientific procedures generally accepted in the scientific community. (20 RT 1224.)

Appellant responded with a threefold attack on the admission of the evidence. First, appellant argued Dr. Blake's methods deviated from the generally accepted procedures in the community because when replicating the DNA specimens, he ran 35 cycles rather than 32 cycles – 32 cycles being the recommendation of the manufacturer of the DQ-Alpha testing kit and the number of cycles mentioned in some of the literature – and he used reagents in addition to those in the PCR DQ-Alpha testing kit. (20 RT 1224-1227.) (Appellant does not reprise this complaint on appeal.) Second, appellant challenged the reliability of Dr. Blake's "conclusion that he can tell a primary from a secondary [sperm] donor. . . [or] tell which alleles go together in a situation where maybe you have four [alleles] as opposed to which you'd expect to find two." (20 RT 1227.) Third, appellant argued PCR typing was not generally accepted in the forensic science community, even if it was accepted in the general scientific community for diagnosis, because forensics involved mixed samples, degraded samples, and samples affected by the elements while diagnostics involved known samples. (20 RT 1227-1229.)

The prosecution responded to appellant's arguments. (20 RT 1229-1232.) First, the Superior Courts in both *Moffett* and *Mack* specifically addressed and rejected claims challenging Dr. Blake's methods and found they were scientifically and legally approved. (20 RT 1229-1230.) Moreover, Dr. Blake was recognized as a pioneer in the area of forensic PCR typing – a recognized expert in the scientific community. (20 RT 1230-1231.) Second,

the prosecution pointed out that the issue of multiple donors had also been fully addressed and rejected by the courts in *Moffett* as well as during appellant's preliminary hearing, and the issue was one of weighing the evidence and not whether it was admissible. (20 RT 1231.) Furthermore, the DNA evidence was not admitted to establish identity but, rather, was circumstantial evidence linking appellant to the crimes. (20 RT 1231-1232.) Regarding appellant's claim that PCR DQ-Alpha typing was accepted for diagnostic but not forensic purposes, the prosecutor pointed out the same issues and concerns arose in both contexts. (20 RT 1232.)

Appellant addressed the prosecution's assertion that Dr. Blake was an expert in the area by questioning his credibility and expertise because Dr. Blake derived his income from his DNA work. (20 RT 1233.) Appellant argued Dr. Blake should not be allowed to self validate his own studies and techniques; no one had independently validated Dr. Blake's techniques. (20 RT 1233-1234.) It should be noted that this position is untenable because general acceptance in the scientific community may be established by the testimony of a director or supervisor of a DNA forensic lab such as Dr. Blake. (*People v. Hill* (2001) 89 Cal.App.4th 48, 58.)

The court found that there was no question that the science underlying the DNA testing offered by the prosecution was well accepted within the scientific community. (20 RT 1234.) The court stated the issue went to the third prong of the *Kelly* three-pronged test – whether the correct procedures were employed and not whether they were employed correctly. The court found there was no question that the procedures employed in the instant case passed the *Kelly* test. (20 RT 1334-1335.) The court then went on to specify the materials upon which it had relied to reach its conclusion. (20 RT 1235-1238.)

Specifically, the court referenced the decision in *People v. Moore* which found a clear majority of the relevant scientific community accepted PCR as a reliable procedure and further found the third prong of *Kelly* was satisfied. (20 RT 1235-1236.) That is, Dr. Blake's procedures were substantiated as scientifically correct. The court also referenced the rulings in *People v. Roybal, People v. Nenigar, People v. Amundson, and People v. Prince,* which accepted the statistical data analyzing PCR DQ-Alpha locus studies and population frequencies. (20 RT 1236-1237.) The court also incorporated by reference the preliminary hearing transcript from appellant's case into its ruling as well as the ruling in *People v. Moffett.* (20 RT 1237-1238.) The court specifically rejected the ruling in *People v. Mack.* (20 RT 1238.) Additionally, the court considered the National Research Council article from 1992, a law review article submitted by appellant, and trial and appellate court cases from other jurisdictions to find all three prongs of *Kelly* had been satisfied. (20 RT 1238.) The court found that in the instant case, Evidence Code Section 352 did not apply or preclude the evidence from being admitted. (20 RT 1238.)

On rebuttal, the prosecution sought to admit PCR polymarker evidence to bolster the PCR DQ-Alpha test results, and appellant objected to its admission. Following a 402 hearing, the trial court permitted its admission. (37 RT 4124- 4215; 41 RT 4470- 4597.) Respondent foregoes a detailed description of the trial testimony and actual PCR DQ-Alpha and polymarker results because these facts are unnecessary to determine whether the science passes muster under *Kelly*'s three-pronged test.

C. Appellant Fails To Establish The Trial Court Committed Error By Admitting The PCR DQ-Alpha And Polymarker Evidence

Under *Kelly*'s first prong, if the technique or method is new, then the proponent of the evidence must first establish general acceptance. In

making that determination, the goal is not to decide the actual reliability of the new technique, but simply to determine whether the technique is generally accepted in the relevant scientific community. (*People v. Venegas* (1998) 18 Cal.4th 47, 85; *People v. Morganti* (1996) 43 Cal.App.4th 643, 656.) In evaluating general acceptance,

> the court merely determines from the professional literature and expert testimony whether or not the new scientific technique is accepted as reliable in the relevant scientific community and whether 'scientists significant either in number or expertise publicly oppose [a technique] as unreliable.'

(*People v. Soto* (1999) 21 Cal.4th 512, 519.) Once a scientific technique has been acknowledged as generally accepted in a published appellate court opinion, the first *Kelly* prong is satisfied and this prong need not be relitigated in future cases. (*People v. Wright* (1998) 62 Cal.App.4th 31, 42, fn. 2.)

For purposes of appellate review, "general acceptance" has been characterized as a mixed question of law and fact subject to limited de novo review. (*People v. Hill* (2001) 89 Cal.App.4th 48, 57.) The trial court's determination is reviewed with deference to any and all supportable findings of "historical" fact or credibility, and then this Court decides as a matter of law, based on those assumptions, whether there has been general acceptance. (*People v. Ashmus* (1991) 54 Cal.3d 932, 971.)

With respect to the second prong of the *Kelly* test, regarding the expert's qualifications, the trial court is given considerable latitude in determining the qualifications of an expert. Its ruling will not be disturbed on appeal absent a manifest abuse of discretion. (*People v. Kelly, supra*, 17 Cal.3d at p. 39; *People v. Morganti, supra,* 43 Cal.App.4th at pp. 656-657.)

The third prong of the *Kelly* test is whether correct scientific procedures were used. *Kelly*'s third-prong inquiry does not apply to test shortcomings such as mislabeling, mixing the wrong ingredients, or failing to follow routine precautions against contamination. Such missteps involve the

"degree of professionalism" with which the otherwise scientifically accepted methodology was applied in a given case. Careless testing goes to the weight of the evidence, not its admissibility. (*People v. Venegas, supra*, 18 Cal.4th at p. 81; *People v. Farmer* (1989) 47 Cal.3d 888, 913, overruled on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) In sum, the third-prong issue is whether the correct procedures were used, not whether the correct procedures were used correctly. The party offering the evidence has the burden of proving its admissibility by a preponderance of the evidence. (*People v. Ashmus, supra,* 54 Cal.3d at p. 970.) The resolution of this prong is also examined for abuse of discretion. (*Id.* at p. 971.)

This third-prong inquiry assumes that the methodology and technique in question have already met the general acceptance test. "[I]t inquires into the matter of whether the procedures actually utilized were in compliance with that methodology and technique, as generally accepted by the scientific community." (*People v. Venegas* (1998) 18 Cal.4th 47, 78.) The third-prong inquiry is case specific and cannot be satisfied by relying on a published appellate decision. (*Ibid.*; *People v. Morganti, supra*, 43 Cal.App.4th at p. 661.) All that is necessary in the limited third-prong hearing is a foundational showing that correct scientific procedures were used. (*People v. Barney* (1992) 8 Cal.App.4th 798, 825.)

However, trial courts must make the threshold determination of whether to conduct a *Kelly* hearing in the first place.

> *Kelly/Frye*[81] only applies to that limited class of expert testimony which is based, in whole or part, on a technique,

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81. *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013 was rejected in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579 [113 S.Ct. 2786, 125 L.Ed.2d 469]. Nevertheless, *Kelly* and its progeny continue to represent the admissibility of new scientific evidence in this State. (See *People v. Leahy* (1994) 8 Cal.4th 587.)

> process, or theory which is *new* to science and, even more so, the law. [Citations and internal quotations omitted.] Published opinions may assist in determining whether the technique is new. *'[O]nce a trial court has admitted evidence based upon a new scientific technique, and that decision is affirmed on appeal by a published appellate decision, the precedent so established may control subsequent trials, at least until new evidence is presented reflecting a change in the attitude of the scientific community.'*

(*People v. Henderson* (2003) 107 Cal.App.4th 769, 776-777, emphasis added; see also *People v. Hill, supra,* 89 Cal.App.4th at p. 57, quoting *People v. Kelly, supra*, 17 Cal.3d at p. 32.)

1. Appellant Fails To Establish The PCR DQ-Alpha Dot Intensity Analysis Was Erroneously Admitted

The trial court in the instant case considered a vast amount of information before hearing argument by counsel and making its determination to admit that PCR DQ-Alpha evidence. (8 CT 1341-9 CT 1570 [defense exhibits]; 10 CT 1592-23 CT 3926; 25 CT 4360-27 CT 4788 [prosecution exhibits].) This Court has recognized the propriety of considering such writings in lieu of testimony. (*People v. Leahy* (1994) 8 Cal.4th 587, 611.) Based upon this wealth of information and following argument by counsel, the trial court in the instant case found PCR DQ-Alpha testing generally accepted in the scientific community, specifically citing numerous transcripts from Superior Court hearings addressing this issue – including a lengthy hearing involving appellant's own case – as well as articles and appellate court cases from other jurisdictions. (20 RT 1235-1238.) Giving deference to these supported historical facts, appellant fails to establish as a matter of law that the procedures employed in the instant case fail the first prong under *Kelly* – general acceptance in the relevant scientific community. (*People v. Soto, supra*, 21 Cal.4th at p. 512, fn. 31 [appropriate to rely upon written materials supporting

general acceptance]; *People v. Hill, supra*, 89 Cal.App.4th at p. 57.) Neither does appellant establish the court committed error under *Kelly*'s third prong.

Addressing PCR DQ-Alpha typing of mixed samples, Dr. Blake testified during appellant's preliminary hearing, and a transcript of this hearing was one of the prosecutor's exhibits. (11 CT 1755- 1947.) Concerning mixed samples and dot intensity typing, Dr. Blake testified that two papers supported the validity of his analysis of the PCR DQ-Alpha amplification results; one authored by himself and another authored by two other scientists. (11 CT 1901-1902; 25 CT 4366; 26 CT 4718-4722.) These articles were included in the exhibits provided by the prosecution; Exhibits 1 and 5. (25 CT 4359-4385; 26 CT 4713- 4728.) Dr. Blake also clarified statements in the NRC report indicating that although PCR amplification yielded ***qualitatively*** reliable results, it could yield ***quantitatively*** unfaithful results by explaining that these assertions concerned PCR amplification in general and not PCR amplification involving DQ-Alpha.[82/] (11 CT 1907-1908.) Dr. Blake was unaware of any articles indicating a lack of "quantitative fidelity" with regard to PCR DQ-Alpha amplification. (11 CT 1908.) Appellant offered no such articles refuting Dr. Blake's testimony.[83/]

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82. While throughout his argument (AOB 248-249, 252-253, 265) appellant quotes the portion of the NCR report which Dr. Blake was directly addressing in his preliminary hearing testimony, appellant fails to acknowledge Dr. Blake's testimony directly addressing this. It is apparent both the court which heard Dr. Blake's testimony during the preliminary hearing and trial court which considered appellant's *Kelly* hearing found Dr. Blake credible on this matter, so deference should be accorded this finding. (*People v. Henderson, supra*, 107 Cal.App.4th at p. 777.)

83. Appellant references transcript testimony from other Evidence Code section 402 hearings of Dr. John Gerdes and Dr. Stephen Daiger under the headings, "A. Procedural History, 1. DNA-PCR-Dot Intensity". (AOB 247-248.) These two doctors simply opined in other *Kelly* hearings that they did not agree with PCR DQ-Alpha dot intensity analysis but offered no knowledge of

Claiming DQ-Alpha dot intensity analysis is not scientifically accepted, appellant twice references the same transcript testimony by Dr. Mary King who testified for the defense during the September 1990 *Kelly* hearing conducted in the case of *People v. Paul Steven Mack.* (AOB 247, 265.) Appellant quotes Dr. King stating she was unaware of the published literature or "external validation" regarding dot intensity analysis. (22 CT 3729-3730.) However, the two articles which Dr. Blake mentioned in his testimony validating mixed sample/dot intensity typing (11 CT 1901-1902) were published ***after*** 1990 when Dr. King testified in the *Mack* case– the articles were published in May 1992 and November 1991. (25 CT 4360; 26 CT 4718.) Therefore, appellant's reliance upon Dr. King for this proposition is meaningless. Dr. King's opinion that "you cannot try to draw conclusions from dots of varying intensity"[84] was, at best, obsolete at the time of appellant's *Kelly* hearing.

Also amongst the exhibits which the prosecution submitted were two published appellate court decisions. The Supreme Court of Virginia

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written work in support of their opinions. The trial court considered all of the evidence at the *Kelly* hearing to find the evidence addressing PCR DQ-Alpha dot intensity analysis admissible and necessarily rejected the credibility of that evidence referenced by appellant in contradiction to the evidence favoring its admissibility. This Court affords deference to these findings of historical fact by the trial court. (*People v. Hill*, *supra,* 89 Cal.App.4th at p. 57.) Furthermore, establishing general acceptance in the community does not require unanimity amongst the experts but, rather, considers the quality and quantity of the evidence supporting or opposing a new scientific technique. (*People v. Venegas*, *supra*, 18 Cal.4th at p. 85.) However, "Mere numerical majority support or opposition by persons minimally qualified to state an authoritative opinion is of little value." (*Ibid.*; citations omitted.) In fact, Dr. Gerdes, whose testimony was offered by way of transcript, acknowledged Dr. Blake was the expert in the field regarding PCR analysis. (15 CT 2535-2536.) That is, Dr. Blake had "more experience than anyone in PCR forensics." (15 CT 2536.)

84. (22 CT 3816.)

accepted PCR DQ-Alpha DNA typing as scientifically reliable evidence in *Spencer v. Commonwealth* (1990) 240 Va. 78, 96, 393 S.E.2d 609, 620 (27 CT 4785-4786) as did the Oregon State Court of Appeal in *State v. Lyons* (1993) 124 Or.App. 598, 602-610, 863 P.2nd 1303, 1306-1311 (27 CT 4736-4743). Both decisions explained how the process of PCR works and how DQ-Alpha typing results from this process. Specifically, the court in *Spencer* stated

> The third stage is the typing of the amplified gene. Nine 'allele-specific probes' are attached to a nylon membrane, and the amplified DNA is flooded over it. The probes are designed to recognize each of the variants of the 'gene of interest' which, in this case, was 'DQ-Alpha.' The probes 'light up' in the presence of the variants for which they are specific.

(27 CT 4785.) The court in *Lyon*, which utilized a test similar to *Kelly* regarding admissibility of scientific evidence, held "There is no dispute that the PCR method is generally accepted within the field." (27 CT 4740.)

While appellant now concedes PCR replication and DQ-Alpha typing is generally accepted in the scientific community (AOB 255, fn. 81), he challenges PCR DQ-Alpha and polymarker typing results being interpreted based on dot intensity. Appellant claims such typing is not generally accepted, but appellant is wrong. (AOB 258-267.)

Clearly, the testimony of Dr. Blake at the preliminary hearing, the scientific journal articles, and published appellate court decisions support, as a matter of law, the trial court's determination that the scientific community generally accepts PCR DQ-Alpha typing based on dot intensity. (*People v. Venegas*, *supra*, 18 Cal.4th at p. 76; *People v. Soto*, *supra*, 21 Cal.4th at p. 512, fn. 31 [reliance upon written materials supporting general acceptance in scientific community].) Even though a *Kelly* hearing was held in the instant case to determine whether the typing and interpretation of mixed-source DNA samples was generally accepted, the hearing was not required because the use of PCR DQ-Alpha with mixed-source samples did not involve the

"fundamental validity" of a new scientific methodology. This is not a case in which the scientific community viewed the PCR DQ-Alpha analysis of mixed-source samples as "experimental or of dubious validity." (See *People v. Hill*, *supra*, 89 Cal.App.4th at p. 58 [rejected argument that each new PCR STR test kit must be subjected to a *Kelly* prong one analysis].) Therefore, the trial court's decision in the instant case to admit it was not erroneous in the absence of appellant's providing any new evidence reflecting a change in the attitude of the scientific community. (*People v. Henderson*, *supra*, 107 Cal.App.4th at pp. 776-777.) Additionally, since the trial court's finding, several appellate court cases have acknowledged that PCR DQ-Alpha dot intensity analysis is generally accepted in the scientific community. (*People v. Wright*, *supra*, 62 Cal.App.4th at pp. 38-43 [appellate court considered authority following Wright's trial concerning admission of DNA evidence]; *People v. Morganti* (1996) 43 Cal.App.4th 643, 671.)

The Supreme Judicial Court of Massachusetts specifically addressed PCR test results which indicated mixed samples and upheld the lower court's finding that the methodology of interpreting such results based on dot intensity was "generally accepted within the scientific community." (*Commonwealth v. Gaynor* (2005) 443 Mass. 245, 820 N.E.2d 233, 249-251.) The PCR testing in *Gaynor* included DQ-Alpha typing. (*Id.* at pp. 239, 250.) Also, in *United States v. Gaines* (S.D. Fla. 1997) 979 F.Supp. 1429, 1439, the federal district court acknowledged the general scientific acceptance of PCR DQ-Alpha (and Polymarker) dot intensity analysis of mixed samples. In *State v. Harvey* (N.J. 1997) 699 A.2d 596, 624 (see AOB at pp. 259-263), the defendant challenged the admissibility of the dot-intensity analysis of PCR polymarker testing. The New Jersey Supreme Court held that based upon expert testimony, publications, Cellmark validations studies, and a judicial opinion, dot intensity analysis was scientifically reliable and admissible. (*Id.* at pp. 624-

628.) *Commonwealth v. McNickles* (Mass. 2001) 753 N.E.2d 131, 139, 142-143, an earlier case from the Supreme Judicial Court of Massachusetts, held that the trial court did not err in admitting the results of PCR DQ-Alpha testing, allowing the jury to assess the weight of such evidence when less than the recommended quantity of matter was tested and experts from both sides disagreed on the significance of the results.

As the court below noted, dot intensity analysis of DQ-Alpha typing results does not concern the first *Kelly* prong question of general acceptance in the scientific community but, instead, the weight to be accorded the evidence. (20 RT 1234-1235.) Appellant erroneously asserts the trial court never addressed the issue whether dot intensity analysis was generally accepted in the scientific community – *Kelly*'s first prong. (AOB 259, fn. 82.) In fact, the court specifically held, "and as the National Research Council pointed out in their report, I think, very well, there is no substantial dispute about the underlying scientific principles." (20 RT 1234.) These "scientific principles" necessarily included dot intensity typing since, as appellant points out, he had just raised the issue of typing mixed samples. While the court never specifically addressed each of appellant's individual arguments, it did so in general when finding the question became the "adequacy of laboratory procedures and of the competence of the experts . . ." (20 RT 1234.)

Arguing dot intensity analysis is not generally accepted in the scientific community when the results indicate there is a mixed sample, appellant relies upon two cases: *People v. Pizarro* (2003) 110 Cal.App.4th 530, disapproved on other grounds in *People v. Wilson* (2006) 38 Cal.4th 1237, 45 Cal.Rptr.3d 73, which in turn relies upon the dissent in *State v. Harvey*, *supra*, 699 A.2d at page 596. (AOB 259-263.) Appellant also references *Pizarro*, claiming the prosecution failed to carry the burden of establishing the PCR DQ-Alpha dot intensity analysis was properly employed when scrutinized pursuant

to *Kelly*'s prong three. (AOB 270.) Appellant is wrong. Furthermore, respondent submits *Pizarro* was erroneously decided and, nonetheless, is inapplicable to the instant case.

As appellant acknowledges (see AOB 258), *Pizarro* involved an entirely different DNA testing method than the methods utilized in the instant case – restriction fragment length polymorphism (RFLP). (*People v. Pizarro, supra*, 110 Cal.App.4th at p .540.) This is a critical distinction for two reasons. First, PCR and RFLP methodologies are only superficially similar. (*People v. Wright, supra*, 62 Cal.App.4th at p. 40, fn. 1.) Therefore, the factual and legal analysis do not translate to the instant case which involves PCR methodologies.

Second, pivotal to the analysis in *Pizarro* was the determination that the cases generally accepting RFLP typing within the scientific community did not address band intensity analysis of the particular autorad under question in that case. (*Id.* at pp. 606-610.) On the other hand, in the instant case there is published authority directly acknowledging dot intensity typing of PCR DQ-Alpha and polymarker testing – *Commonwealth v. Gaynor, supra*, 820 N.E.2d at pp. 249-251, and *United States v. Gaines, supra*, 979 F. Supp. at pp. 1438-1439. RFLP analysis involves considering several autorads – unlike DQ-Alpha analysis which assesses one trait – and in *Pizarro* the "band intensity did not correlate with DNA quantity" when all autorads were considered. (*People v. Pizarro, supra*, 110 Cal.App.4th at pp. 610-615.) But more importantly, the court in *Pizarro* did not find band intensity analysis lacked general acceptance in the scientific community but simply as applied in that case. (*People v. Pizarro, supra*, 110 Cal.App.4th. at p. 610.)

So even if RFLP band intensity analysis is considered similar to PCR DQ-Alpha dot intensity analysis, the problematic facts in *Pizarro* do not exist in the instant case.

The court in *Pizarro* acknowledged that the key consideration for determining whether a procedure is analyzed under *Kelly*'s first prong rather than *Kelly*'s third prong involves considering whether a new procedure is involved or a variation of an already accepted procedure. (*People v. Pizarro*, *supra*, 110 Cal.App.4th at pp. 615-616.) In the latter instance, the issue is analyzed under *Kelly*'s prong three, not prong one.

For purposes of the instant case, dot intensity analysis of PCR DQ-Alpha and polymarker results do not involve new or different procedures – the procedures followed are identical regardless of the number of dots or their intensity which appear in the results. That is, in the instant case the PCR DQ-Alpha procedures followed to determine the control or known samples, i.e., the samples taken from the different victims and appellant, were the exact same procedures as those used to analyze the samples from the various pieces of evidence. Appellant fails to rebut the evidence presented by the prosecutor to establish PCR DQ-Alpha dot intensity analysis was not in compliance with the methodology and techniques generally accepted by the scientific community. (*People v. Venegas*, *supra*, 18 Cal.4th at p. 78.)

Also, *Pizarro*'s analysis discussing PCR DQ-Alpha dot intensity typing as discussed in *Harvey* is simply dicta because it was unnecessary to the holding. Likewise, *Harvey* does not support appellant's argument for several reasons. First, the analysis in *Harvey*'s dissenting opinion was addressed and rejected by the majority so it is neither authoritative or persuasive. Second, *Gaynor, supra*, 820 N.E.2d at pages 249-251, and *Gaines, supra*, 979 F Supp. at page 1439, discussed above both specifically addressed dot intensity analysis of DQ-Alpha typing and found it generally accepted. But the majority in *Harvey* noted in that case,

> The record contains no discussion of the application of dot-intensity analysis to the results of the DQ Alpha test. At trial, the defense did not challenge the absence of any such analysis.

> Hence, the record does not reveal whether dot-intensity analysis can be performed on a DQ Alpha test or whether the test for the DQ Alpha allele differs from the polymarker test.

(*State v. Harvey* (N.J. 1997) 699 A.2d 596, 626.) The majority in *Harvey* found dot intensity analysis appropriate in the context of PCR polymarker typing and did not address dot intensity analysis in the context DQ-Alpha typing. Appellant misstates the holding of *Harvey* when asserting that the majority found dot intensity analysis was not acceptable in conducting DQ-Alpha testing (AOB 262) because the prosecution in *Harvey* never offered dot intensity analysis of the DQ-Alpha results. Rather, the court in *Harvey* found the PCR DQ-Alpha evidence admissible because, given the results of the DQ-Alpha testing, Harvey could not be eliminated as a possible contributor. (*Id.* at p. 632.) Unlike *Harvey*, the evidence and argument at the *Kelly* hearing in the instant case addressed dot intensity analysis. Since *Gains* and *Gaynor* directly address PCR DQ-Alpha dot intensity typing and *Harvey* did not, the dissent in *Harvey* is inapposite.

Therefore, contrary to appellant's claims otherwise, the trial court did not commit error by allowing the admission of the PCR DQ-Alpha analysis based upon dot intensity pursuant to *Kelly*'s prong one analysis. (AOB 250.) Appellant does not assert the court committed error under *Kelly*'s prong three – the correct scientific procedures were used in this case – regarding PCR DQ-Alpha dot intensity analysis. Any such claim should be deemed forfeited for purposes of appeal. The trial court noted when rejecting this claim below, appellant's claims went to the weight of the evidence and not its admissibility. (20 RT 1334-1335.)

Furthermore, appellant's attempt at applying the law to the facts in the instant case is fatally flawed for two reasons. (AOB 262-270.) First, appellant argues the facts presented at trial – not the information presented during the *Kelly* hearing – establish the trial court committed error. Such

analysis is not a proper basis for urging *Kelly* error. (*People v. Wright*, *supra*, 62 Cal.App.4th at p. 42.) Appellant must rely upon the evidence presented to the trial court at the time of the *Kelly* hearing; the trial court was obviously unable to consider the evidence presented at trial when determining whether the DNA evidence was admissible. (*Id* at pp. 41-42.) When *Wright* attempted a similar analysis, the court rejected it, stating "appellant is seeking to create some sort of retroactive *Kelly-Frye* error here, by arguing Riley's testimony at trial should have had retroactive effect in undoing the trial court's ruling as to admissibility at the previous *Kelly-Frye* hearing. This is not a proper basis for urging *Kelly-Frye* error." (*Id.* at p. 42.)

Second, even if it is appropriate to consider the evidence at trial, appellant's own expert– Marc Taylor – employed dot intensity analysis to analyze the mixed samples. (37 RT 4067-4068, 4091-4096.) Appellant's own expert did not question the science behind dot intensity analysis nor whether it was accepted in the scientific community. Therefore, to the extent appellant's own experts at trial considered dot intensity analysis to be deemed scientifically accepted for purposes of their results, appellant should be equitably estopped from asserting error on appeal and the issue should be deemed forfeited for purposes of appeal.

Appellant's arguments challenging the admission of the DNA evidence in the instant case as improperly admitted because it was not generally accepted in the scientific community – *Kelly*'s prong one– should be rejected. The trial court correctly found appellant's claims went to the weight of the evidence not its admissibility, and appellant fails to establish the contrary.

2. Appellant Forfeited The Issue Challenging The Admission Of The Prosecution's Population Frequency Analysis, And Assuming It Was Not, Appellant's Arguments Lack Merit

Appellant claims the trial court committed error by allowing the prosecution to present population frequency data limited to the "average man" rather than including "all possible perpetrators." (AOB 270-276.) Appellant did not make this challenge below but, instead, made a general challenge to population frequency analysis, so his argument should be deemed forfeited for purposes of appeal. Furthermore, appellant's argument lacks merit because this Court rejected appellant's arguments in *People v. Wilson, supra*, 45 Cal.Rptr.3d at pp. 75, 79-83.

It is well-established that an objection must be made based upon specific grounds to be preserved for purposes of appeal. (Evid. Code, § 353, subd. (a); *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148 [failure to object to specific questions waives claim on appeal]; *People v. Neely* (1999) 70 Cal.App.4th 767, 781-782 [issues forfeited on appeal because not asserted at trial].) Objecting to the admission of DNA evidence, appellant argued against the admission of the statistical analysis of the DNA results with a general claim that statistical issues needed to be resolved before there could be "meaningful use of DNA results" appropriate for jury consideration. (8 CT 1311-1314.) The prosecutor responded to appellant's claims by noting most of the appellant's authorities concerned RFLP DNA typing and referenced the vast authority acknowledging the validity of population frequency analysis. (25 CT 4349-4352.) Appellant presented no new argument or authority addressing this issue when the court heard and denied his motion to exclude the DNA evidence. Appellant made no argument resembling the arguments which he presents on appeal that the population frequency data should include all possible perpetrators rather than being limited to the average man, so the claim

should be forfeited for purposes of appeal. (Evid. Code, § 353, subd. (a); *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1148; *People v. Neely*, *supra*, 70 Cal.App.4th at pp. 781-782.)

Nonetheless, assuming the issue is not forfeited, it lacks merit. Appellant relies on *Pizarro* and argues that because the "perpetrator's race or ethnicity [was] unknown" the prosecutor could only present the most conservative frequency statistical analysis without mention of ethnicity or present a frequency analysis of a general, not-ethnic population. (AOB 271.) This Court in *Wilson* rejected this analysis in *Pizarro*, specifically holding that statistical analysis was relevant even though there was no independent evidence of the perpetrator's identity. (*People v. Wilson*, *supra*, 45 Cal.Rptr.3d at pp. 78-79.) This Court acknowledged the propriety of using a statistical analysis based upon African-Americans, Hispanics and Caucasians. (*Ibid.*)

Appellant faults the prosecutor for not using statistical evidence that included every ethnicity represented in San Diego. (AOB 272-273.) This Court in *Wilson* also rejected this analysis. (*People v. Wilson*, *supra*, 45 Cal.Rptr.3d at pp. 82-83.) Wilson, like appellant, argued that population frequency analysis should have been done based upon the geographical area of the crime scene, including Asians, Pacific Islanders, and Native Americans, but this Court held that including all possible population groups was unnecessary. (*Id.* at pp. 82-83.) Likewise, appellant's claim that San Diego is a Navy town with sailors of all races and ethnicities as well as an international business center does not mean that Dr. Blake's population frequency analysis had to include every note of ethnicity or population group in San Diego. (*Ibid.*) Appellant's argument to the contrary should be rejected.

3. The Lack Of An S Dot In The PCR Polymarker Results Did Not Render Dr. Blake's Testimony Concerning The Polymarker Evidence Inadmissible Under *Kelly*'s Third Prong

Appellant claims the trial court committed error by allowing Dr. Blake's PCR Polymarker testimony concerning the sperm samples associated with Trina Carpenter and JoAnn Sweets because the "S dot" (sensitivity dot) on the test strips of those samples was not present. (AOB 274-276.) Appellant argues this did not pass muster under *Kelly*'s third prong because the manufacturer recommended against typing a DNA sample without a S dot present, and the testimony of two experts whom appellant called on surrebuttal contradicted Dr. Blake's findings. Appellant's argument is legally and factually incorrect.

First, how the test strips were read or interpreted was a question concerning the weight of the evidence, not its admissibility. (20 RT 1334-1335.) Appellant challenges whether Dr. Blake implemented the correct procedures correctly – appellant does not question Dr. Blake's scientific procedures but simply his interpretation of the results; results which were not necessarily inconsistent with appellant's experts' interpretations. That is, appellant does not challenge Dr. Blake's procedures as noncompliant with the methodology and techniques generally accepted by the scientific community – the issue raised in *Kelly*'s third prong (*People v. Venegas*, *supra*, 18 Cal.4th at p. 78) – but challenges his interpretation of the results. Appellant fails to establish the trial court abused its discretion by allowing admission of Dr. Blake's PCR polymarker testimony.

Second, appellant misstates the facts because the PCR polymarker kit manufacturer acknowledged that laboratories may choose to type all strips

on which results are observed. (43 RT 4841[85].) Dr. Blake testified that there was no S dot detected on the polymarker control samples for either appellant or JoAnn Sweets which was why he felt confident in typing those polymarker strips on which there was no S dot. (43 RT 4882-4884.) Appellant's own experts conceded these facts, acknowledging that the lack of a S dot did not negate the ability to read results from the polymarker test strips (42 RT 4746-4747, 43 RT 4902-4903, 4913-4914, 4919-4920), S dots did not appear on some of the control sample test strips (43 RT 4944-4947), and the manufacturer of the polymarker kit stated that strips without an S dot could be typed (43 RT 4954). Therefore, appellant's complaints that the trial court committed error under *Kelly*'s third prong by allowing the polymarker evidence lack merit.

D. Any Error By The Admission Of The DNA Evidence Was Harmless

Appellant claims the admission of the DNA evidence resulted in prejudice. (AOB 276-286.) Assuming arguendo the trial court did commit error by allowing the DNA evidence to be admitted, appellant fails to establish prejudice based on its admission regarding either the guilt or penalty phases.

Regarding the guilt phase trial, appellant fails to establish it is reasonably probable that had the DNA evidence not been admitted, he would have received a more favorable result. (*People v. Venegas*, *supra*, 18 Cal.4th

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85. Dr. Blake read from the manufacturer's manual concerning reading the types from the DNA probe strips for the polymarker test kits as follows:

> 'To read the developed amplitude PM DNA probe strip, begin by examining the 'S' dot. It is recommended that a DNA probe strip with no visible 'S' dot not be typed for any locus. . . . ¶ However, individual laboratories may choose to type all Loci for which a band was observed on the amplitude PM PCR product gel.'

(43 RT 4841.)

at p. 93.) Appellant's prejudice argument completely ignores the fact that some of the DNA evidence was admitted to establish appellant murdered Carpenter, but the jury did not reach a verdict on this count. Nor did the jury returned a verdict finding appellant raped Glover. Obviously, the jurors were not so overwhelmingly impressed with the DNA evidence that they were willing to rely upon it to convict appellant or they would have found him guilty of murdering Carpenter and raping Glover. It is clear the jury required more than just DNA evidence from the prosecution to establish appellant's guilt of the Glover and Sweets murders and of the sexual offenses.

Regarding Glover, appellant acknowledges she was found within close proximity to the Wilsie residence but erroneously asserts this is the "sum total" of the evidence – besides the DNA evidence – connecting him to the murders. (AOB 277.) Initially, the jury did not reach a verdict finding appellant raped Glover, and the DNA evidence established Glover had sex with more than one man. The DNA evidence, in and of itself, tying appellant to Glover's murder was less than compelling and was actually more favorable to appellant than the prosecution. Appellant's argues that the existence of more than one man's semen established Glover was sexually assaulted by more than one man (AOB 277), but this argument is flawed because the existence of sperm did not establish forced sex. More importantly, it mitigates against a finding of prejudice rather than for it because it left open the possibility someone else committed the offenses.

More compelling than the DNA evidence was the way Glover's body was found as well as the way she was murdered and injuries she sustained prior to death which tied appellant to the murders. Glover, just like appellant's other victims (including Karen M., Maria R., and Bertha R.), was violently strangled and sexually assaulted. Glover was found nude and wrapped in a blanket just like Sweets. Moreover, Sweets was also found in close proximity

to appellant's apartment but in another part of town only three months before the murder of the Glover; appellant got rid of the bodies in close proximity to where he stayed or lived. This evidence, along with the fact Karen and Bertha were all violently sexually assaulted and strangled at the Wilsie residence close to where Glover was found establish it is reasonably probable that even if the DNA evidence had been excluded, appellant would not have received a more favorable result. (*People v. Venegas*, *supra*, 18 Cal.4th at p. 93.)

Likewise, the non-DNA evidence establishing appellant's guilt of Sweets' murder was compelling; much more so than the DNA evidence which showed a mixed sample. Sweets' nude body was found in a dumpster directly behind appellant's apartment in an alley, wrapped in a plastic bag with appellant's fingerprint on it, covered in a blanket made by appellant's mother with whom appellant had lived at that apartment, and with carpet fibers that matched the carpet in appellant's apartment. Again, Sweets like the other victims had been brutally strangled and sexually assaulted. While appellant offers explanations for all of this evidence (AOB 278-284), the jury heard these explanations and rejected them.

Regarding the penalty phase trial no new evidence regarding either Glover or Sweets was admitted nor was any additional DNA evidence admitted. While the jury was instructed that they could consider the offenses for which they could not reach a verdict for purposes of establishing appellant's penalty, they could only consider this evidence if they were satisfied beyond a reasonable doubt that appellant did, in fact, commit the criminal acts. (53 RT 5982-5983.) Given the fact the DNA evidence established a mixed sample regarding both Glover and Sweets, any error by the admission of this evidence was harmless beyond a reasonable doubt in the context of the determination of appellant's penalty.

Similarly, appellant argues the DNA evidence regarding Trina Carpenter was prejudicial because the jury was instructed they could consider the murder charges involving her for purposes of determining appellant's penalty so long as each juror "found beyond a reasonable doubt that [appellant] committed the murder (RT 5982)." (AOB 285.) However, any finding of prejudice would have to be based on pure speculation because nothing in the penalty verdict indicates what the jury considered in making its determination to impose the death penalty. Since the jury did not reach a verdict regarding the charges involving Carpenter and no new evidence was introduced during the penalty trial concerning Carpenter, appellant's claim of prejudice has no basis under any standard of review.

The DNA evidence was properly admitted during appellant's guilt phase trial. The trial court properly employed *Kelly*'s three-pronged test before admitting it. Appellant fails to establish the contrary. Even if the trial court did commit error by allowing its admission, appellant fails to establish prejudice. His arguments to the contrary should be rejected.

V.

THE EXPERT TESTIMONY OF DR. MELOY ADDRESSING "SEXUAL HOMICIDE" WAS PROPERLY ADMITTED

In argument 11, appellant makes a multifaceted argument attacking the testimony of Dr. John Reid Meloy who testified about "sexual homicide." (AOB 287-346.) First, appellant argues the trial court misapplied *People v. Bledsoe* (1984) 36 Cal.3d 236, when finding this evidence admissible. (AOB 289, 293-302.) Second, appellant asserts Dr. Meloy's testimony was inadmissible pursuant to Evidence Code section 720. (AOB 302-306.) Third, appellant argues Dr. Meloy's testimony was inadmissible pursuant to Evidence Code section 801, subdivisions (a) and (b). (AOB 306-316.) Fourth, appellant

complains Dr. Meloy's testimony was inadmissible pursuant to Evidence Code sections 1101 or 1102. (AOB 315-318.) Fifth, appellant argues Dr. Meloy's testimony was inadmissible under the *Kelly* standard for determining the admissibility of scientific evidence, and the trial court erroneously found *Kelly*'s standards did not apply. (AOB 318-325.) Sixth, appellant asserts Dr. Meloy's testimony was inadmissible under Evidence Code sections 210 and 350 because it was irrelevant, and it was inadmissible pursuant to Penal Code section 29 which prohibits expert testimony on ultimate questions of purpose, intent, knowledge, or malice aforethought. (AOB 325-328.) Seventh, appellant complains Dr. Meloy's testimony was improperly admitted pursuant to Evidence Code section 352. (AOB 329-331.) Eighth, appellant claims the admission of Dr. Meloy's testimony violated his right to due process of law. (AOB 332-333.) Finally, appellant argues Dr. Meloy's testimony was prejudicial under both the *Chapman* and *Watson* standards. (AOB 333-346.) Appellant's claims were rejected below and lack merit on appeal. This issue was thoroughly litigated and appellant fails to establish the trial court abused its discretion by allowing Dr. Meloy's testimony.

A. Procedural History

1. Pretrial Offer Of Proof And Rulings

On December 3, 1993, appellant filed a request for an evidentiary hearing to learn what evidence the prosecution intended to admit through the testimony of Dr. Meloy. (27 CT 4052-4055.) On the same day, the prosecution filed a reply to appellant's motion and argued Dr. Meloy's testimony was admissible despite appellant's "anticipated objections." (27 CT 4856-4862.)

On December 15, 1993, the court held a pretrial Evidence Code section 402 hearing addressing the proposed testimony of Dr. Meloy. (9 RT

480-595.) At the close of the hearing, the court tentatively ruled to allow Dr. Meloy's testimony about sexual assault. (9 RT 590-594.)

On December 23, 1993, appellant filed a motion to exclude Dr. Meloy's testimony. (28 CT 5007-5026.) On January 4, 1994, the court stated it would consider appellant's motion and gave the prosecution the opportunity to file a written response. (10 RT 634.) The prosecutor stated he would rely upon the information already before the court. The court wanted to consider the transcript referenced by appellant from a pretrial hearing in *People v. Amundson* in which the trial court in that case ruled it would not allow Dr. Meloy to testify. (10 RT 634-635.) The court then heard extensive argument by both sides but put off making a final ruling. (10 RT 634-656.)

On January 11, 1994, the prosecutor filed a response to appellant's supplemental points and authorities regarding the testimony of Dr. Meloy. (30 CT 5560-5567.) On January 12, 1994, the court heard further argument regarding Dr. Meloy's testimony. (12 RT 755-776.) The court made several findings, ultimately holding that Dr. Meloy's testimony was admissible with certain limitations.

On January 20, 1994, the prosecutor submitted an offer of proof supplementing Dr. Meloy's prior testimony. (31 CT 5655-5670.) On January 31, 1994, the court revisited its holding and indicated Dr. Meloy's testimony would be limited to that portion which would dispel any confusion concerning the intent of someone killing a willing sexual partner; in this case, a prostitute. (19 RT 1199.) However, the court stated it would consider further argument on this issue.

On February 7, 1994, the court revisited its previous tentative ruling limiting Dr. Meloy's testimony in light of additional information provided by the prosecution but maintained its original holding. (20 RT 1221.)

a. December 15, 1993, Evidence Code Section 402 Hearing

Dr. Meloy worked part-time as the administrative overseer of the San Diego County Courthouse diagnostic unit, part-time as the administrator overseeing the conditional release program for insanity acquittees who were in an outpatient setting and had a private practice in criminal and civil matters as a forensic psychologist. (9 RT 480.) Dr. Meloy had been studying and doing research on sexual homicide for 18 years following an incident with a patient in Chicago, Illinois.[86] (9 RT 482-483.)

As a result of his experience in Chicago, Dr. Meloy began doing research into sexual homicide behavior, found such research already existed and he added to it by doing his own research. (9 RT 482-483.) Dr. Meloy had published nine papers focusing on sexual homicide, had devoted two books to sexual homicide and was in the process of publishing a third book entitled *The Rorschach Assessment of Aggressive and Psychopathic Personalities*. (9 RT 487.) Dr. Meloy had published other papers with his partner, Carlo Chacono, empirically studying small groups of psychopathic criminals compared to non-psychopathic criminals in the context of how they think, feel, and how their personalities are structured primarily using the Rorschach test as a framework for doing these studies. (9 RT 531.) Dr. Meloy was currently working on a paper, set for publication in January of the following year, involving sexual homicide perpetrators which was in the process of being blind peer-reviewed, and he provided the galley proofs for this paper to counsel. (9 RT 531-538, 573-574, 577-578.)

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86. Dr. Meloy treated an individual who had committed two sexual homicides and had been placed in Dr. Meloy's program for bipolar and manic depression, and while the treatment appeared successful, the individual committed a third sexual homicide three months in to the program. (9 RT 529-530.)

Dr. Meloy discussed various papers and other publications by others in the area of sexual homicide and was currently involved in research with a former FBI behavioral scientist, Robert Ressler. (9 RT 485-486.) Throughout his testimony Dr. Meloy discussed the research of others. Dr. Meloy was familiar with a paper authored in the 1960s by Revitch entitled *Sex, Murder, and Sex Murder* which included case studies of sexual homicide. (9 RT 528.) During the 70s, Nicholas Groth and Rada did studies on sexual homicide. (9 RT 489.) The FBI published a study on sexual homicide in 1988. (9 RT 502.) Dr. Meloy discussed five books which he brought to the hearing that addressed sexual homicide: (1) *The Crime Classification Manual*, authors John Douglas, Ann Burgess, Allen Burgess, and Robert Ressler [a chapter on sexual homicide, pages 123-144, described the four sub-types of sexual homicide] (9 RT 523); (2) *Sexual Homicide Patterns and Motives*, authors Robert Ressler, Ann Burgess and John Douglas, printed 1988, [book involved the study of 36 sexual homicide perpetrators between 1979 and 1983; these 36 perpetrators had 118 victims] (9 RT 524-526); (3) *The Practical Homicide Investigation*, 2d edition, by Vernon Gebreth, published 1990 [chapter 12 addressed "The Investigation of Sex-Related Homicides," and chapter 17 specified the difference between organized and disorganized offenders at pages 505-519] (9 RT 526-527); (4) *Psychopathology of Homicide*, by Revitch and Schlesinger, printed 1981 [a chapter addressed "Compulsive Homicides"; Revitch had 20 years of experience focusing on sexualized aggression and sexual homicide] (9 RT 527-528); and (5) *The Psychopathic Mind*, published 1988 (9 RT 528-529).

According to Dr. Meloy, sexual homicide involved sexual arousal and sex in combination with violent behavior – sexual arousal heightened by violence. (9 RT 490.) The manual published by Robert Ressler and John Douglas identified sexual homicide as one of four major homicidal patterns in

general, and within sexual homicide, identified for separate subtypes. (9 RT 488-489.) One of the hallmarks of the typology of a sexual homicide perpetrator was either no acquaintance with the victim or a casual or emotionally distant relationship with the victim. (9 RT 556.)

Because violence heightens the sexual experience, this type of sex becomes more gratifying than sex not involving violence. Therefore, a person who commits serial sexual homicides might also be in a regular sexual relationship but continue to commit sexual homicides in order to obtain the heightened sexual arousal. (9 RT 490.) A characteristic of sexual homicide might include picking victims with a common characteristic such as appearance, accessibility, profession, and a willingness to make themselves vulnerable to the perpetrator. (9 RT 492.) Dr. Meloy went through information which he had obtained from the prosecutor about the seven victims in the instant case and categorized it in the context of sexual homicide. (9 RT 495-510, 517-519.)

Following argument, the trial court made several findings. (9 RT 590-595.) First, the court found Dr. Meloy was a qualified expert and had sufficient background and experience to satisfy Evidence Code sections 801 and 720. (9 RT 591.) The court found Dr. Meloy could testify with certain limitations. The court found the empirical studies of crimes and crimes scenes done by the FBI which provided the four categories for sexual homicide was relevant to help determine whether there was a pattern that the crimes in the instant case fit into, specifically finding the testimony was not "horribly awful to the defense" and "cut both ways." (9 RT 591.) The court also found Dr. Meloy's testimony was relevant to determine motive and the motivation for the crimes. (9 RT 592.) However, the court excluded Dr. Meloy's charts which contained the names of victims and how they fit within certain categories. (9 RT 593-594.)

b. Argument And Tentative Ruling On January 4, 1994

After appellant filed his written motion seeking to exclude the testimony of Dr. Meloy, the court stated it would consider it along with the transcript from *People v. Amundson*. (10 RT 634.) At this time appellant made several arguments challenging Dr. Meloy's study, how it was conducted, and Dr. Meloy's use of the Rorschach test to arrive at his conclusions. (10 RT 636-644.) While appellant stated Dr. Meloy's testimony brought up *Kelly* issues, appellant did not develop this argument at this time. (10 RT 638.) However, appellant agreed the intent of the perpetrator was an important issue for the jury to consider. (10 RT 644-645.)

The prosecutor argued that *Kelly* did not apply to psychological opinions and that in *People v. Amundson*, the court improperly applied *Kelly*. (10 RT 646-647.) Dr. Meloy's expert psychological opinion evidence was similar to psychological evidence challenging the reliability of eyewitness testimony, and such testimony was not subject to *Kelly*. (10 RT 947.) The prosecutor also argued Dr. Meloy's testimony went to motive– regardless of the defense argument that there was no need to prove motive – because the facts of the case raised the issue of why someone would kill a willing sex partner, i.e., a willing prostitute. (10 RT 649.)

The court stated that Dr. Meloy's testimony was relevant to address the psychodynamics aimed directly at motive. (10 RT 650, 653-655.) However, the court expressed reservations about allowing Dr. Meloy to testify to the four categories of sexual homicide, about bonding and familial relationships, and other aspects of Dr. Meloy's testimony, stating it would reconsider these issues after reading the *Amundson* transcript and hearing argument. (10 RT 653-655.) The court maintained that Dr. Meloy's testimony that consensual sex was not as good as violent, nonconsensual sex because

violence accentuated arousal was clearly within the realm of admissible forensic pathology testimony. (10 RT 655.)

c. Argument And Court's Rulings On January 12 & 31 As Well As February 7

During the January 12 hearing, appellant primarily addressed the prosecutor's arguments asserted in the points and authorities which the prosecutor filed on January 11. Appellant argued Dr. Meloy's testimony needed to satisfy the requirements of *Kelly*. (12 RT 755-761.) The prosecutor argued *Kelly* did not apply to Dr. Meloy's testimony because it was distinguishable from the cases upon which appellant relied, and one of the cases upon which appellant relied, *People v. Cegers* (1992) 7 Cal.App.4th 988, actually held that the trial court committed error by applying *Kelly* to psychological evidence. (12 RT 759.) Furthermore, even if Dr. Meloy's testimony was considered character evidence, it was admissible pursuant to Evidence Code section 1101, subdivision (b), to establish motive and intent. Dr. Meloy was a legitimate expert regarding sexual homicide, and his expert testimony showed what went through the minds of a sexual homicide perpetrator. (12 RT 759-760.)

The court held that Dr. Meloy's testimony addressing the connection between violence and sexual arousal was beyond common experience and, therefore, constituted appropriate expert testimony. (12 RT 762-763, 767-768.) The court also found the study of sexual homicide had a significant history with no contradictory evidence in this field of study, and Dr. Meloy had significant experience in the field of sexual homicide; he qualified as an expert in this field. (12 RT 762-763, 766-767.) The court found that a *Kelly* hearing was unnecessary because the basis of Dr. Meloy's testimony did

not involve any new test or procedure but, rather, involved interviews with individuals. (12 RT 762-763.)

The court held Dr. Meloy could testify to the connection between sexual arousal and violence, anger, and rage because this went directly to the question of motive and intent. (12 RT 764-765.) However the trial court held Dr. Meloy could not testify about the psychological factors associated with sexual homicide, serial sexual homicide or to the FBI categories. (12 RT 764-767, 769-771, 772-774.) The court cited the case authority upon which it relied to make its findings. (12 RT 769.)

On January 31 and February 7 the court reiterated this holding allowing Dr. Meloy's testimony with the same restrictions after the prosecutors submitted a written supplemental offer of proof regarding the four categories of sexual homicide and the FBI factors. (19 RT 1199; 20 RT 1217-1221.)

2. Testimony At Trial

Dr. Meloy's entire testimony spans only 16 pages. (30 RT 3250-3266.) Dr. Meloy holds licenses in California as a psychologist, a clinical social worker and a certified forensic pathologist. (30 RT 3253.) Dr. Meloy works as a physician in private practice doing forensic pathology and as the Chief of Court Services for the Forensic and Mental Health Division for San Diego County. (30 RT 3250.) In his position with San Diego County, Dr. Meloy administers the outpatient psychiatric program for individuals found not guilty by reason of insanity and a clinic at the courthouse which diagnoses individuals in custody. (30 RT 3251.)

Dr. Meloy conducted research and published papers in the area of "sexual homicide" and kept abreast of others also doing work in this area. (30 RT 3254-3257.) On cross-examination he discussed how he conducted his most recent research. (30 RT 3260-3261, 3263-3264.) The research conducted by Dr. Meloy utilized the Rorschach Test because there was an accumulated

body of the information on the use of this test. (30 RT 3263-3264.) The Rorschach test was administered to individuals who had either been convicted of or pled guilty to committing a sexual homicide. (30 RT 3260.)

During a sexual homicide, the perpetrator is sexually aroused by violence against a woman and will attempt to reach an orgasm before, during or after killing the woman. (30 RT 3259.) Dr. Meloy defined sexual homicide as the intentional killing of another human being during sexual activity by a perpetrator who confessed to being sexually aroused right before, during or after killing the person with whom they were having sex, and physical evidence established sexual activity before, during or after the killing. (30 RT 3258-3259.) By definition, sexual homicide involves an individual who commits violent acts as a means of sexual arousal; a "normal" homicide lacks any sexual component. (30 RT 3259.) Dr. Meloy stated sexual homicide was a "goal oriented behavior" because the purpose of the homicide was sexual arousal. (30 RT 3259-3260.)

Major publications discussing sexual homicide include the *Crime Classification Manual* published by the FBI. (30 RT 3265-3266.) However, the *DMS-III*, the manual for diagnosing mental and emotional disorders used by psychiatrists and psychologists, does not include a definition of sexual homicide. (30 RT 3261-3262.)

B. The Trial Court Did Not Commit Error By Allowing The Admission Of Dr. Meloy's Expert Testimony Addressing Sexual Homicide

A trial court's determination to admit expert evidence will not be disturbed on appeal absent a showing the court abused its discretion in a manner that resulted in a miscarriage of justice. (*People v. Robinson* (2005) 37 Cal.4th 592, 630.) The trial court's determination that a witness qualifies as an expert is a matter of discretion which will not be disturbed absent a showing of

manifest abuse. (*People v. Bolin* (1998) 18 Cal.4th 297, 321-322.) A determination that a witness qualified as an expert will only be found erroneous if the evidence shows that the witness clearly lacked qualifications as an expert. (*People v. Farnam* (2002) 28 Cal.4th 107, 162.) Once a witness establishes sufficient knowledge of a subject to entitle their opinion to go to the jury, the question of the degree of their knowledge goes to the weight of the evidence and not its admissibility. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 322.) Concerning the subject matter of expert testimony, it is well-established "[t]he jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission." (*People v. Farnam*, *supra*, 28 Cal.4th at pp. 162-163 [quotations and citations omitted].)

1. Dr. Meloy Was A Qualified Expert On Sexual Homicide Pursuant To Evidence Code Section 720, And Appellant's Claims To The Contrary Should Be Deemed Forfeited Or, Alternatively, Lacking In Merit

The record clearly establishes that Dr. Meloy was a qualified expert in the field of sexual homicide. A person qualifies as an expert if they have special knowledge, skill, experience, training or education on a subject to which their testimony relates. (Evid. Code, § 720, subd. (a).) As a psychologist, Dr. Meloy had been doing research on sexual homicide for 18 years. (9 RT 482-483, 529-530.) Dr. Meloy had authored numerous papers, chapters in books and a book addressing sexual homicide. (9 RT 487, 531-538, 573-574, 577-578.) Dr. Meloy discussed the research and studies of others in the area of sexual homicide, and Dr. Meloy had worked with some of these other researchers. (9 RT 485-490, 522-530.) Therefore, the trial court's finding that Dr. Meloy was a qualified expert was not an abuse of discretion. (9 RT 191.) Appellant fails to establish the evidence showed Dr. Meloy lacked the qualifications of an expert. (*People v. Farnam*, *supra*, 28 Cal.4th at p. 162.)

In fact, the argument appellant makes challenging Dr. Meloy as an expert should be deemed forfeited for purposes of appeal besides lacking merit.

On appeal appellant does not dispute Dr. Meloy's expertise but, rather, claims "sexual homicide" is not a valid field of psychology. (AOB 302-306.) Appellant failed to make this objection below, so it should be forfeited for purposes of appeal. (*People v. Bolin* (1998) 18 Cal.4th 297, 321 [failure to challenge witness's expertise below forfeited on appeal].) Indeed, in the court below, appellant conceded Dr. Meloy was a "highly qualified and experienced forensic psychologist." (28 CT 5014.) Instead, appellant objected in court below that Dr. Meloy's testimony concerned "crime scenes and other factual data" and not psychological evidence, and he did not have sufficient experience as a crime scene investigator. (28 CT 5013-5014.) Appellant did not question the fact that sexual homicide was a valid area of expertise or psychology, so because appellant did not make this specific objection below, it should be deemed forfeited for purposes of appeal. (*People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1433-1435 ["vagueness" objection insufficient to preserve challenge of "beyond the proper scope"]; *People v. Flores* (1992) 7 Cal.App.4th 1350, 1359-1360 [objection to gang expert testimony as "beyond expertise" and "improper foundation" did not preserve other claims of error].)

Assuming the argument is not forfeited for purposes of appeal, it lacks merit. Appellant concedes sexual homicide may be "a subfield in law enforcement." (AOB 303.) Appellant acknowledges the vast body of information and research on sexual homicide. (AOB 303-306.) The record amply establishes that sexual homicide was a field of study that Dr. Meloy was well acquainted with, that Dr. Meloy had substantially contributed to the field of study of sexual homicide and appellant acknowledges Dr. Meloy was a highly qualified and experienced forensic psychologist in this field of study. Appellant's claim that Dr. Meloy was not a qualified expert within the meaning

of Evidence Code section 720 because sexual homicide is not a field of psychology should be rejected because the prosecution was not required to establish sexual homicide as a specialized field of psychology as opposed to law enforcement. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1120-1121.)

This Court in *Fudge* rejected a similar claim as that which appellant makes in the instant case, finding the detective in *Fudge* qualified as an expert to testify that the victims were "trapped" by the defendant in a "corridor" created by a combination of a fence on one side and parked cars on the other side. (*Ibid.*) In the instant case, Dr. Meloy had studied sexual homicide and, in fact, testified about this phenomenon in both criminal and civil matters. (9 RT 480, 484-486, 539-541.) Certainly, Dr. Meloy was a qualified expert on sexual homicide, and appellant fails to establish the trial court's determination was a manifest abuse of discretion. (*People v. Fudge*, *supra*, 7 Cal.4th at 1121.)

Pursuant to Evidence Code section 720, all the prosecutor was required to do was establish Dr. Meloy possessed special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject of sexual homicide and the record amply establishes this. Appellant's claim that Dr. Meloy did not qualify as an expert pursuant to Evidence Code section 720 should be rejected if not deemed forfeited.

2. Dr. Meloy's Testimony Was Properly Admitted Within The Meaning Of Evidence Code Section 801, Subdivisions (a) And (b), And Section 210

The Evidence Code limits expert testimony to those subjects sufficiently beyond common experience such that the opinion of the expert assists the trier of fact and is based on matter personally known by the expert – including the expert's special knowledge, skill, experience, training, and education – that is of a type that reasonably may be relied upon by an expert in

forming an opinion on the subject to the which the expert's testimony relates. (Evid. Code, § 801, subds. (a), (b).) Dr. Meloy's testimony addressing the aberration of sexual arousal heightened by the infliction of violence and homicide was beyond common experience and was based upon Dr. Meloy's study in this field for over 18 years. Likewise, for the same reasons Dr. Meloy's testimony was admissible pursuant to Evidence Code section 801, it was relevant, pursuant to Evidence Code sections 210 and 350. (AOB 325-326.) Appellant's arguments that this evidence was improperly admitted pursuant to Evidence Code section 801, subdivisions (a) and (b), and section 210, should be rejected.

Immediately following the prosecution's offer of proof concerning Dr. Meloy, the trial court found Dr. Meloy's testimony addressed matters sufficiently beyond the common experience of the jury to warrant its admissibility. (9 RT 591.) Later, after more briefing and argument on the issue of the admissibility of this evidence, the court found Dr. Meloy's testimony was relevant to address the psychodynamics of sexual arousal being heightened by committing violence in the context of motive and intent. (10 RT 649; 12 RT 762-765, 767-768.) However, the trial court severely restricted Dr. Meloy's testimony to this area and precluded him from testifying to the four categories of sexual homicide or to the specifics of any of the offenses. Appellant fails to establish the trial court abused its discretion by allowing Dr. Meloy's testimony addressing sexual homicide. (*People v. Robinson, supra*, 37 Cal.4th at p. 630.)

Dr. Meloy's testimony connected violence to heightened sexual arousal; two concepts which would seem to be mutually exclusive but appeared to be inextricably intertwined in the instant case. "The law does not disfavor the admission of expert testimony that makes comprehensible and logical that which is otherwise inexplicable and incredible." (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551.) The court in *Gonzalez* upheld the admissibility

oriented, and motivated by sex." (AOB 307.) Rather, Dr. Meloy described a phenomenon whereby a person is sexually aroused by committing violence or homicide during or after sex. (30 RT 3258-3260.) Dr. Meloy's testimony offered no legal conclusions, did not involve factual hypotheticals opining on appellant's mental state, the jury was instructed with the definition of murder (45 RT 5132-5138), they were instructed on the consideration of expert testimony and that they could accept or reject it (45 RT 5117-5118), and were instructed to follow the law as defined by the trial court (45 RT 5105). In order for appellant's argument to have any merit, these facts must be ignored. Given the evidence indicated all the offenses involved sex and homicide or attempted homicide, pursuant to Evidence Code section 801, subdivision (a), Dr. Meloy's testimony addressed a subject which was beyond common experience that assisted the trier of fact in understanding the motivation behind the crimes.

Appellant makes a multifaceted argument that Dr. Meloy's testimony was inadmissible pursuant to Evidence Code section 801, subdivision (b). (AOB 308-315.) However, his claims lack merit in light of the entirety of the record and when considered in context. First, appellant dissects Dr. Meloy's pretrial and trial testimony when reasoning Dr. Meloy's testimony was "unreliable." (AOB 308-311.) Appellant's reasoning ignores the fact Dr. Meloy's pretrial testimony involved a greater offer of proof than he was allowed to put in evidence at trial. Dr. Meloy's testimony was not "contradicted by his own study" or by Dr. Eugene Revitch, whose studies Dr. Meloy had relied upon. Rather, Dr. Meloy's pretrial testimony was greater in scope and addressed the specifics of the crimes in the instant case while his testimony at trial was restricted to generally addressing the phenomenon of sexual homicide.

Second, appellant asserts Dr. Meloy's study, which was pending publication, was untested (AOB 311), but appellant ignores the fact that before Dr. Meloy's study was approved for publication it had gone through blind peer

of expert evidence addressing gangs "to understand an inmate's cold-blooded attempt to murder a nearly naked, defenseless fellow inmate who did nothing to provoke the attack" even though most people were familiar with activities of street gangs and can imagine circumstances that could lead to a crime of passion. (*Ibid.*) Likewise, all of the murder victims in the instant case were found nearly naked, two of the four murdered women were known prostitutes,[87] and Maria and Karen, appellant's rape/attempted murder victims, were prostitutes who had agreed to have sex with appellant. Even though people may be familiar with the general activities of prostitutes and know violence occurs on the streets involving this activity, Dr. Meloy's testimony addressed the motivation of someone who would seek out women to murder in order to achieve heightened sexual arousal – information beyond common experience to assist the jury. While Dr. Meloy's testimony did not involve a subject matter about which the jury was totally ignorant, it was properly admitted. (*People v. Farnam*, *supra*, 28 Cal.4th at pp. 162-163.) For the same reasons, it was relevant within the meaning of Evidence Code section 210.

Appellant argues Dr. Meloy's testimony amounted to a legal conclusion and was improper pursuant to Evidence Code section 801, subdivision (a). (AOB 306-308.) Appellant's arguments ignore his own cross-examination when Dr. Meloy was asked, "So this definition that you have given us here ***is not a legal definition of any kind***? This is your personal definition to describe the area that you're dealing in?" (30 RT 3261 [emphasis added].) Dr. Meloy answered in the affirmative. Additionally, contrary to appellant's analysis, Dr. Meloy did not define "a particular kind of homicide" or offer "legal conclusions that all sexual homicides are intentional, purposeful, goal

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87. As previously established, the evidence before trial established all four murder victims were prostitutes (3 RT Prelim 401, 411-412), and the jury received evidence indicating all four murder victims were prostitutes.

review. (9 RT 531-538, 573-574, 577-578.) Also, given Dr. Meloy's 18 years studying sexual homicide, Dr. Meloy's expertise did not hinge upon the publication of his most recent research. Third, appellant argues Dr. Meloy's definition of "sexual homicide" was overbroad, and appellant purports to give several examples of scenarios involving sex and murder which would qualify as "sexual homicide," but appellant fails to take into consideration the entirety of Dr. Meloy's testimony. (AOB 312-314.) Dr. Meloy specifically testified the perpetrator of a sexual homicide "is sexually aroused by the act of violence towards the victim . . . ." (30 RT 3259.) Appellant's analysis and examples do not involve a perpetrator sexually aroused by an act of violence but simply homicides coincidental to sex; it is appellant's analysis which is overbroad and general. Appellant fails to establish the trial court abused its discretion when rejecting these claims. (*People v. Robinson*, *supra*, 37 Cal.4th at p. 630.)

Appellant's arguments that Dr. Meloy's testimony was improperly admitted pursuant to Evidence Code sections 801 and 210 lack merit in light of the law and the entirety of the record. Appellant's claims to the contrary should be rejected.

3. Appellant's Argument Based On Evidence Code Sections 1101 And 1102 Are Forfeited For Purposes Of Appeal And, Nonetheless, Lack Merit As Does His Argument Invoking Penal Code Section 29

Appellant claims Dr. Meloy's testimony was inadmissible pursuant to Evidence Code section 1101 or 1102 and that it was improper pursuant to Penal Code section 29. (AOB 315-318, 326-328.) However, appellant did not argue the evidence was inadmissible pursuant to Evidence Code sections 1101 and 1102 in the court below, so it should be deemed forfeited for purposes of appeal. (*People v. Flores*, *supra*, 7 Cal.App.4th at pp. 1359-1360.) The appellate court in *Flores* refused to entertain numerous

arguments on appeal attacking the admissibility of expert testimony which had not been made in the court below. (*Ibid.*) While appellant made numerous arguments objecting to the testimony of Dr. Meloy below, he did not argue it was inadmissible character or profile evidence pursuant to Evidence Code section 1101. Therefore, this assertion should be deemed forfeited for purposes of appeal.

Assuming the issue is not forfeited, it lacks merit. Dr. Meloy's testimony was neither character evidence within the meaning of Evidence Code section 1101 nor psychological profile evidence. The authority upon which appellant relies is distinguishable.

Appellant relies upon *People v. McFarland* (2000) 78 Cal.App.4th 489, 491, 494, which involved a defendant charged with annoying or molesting a child and with having two prior strikes for lewd conduct with a child. (AOB 315-316.) In *McFarland* an expert testified who had considered crime reports of the charged offenses, information of other child molestations McFarland committed and a history of McFarland's sexual dysfunction going back to childhood to opine McFarland "was motivated by unnatural or abnormal sexual interest in children" when he committed the charged molestations. (*Id.* at p. 492.) The appellate court found this improper character evidence because the doctor offered "an expert opinion on the ultimate issue that appellant harbored an unnatural and abnormal sexual interest" in his victim and such evidence was only admissible as rebuttal after the defendant first offered character evidence. (*Id.* at p. 495.) The evidence proffered to the jury in the instant case differs substantially from that presented in *McFarland*.

Dr. Meloy testified to the phenomenon of sexual homicide, and even though he had reviewed information about the crimes committed in the instant case, Dr. Meloy did not testify about any specifics of the instant offenses, and his testimony was not based upon the facts known about the

crimes. Rather, Dr. Meloy's testimony was based upon his extensive research. Unlike the expert in *McFarland* who testified the defendant had unnatural and abnormal sexual interests, Dr. Meloy did not offer any opinions – implied or otherwise – about appellant. The facts and law of *McFarland* do not apply to the instant case.

Appellant also relies upon *People v. Castaneda* (1997) 55 Cal.App.4th 1067, *People v. Walkey* (1986) 177 Cal.App.3d 268, and *People v. Robbie* (2001) 92 Cal.App.4th 1075. (AOB 316, 318.) All three cases involved expert testimony constituting profile evidence and are readily distinguishable. (*People v. Smith* (2005) 35 Cal.4th 334, 357-358.) In *Smith*, this Court addressed and distinguished each of these cases, finding "Profile evidence is objectionable when it is insufficiently probative because the conduct or matter that fits the profile is as consistent with innocence as guilt. The evidence here, however, does not have this problem." (*Id.* at p. 358.) Initially, the instant case does not involve profile evidence, but even if it does, Dr. Meloy did not describe conduct which could be as consistent with innocence as with guilt.

The police officer in *Castaneda* described a typical heroine dealer in the area were Castaneda was arrested as an adult Hispanic male, either a United States citizen or Mexican national; a general description which Castaneda fit. (*People v. Castaneda, supra*, at pp. 1071-1072.) Contrary to appellant's analysis, Dr. Meloy's testimony addressing sexual homicide did not describe appellant, did not describe general conduct and was nothing like the police officer's testimony in *Castaneda*; it in no way smeared appellant "with the character of 18 criminals . . ." (AOB 318.)

The expert in *Walkey* addressed "battering parent syndrome"[88/] and the expert in *Robbie* offered testimony to establish that the defendant's

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88. *People v. Walkey, supra*, 177 Cal.App.3d at pp. 277-279.

conduct during a rape was consistent with being a certain type of rapist and included hypothetical behavior consistent with the defendant's words and conduct described by the victim[89]. The appellate courts in *Walkey* and *Robbie* found the evidence in those cases improper profile evidence. (*People v. Walkey, supra*, 177 Cal.App.3d at pp. 278-279; *People v. Robbie, supra*, 92 Cal.App.4th at p. 1084.)

In *Robbie*, the appellate court found the evidence improper for two reasons. (*People v. Robbie, supra*, at p. 1087.) First, rather than identifying a misleading notion in the public consciousness and disabusing the jurors of the misconception, the prosecution in *Robbie* identified a stereotype and then fit the defendant into it. (*Id.* at pp. 1086-1087.) The court in *Walkey* rejected battering parent syndrome evidence for similar reasons. (*People v. Walkey, supra*, 177 Cal.App.3d at p. 297.) Second, in *Robbie* the expert – a special agent with the California Bureau of Investigation without a degree in psychology – was not "qualified to testify about the motivations or cognitive processes of those whose behavior she observe[d]." (*People v. Robbie, supra*, 92 Cal.App.4th at p. 1087.)

Dr. Meloy's testimony in the instant case addressed the phenomenon of heightened sexual arousal resulting from committing violence before, during or after sex; the reason why someone would murder a woman willing to have sex such as a prostitute. Unlike the expert testimony in *Robbie* or *Walkey*, Dr. Meloy's testimony disabused the jury of the misleading notion that someone would not kill or attempt to kill a woman willing to have sex. Also unlike the expert in *Robbie*, Dr. Meloy was a licensed psychologist, clinical social worker and certified forensic pathologist. (30 RT 3253.) Dr. Meloy was amply qualified to testify about behavior in light of his study of sexual homicide over 18 years. Furthermore, Dr. Meloy's testimony focused

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89. *People v. Robbie, supra*, 92 Cal.App.4th at pp. 1081-1083.

upon his research and background, addressing the psychology and motivation behind a sexual homicide and not specific behaviors and hypotheticals based upon appellant's conduct.

For the same reasons that the evidence was not improperly admitted pursuant to Evidence Code section 1101, it was not improperly admitted pursuant to Penal Code section 29. Appellant reasons Dr. Meloy's testimony was inadmissible under Penal Code section 29 which precludes an expert who testifies to a defendant's "mental illness, mental disorder, or mental defect . . . [from testifying] whether the defendant had or did not have the required mental states, which include . . . purpose, intent, knowledge or malice aforethought. . ." because Dr. Meloy testified sexual homicides are intentional, have the purpose of achieving a better orgasm, and are goal oriented. (AOB 326-328.) Appellant references the prosecutor's closing arguments to claim Dr. Meloy improperly testified to appellant's intent to kill and that he harbored malice aforethought (AOB 327), but as the jury was instructed, statements by counsel are not evidence (45 RT 5106-5107). The prosecutor was simply exercising his wide latitude to fully state his views on what he believed the evidence established. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1153; *People v. Thomas* (1992) 2 Cal.4th 489, 526.) Penal Code section 29 precludes an expert from testifying whether a defendant had or did not have the required mental state, and Dr. Meloy's testimony did not violate this dictate; he did not propound appellant had the required mental state, purpose, intent, or malice aforethought.

McFarland, *Castaneda*, *Walkey* and *Robbie* do not help appellant. Since appellant did not raise Evidence Code sections 1101 and 1102 below, his arguments should be deemed forfeited for purposes of appeal and, nonetheless, they lack merit. Dr. Meloy's testimony was not profile evidence, was not character evidence, and was not descriptive of appellant or based upon

appellant's behavior. (*People v. Smith*, *supra*, 35 Cal.4th at p. 358.) Likewise, Dr. Meloy's testimony did not improperly opine on any ultimate question for the jury. Evidence Code sections 1101 and 1102 and Penal Code section 29 were not implicated, so appellant's arguments attacking the admission of it on these grounds should be rejected.

4. The Trial Court's Decision To Admit Dr. Meloy's Testimony Was Neither Contrary To This Court's Decision In *People v. Bledsoe*, *supra*, 36 Cal.3d 236 Nor Was A *Kelly* Hearing Necessary

In two separate arguments, appellant argues the court improperly admitted Dr. Meloy's testimony because it did not address a commonly held misconception or myth (AOB 293-302) and the court committed error by not holding a *Kelly* hearing to establish the validity of Dr. Meloy's research (AOB 318-325). Because both these issues are predicated upon this Court's holding in *People v. Bledsoe*, *supra*, 36 Cal.3d at page 236, the response to them has been consolidated.

In the process of addressing appellant's claims concerning Evidence Code sections 210, 720, 801 and 1101 as well as Penal Code section 29, respondent has already addressed appellant's first assertion – the commonly held misconception which Dr. Meloy's testimony addressed was equating violence and homicide with sexual arousal. Nonetheless, respondent will address specific arguments made by appellant which were not already addressed. Also, appellant asserts a *Kelly* hearing was necessary for the prosecution to establish that the Rorschach test was generally accepted as reliable within the scientific community because Dr. Meloy based his study on it. (AOB 318-325.) Appellant likens Dr. Meloy's study to a truth serum "just like a polygraph test and hypnosis." (AOB 325.) Appellant's claims lacked

merit and will be addressed in turn.

Appellant claims the prosecutor failed to establish a viable "misconception or myth actually exist[ed]" because the prosecutor did not produce literature, case law, or expert testimony that there was a "common misconception about sexual homicides." (AOB 295-296.)[90] On the contrary, Dr. Meloy, an expert who studied sexual homicide extensively, testified that sexual homicide was a phenomenon that had been studied for a hundred years, and during the pretrial evidentiary hearing identified several other researchers and studies addressing it from various contexts. (9 RT 482-489, 502, 522-529, 542-543, 567-571, 576-577.) This information included the fact that the perpetrator of sexual homicides could be in a normal sexual relationship but commit sexual homicide to achieve heightened sexual arousal. (9 RT 490, 517.) The prosecution, through the testimony of Dr. Meloy, presented ample evidence in the form of the various studies by various experts addressing the aberrational behavior of sexual homicide.

Appellant erroneously asserts that Dr. Meloy's studies were merely ipse dixit. (AOB 322-324.) On cross-examination during the pretrial hearing, when Dr. Meloy was asked if the results of his studies had been duplicated by other researchers to test their validity, he answered affirmatively and described several aspects of his study which were supported by the study of others. (9 RT 531-535.) Dr. Meloy also discussed the use of the Rorschach test by comparing sexual homicide perpetrators' results with the results of others. (9 RT 536-537.) However, Dr. Meloy did concede there was still work

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90. It must be noted that appellant accepts Dr. Meloy's expert testimony at face value that sexual homicides are rare and of low frequency when arguing this point. (AOB 296.) When it suits appellant's purpose Dr. Meloy is an expert. Since appellant accepts the fact sexual homicides are rare and of low frequency, it stands to reason that appellant would have to acknowledge that it is a phenomenon beyond common understanding and subject to common misconception.

to be done in this area. Dr. Meloy also conceded that it would not be possible to take a Rorschach test and determine, based only upon those results, that the individual tested had committed a particular series of homicides. (9 RT 571.) The study of sexual homicide was not exclusive to Dr. Meloy, i.e., it was not ipse dixit, and the fact Dr. Meloy's study of sexual homicide was not an exact science did not render it inadmissible.

Appellant argues that because the jury questionnaire included questions asking potential jurors whether they believed prostitutes were entitled to "any greater or lesser protection as victims than other persons" and asked potential jurors if they thought prostitutes could be raped, Dr. Meloy's testimony was improperly admitted since each of the seated jurors indicated prostitutes were entitled to the same protection as other victims and they could be raped. (AOB 296-297.) Appellant then reasons the jurors did not need to be "disabused of a purported myth" that prostitutes are not killed based on a sexual motivation. (AOB 296-297.) Appellant's analysis is seriously flawed. Appellant fails to correlate the jury questionnaire question with sexual homicide. A juror's understanding that prostitutes could be raped and were entitled to protection in no way suggests that jurors would understand the correlation between violence, homicide and sexual arousal. Furthermore, appellant's own analysis suggesting that jurors might believe that "like some victims of sexual assault, prostitutes may be killed to eliminate the one witness to the crime" (AOB 297) establishes the propriety of expert testimony on sexual homicide; to disabuse the jury of the idea that sexual assault victims would be killed to eliminate them as a witness rather than because violence and homicide sexually aroused the perpetrator.[91/]

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91. In a footnote, appellant speculates that the jurors might have read an article about the plight of prostitutes and, therefore, "become aware of reports that prostitutes are often sexually assaulted." (AOB 297, fn. 93.) Speculation about what jurors ***might*** have read in a newspaper article does not

Appellant also complains that because Dr. Meloy's research did not involve prostitutes, it was not "'*targeted* to a specific "myth" or "misconception"' [citations omitted]," so it was improperly admitted. (AOB 298.) Appellant argues Dr. Meloy's testimony on the "issue of motive and intent and sexual homicide . . . went well beyond targeting or rebutting any myth", so it exceeded the "*Bledsoe* exception" and should have been excluded. (AOB 299-300.) Appellant also claims nothing in the evidence suggested "prostitutes are not killed for a sex-related motive." (AOB 300-301.) There are two problems with appellant's argument.

First, a "sex-related motive" is a generic concept whereas sexual homicide describes the phenomenon of violence motivated by sexual arousal. Second, throughout appellant's briefing he argues there was no evidence Glover and Sweets were prostitutes (AOB 301), so following appellant's logic, it would have been improper to admit evidence of studies limited to prostitutes and sexual homicide. Appellant was also on trial for the murders of Carpenter and Simpson – two known prostitutes – so under appellant's logic Dr. Meloy would have had to produce two studies of sexual homicide; one involving prostitutes and one not involve prostitutes. Dr. Meloy's testimony was relevant to correlate violence and homicide with sexual arousal, regardless of whether the victims were prostitutes. Appellant attempts to place a burden upon the prosecution which does not exist –correlate sexual homicide to prostitutes.

Furthermore, the defense attempted to establish the victims were murdered as a result of drug debts owed to dealers. To accomplish this appellant presented graphic testimony about the seedy underworld of drug dealing where life is cheap. Several defense witnesses testified to an incident

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support appellant's argument because jurors must base their verdict on the evidence presented at trial, and just because jurors may be aware prostitutes are sexually assaulted does not mean they would understand the psychology of sexual homicide.

with Michelle Hicks– a drug addicted prostitute – during which she was humiliated, brutalized, sexually assaulted, shot at and threatened with death because of money she owed her drug dealer. (33 RT 3576-3582, 3600-3601; 3604-3619, 3627, 3639; 3680-3689, 3696-3697; 3718-3722, 3726-3733.) Hicks testified she was threatened with being murdered, put in a dumpster, and lit on fire like Simpson and Carpenter. (33 RT 3616, 3642.) At trial, the drug dealer who made this threat acknowledged doing so, stating it was simply a threat based on events he read about in the newspaper. (33 RT 3725-3726.) Hicks also testified she was driven toward El Cajon Boulevard to prostitute herself until she earned enough money to pay off her drug debt[92/] and this too was confirmed by her dealer. (33 RT 3616-3619, 3733, 3739.) Hicks further testified Trina Carpenter was one of the girls she hung out with and they both got drugs from the same dealer. (33 RT 3636-3638.) Another drug dealer who was present during the brutalization of Hicks described his life as a drug dealer enforcer, threatening people, beating up a few women, and ordering others to beat up people for him. (33 RT 3673-3680, 3692-3694, 3705, 3707-3708.)

Appellant claims the defense was that someone else murdered the victims (AOB 301, 326), but it was more than this. The defense was that the victims were drug users, murdered because they owed money to their dealers. Appellant's closing argument included this theme. (45 RT 5042-5047, 5054-5059, 5063.) Considering these facts, Dr. Meloy's testimony describing sexual homicide was appropriate to disabuse the jury of the idea the murders were necessarily drug-related or that the victims were murdered because they were witnesses to the offenses committed against them.

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92. On the way to El Cajon Boulevard, the car she was in was stopped by the police and she was able to escape by telling the police of her plight which resulted in the drug dealer being arrested. (33 RT 3617-3619, 3625-3626.)

Appellant asserts "it would take a great leap of faith to believe that giving Rorschach tests to prisoners reliably reveals their motive and intent" at the time they committed the crime. (AOB 302.) This assertion goes to the weight of this evidence and not its admissibility.

Appellant claims Dr. Meloy's testimony was "logically irrelevant" and inappropriate under *Kelly* and *Bledsoe* to the extent Dr. Meloy relied upon the Rorschach test. (AOB 301-302, 318-325.) Referencing this Court's language from *People v. Rowland* (1992) 4 Cal.4th 238, 266, appellant reasons Dr. Meloy's use of the Rorschach test "blindsided the jury by claiming that the Rorschach test could be used alone – like truth serum, hypnosis, or a polygraph – to divine what 18 prisoners were actually thinking about when they committed their crimes years before the tests." (AOB 319.) Appellant's argument lacks substance in law or fact. As the trial court found, *Kelly* clearly does not apply to the instant case. (12 RT 762-763.)

Kelly is applicable only to "new scientific techniques," and it only applies to that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is new to science and the law. (*People v. Leahy* (1994) 8 Cal.4th 587, 605.) A technique may be deemed "scientific" if it appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relate to the jury. (*Id.* at 606.) In *People v. Stoll* (1989) 49 Cal.3d 1136, 1157, this Court stated, "absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly/Frye*." This Court went on to note it had never applied *Kelly* to expert testimony, "even when the witness is a psychiatrist and the subject matter is as esoteric as the reconstitution of a past state of mind or the prediction of future dangerousness, or even the diagnosis of an unusual form of mental illness not listed in the diagnostic manual of the American Psychiatric Association . . . ." (*People v. Stoll*, *supra*, at p. 1157,

quoting *People v. McDonald* (1984) 37 Cal.3d 351, 372-373.) Appellant references no case authority since *Stoll* where this Court has applied *Kelly* to expert psychiatric or psychological testimony and respondent is unaware of any. In fact, referencing *Stoll*, one court declined to apply *Kelly* to expert testimony regarding the likelihood the defendant would reoffend. (*People v. Therrian* (2003) 113 Cal.App.4th 609, 614-616.) Dr. Meloy's testimony addressed the psychology of sexual homicide and not a new scientific technique or theory new to science. Appellant's analysis fails to establish otherwise or to establish how the jury was blindsided by Dr. Meloy's testimony.

Attempting to claim the jury was blindsided by Dr. Meloy's testimony, appellant misstates the evidence offered by Dr. Meloy. (AOB 320-325.) Dr. Meloy's study of sexual homicide and of individuals who commit sexual homicide in no way resembled "truth serum, hypnosis, or a polygraph" test. Such an analogy strains credulity since truth serum, hypnosis, and polygraph tests cannot be compared to psychological studies, and Dr. Meloy's studies and testimony never implicated they were comparable. Dr. Meloy's testimony did not appear in both name and description to provide some definitive truth which he could accurately recognize and relate to the jury. (*People v. Leahy, supra*, 8 Cal.4th at p. 606.) Furthermore, Dr. Meloy did not testify appellant possessed the characteristics of someone who would become sexually aroused by committing acts of violence during sex or even that the victims in the instant case were victims of sexual homicide. Dr. Meloy's testimony was limited to presenting the concept of sexual homicide to the jury to offer an explanation of the perpetrator's motive; not as a scientific technique, process or theory.

Appellant's arguments that the trial court committed error in contravention with this Court's ruling in *Bledsoe* and by not having a *Kelly* hearing lack merit. Dr. Meloy's testimony was not presented the jury as

"science" and appellant's attempt to make it something that was not should be rejected. Appellant fails to establish the trial court abused its discretion by allowing admission of Dr. Meloy's testimony. (*People v. Robinson, supra*, 37 Cal.4th at p. 633.)

5. Appellant Fails To Establish Dr. Meloy's Testimony Was Admitted In Contravention To Evidence Code Section 352, Or His Right To Due Process Of Law, But Even If It Was Improperly Admitted, It Did Not Result In Prejudice

Appellant claims Dr. Meloy's testimony was inadmissible under Evidence Code section 352. (AOB 329-331.) In a similar vein, appellant also argues Dr. Meloy's testimony violated due process because there were no permissible inferences for the jury to draw from his testimony. (AOB 332-333.) Finally, appellant claims that the erroneous admission of Dr. Meloy's testimony resulted in prejudice. (AOB 333-346.) These claims lack merit and should be rejected.

During the initial Evidence Code section 402 hearing, the trial court considered the probative value of Dr. Meloy's testimony in light of any prejudicial effect it would have pursuant to Evidence Code section 352. (9 RT 593-594.) The court stated it considered "whether or not [Dr. Meloy's] ultimate conclusions and findings drawn from all of this are going to be pretty much overwhelming based on his expertise, his ability to relate to the jury as an expert who may know more than they can." (9 RT 593.) The court found the jury could draw its own's conclusions. As appellant notes (AOB 341), after further argument and consideration of the offer of proof, the court believed Dr. Meloy's testimony was favorable to the defense to the extent sexual homicide includes a component of "non-volitional aspects of the behavior . . . rage" against women. (12 RT 768.) The court later limited Dr. Meloy's

testimony, precluding Dr. Meloy from describing the four categories of sexual homicide defined by the FBI and other information particular to the case. Appellant fails to establish the trial court abused its discretion.

Arguing prejudice under Evidence Code section 352, appellant speculates "after hearing Dr. Meloy's testimony, the jury must have had a deep loathing for – and therefore an emotional bias against – the defendant." (AOB 329-330.) Appellant reasons the "notion that someone commits murder and enjoys it is repulsive . . . but add to that the inherently inflammatory and unrebutted ingredient that the killer is so depraved that he is sexually excited by the taking of an innocent woman's life and ejaculates as a result . . . is the very definition of prejudice under 352." These assertions are seriously flawed. Appellant's argument assumes the jury believed appellant was the perpetrator and Dr. Meloy's testimony was directly correlated to appellant. Dr. Meloy did not correlate his study of sexual homicide to appellant or the facts of the instant case. Also, the idea of murder is repulsive in any context.

Furthermore, appellant had no problem presenting graphic testimony by numerous witnesses describing the cruel life of soulless drug dealers and the women whom they prey upon; getting young women addicted to drugs, forcing them into a life of prostitution to pay for their habit, beating them up, sexually assaulting them, and humiliating them for entertainment. One of appellant's witnesses acknowledged threatening one such prostitute with killing her, putting her in a dumpster, and lighting her on fire if she did not pay her drug debt. Much of the evidence presented by the defense was more repulsive than anything presented to the jury by Dr. Meloy.

Additionally, the crimes were horrific in and of themselves. Two women were brutally beaten and then burned in dumpsters like garbage. JoAnn Sweets was beaten, sexually assaulted, strangled, murdered and left naked in a dumpster under garbage and Sophia Glover was savagely beaten, sexually

assaulted, strangled and murdered and then left naked near an alley. Appellant presented the defense that the murders were motivated by drugs, prostitution, and merciless drug dealers. Dr. Meloy did not testify that appellant committed these crimes but, rather, described the psychology behind someone who would commit such crimes for sexual gratification rather than retaliation for failing to pay a drug debt or kill a witness to the crime. It was the crimes that were heinous, not the motive. And it was completely up to the jury to decide whether to accept Dr. Meloy's expert testimony or reject it. Nothing in the verdicts suggests they found appellant's motive was sexual homicide as opposed to killing a witness – the motive suggested by appellant (AOB 297).

More importantly, appellant cannot establish prejudice because the jury did not reach verdicts on two of the murder counts; that is, despite Dr. Meloy's testimony, the jury could not agree appellant was the perpetrator of all the charged offenses. The fact the jury did not reach verdicts on two of the murder counts dispositively establishes Dr. Meloy's testimony did not prejudice appellant because Dr. Meloy's testimony directly addressed sexual homicide. Contrary to appellant's claims otherwise (AOB 330), the jury obviously did not have a deep loathing or bias against appellant or presumably they would have found him guilty of all counts.

As for appellant's claim that Dr. Meloy's testimony violated his state and federal rights to due process, as set forth in detail in the procedural history, the trial court heard argument and considered the admissibility of Dr. Meloy's testimony at length. Ultimately, the court limited Dr. Meloy's testimony to his study of sexual homicide without allowing him to apply this concept to the facts of the instant case or opine that the offenses were sexual homicides or attempted sexual homicides. This allowed the jury to determine whether sexual homicide was implicated by the facts in the instant case. Contrary to appellant's assertion otherwise claiming a violation of due process,

Dr. Meloy's testimony was not so inflammatory as to prevent a fair trial, did not render the trial fundamentally unfair, did not deprive appellant of his right to reliable fact-finding, or in any way violate any of appellant's state or federal constitutional rights.

Arguing prejudice under *Watson* and *Chapman* appellant makes two primary assertions: (1) the prosecutor strategically placed Dr. Meloy's testimony towards the end of the People's case-in-chief and highlighted Dr. Meloy's testimony during closing arguments (AOB 333-339) and (2) Dr. Meloy's testimony that all sexual homicides are "purposeful and goal-oriented" resulted in appellant being convicted of first-degree murder rather than second-degree murder by giving the jury a basis to find willful, deliberate, premeditated murder despite evidence the murders were impulsive and the result of uncontrolled rage (AOB 337-345). Indeed, appellant's entire argument is proper fodder for closing arguments but does not establish prejudice.

To establish prejudice under *Watson*, appellant must show it is reasonably probable that he would have received a more favorable judgment if error had not occurred. Under *Chapman*, the record establishes beyond a reasonable doubt that the testimony about which appellant complains did not contribute to the verdict.

Respondent does not concede any error occurred by the trial court's decision to allow Dr. Meloy to testify; however, if any error occurred it was harmless under any standard of law. Appellant's first primary assertion – that Dr. Meloy's testimony was strategically placed and effectively argued – ignores the fact it was only 16 pages in length and limited in scope. Nonetheless, how the prosecutor ordered his witnesses and argued his case does not bolster appellant's claim of prejudice. A total of approximately 81 witnesses testified; 52 witnesses for the prosecution and 29 witnesses for the defense. Dr. Meloy's testimony occurred prior to the defense and rebuttal

witnesses – a total of 39 witnesses. Not that the testimony of one witness cannot have an impact, but considering the length of the trial, number of witnesses, and the amount of testimony, appellant exaggerates the import of the placement of Dr. Meloy's testimony when it is considered in context. Appellant's argument that the prosecutor effectively employed the "rule of recently" by calling Dr. Meloy near the end of the People's case-in-chief ignores the fact the jury heard 39 more witnesses after Dr. Meloy testified, including several witnesses for the prosecution. (AOB 335-337.) Dr. Meloy's testimony was hardly the most "recent" evidence the jury heard.

As for the prosecutor's closing arguments, the jury was clearly instructed that the arguments of counsel were not evidence. (45 RT 5106-5107.) The prosecutor had wide latitude to fully argue his views of what he believed the evidence established and did not overstep his bounds discussing Dr. Meloy's testimony. (*People v. Guerra, supra*, 37 Cal.4th at p. 1153.) Even if Dr. Meloy's testimony was improperly admitted, the jury was properly instructed regarding intent (45 RT 5109-5110) and murder (45 RT 5132-5138), and these instructions did not equate "goal-oriented" conduct with intent. Appellant was free to argue second-degree murder based upon lack of intent and evidence of rage regardless of Dr. Meloy's testimony, but this was not brought up or argued during closing arguments by appellant. (45 RT 5030-5081.) Instead, the defense argued the lack of sufficient evidence to convict appellant and someone else committed the murders. It is pure speculation to argue the jury would have found second-degree murder if Dr. Meloy had not testified.

Considering the totality of the evidence, the probative value of Dr. Meloy's testimony outweighed any prejudicial effect pursuant to Evidence Code section 352. Appellant fails to establish the trial court abused its discretion when rejecting his claim pursuant to Evidence Code section 352.

(*People v. Robinson, supra*, 37 Cal.4th at p. 630.) Even assuming the trial court erred by allowing Dr. Meloy testimony, appellant fails to establish prejudice. Appellant's multifaceted attack on the testimony of Dr. Meloy should be rejected.

VI.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE LATENT FINGERPRINT EXPERT TESTIMONY OF DIANE DONNELLY

In argument 14, appellant claims the trial court committed error by allowing Diane Donnelly, a forensic scientist and latent print analyst with the San Diego Police Department, to testify that the fingerprints found on one of the plastic bags in which Sweets' body was found were appellant's prints because she was not competent to testify about the machine employed to detect his fingerprints. (AOB 376-383.) Appellant argues Ms. Donnelly could not provide the necessary foundation to testify because she lacked sufficient expertise. (AOB 379-381.) Appellant then reasons the fingerprint evidence was pivotal to the prosecution's case, so its admission was prejudicial. (AOB 381-383.) Appellant is wrong because Ms. Donnelly sufficiently established the necessary foundation upon which to base her testimony.

A. Factual And Procedural History

Ms. Donnelly, a certified latent print examiner with 13 years of experience who had testified in court approximately 200 times, matched appellant's known fingerprint of his thumb (People's Exh. 56) with that of the fingerprint obtained from the dumpster (People's Exh. 44) in which Sweets was found. (28 RT 2819, 2823-2825; 37 CT 6990.)

Ms. Donnelly was also given two plastic bags (People's Exh. 42) by another evidence technician and asked to check them for latent prints. (28 RT 2825-2826.) These were the bags in which Sweets' body was found. (26 RT 2300, 2432.) Because the bags were six years old and had not been processed, it was determined she would bring them to Canada in an attempt to process them for latent fingerprints because the Royal Canadian Police had a vacuum metal deposition machine; a machine which did not exist in the United States because of its expense. (28 RT 2826.) Ms. Donnelly was invited to Canada to learn about the process and to check the bags for latent prints. (28 RT 2826-2827.)

During Ms. Donnelly's testimony about the metal deposition process, appellant objected based on lack of expertise, and the court found lack of foundation. (28 RT 2827). When Ms. Donnelly testified about the machine and how it worked, appellant made a second objection, and the court informed the prosecutor "there needs to be foundation as to what training she had actually in this machinery." (28 RT 2828.) While Ms. Donnelly was testifying about her training and background with the machine, appellant objected and then asked to take Ms. Donnelly on voir dire, so the trial court held a conference outside the presence of the jury. (28 RT 2828-2837.)

At the conclusion of the hearing outside the presence of the jury the trial court overruled the defense's lack of foundation objection and held foundation could be established by Ms. Donnelly testifying to her knowledge of the machinery which was used to lift the latent prints: "how it works exactly" and "exactly how the bags were treated while they were in her custody and what was done with them." (28 RT 2836.) Nonetheless, appellant made a continuous objection based on lack of foundation. (28 RT 2836-2837.)

Ms. Donnelly testified that when she received the plastic bags for testing, they were folded in butcher paper with the paper separating the folded

portions of the bags. (28 RT 2837, 2860.) The bags were secured in a box so they could not be crushed in transport and the box was never out of Ms. Donnelly's sight. (28 RT 2838.) Whenever the bags were handled, they were handled by someone wearing two pairs of latex gloves with cotton gloves underneath to prevent a transfer of prints. (28 RT 2838.)

Ms. Donnelly was familiar with various ways to process items for fingerprints, and it was determined that the vacuum metal deposition chamber was the process with the highest probability of obtaining latent prints from the plastic bags. (28 RT 2838-2839.) While Ms. Donnelly had read articles by the Royal Canadian Police about this process, she had not used the machine because one did not exist in the United States. (28 RT 2839.)

The vacuum metal deposition chamber process for extracting latent fingerprints has been used since 1976 and is used in the United Kingdom, Australia, Canada and other countries and works especially well for extracting older latent prints. (28 RT 2839-2840.) This process does not add prints which are not already there, remove prints which are there, or alter fingerprints. (28 RT 2840.) Ms. Donnelly explained how the process worked for extracting prints. (28 RT 2840-2842.)

Utilizing this process, which took 14 cycles over a period of two days, latent prints were lifted off the plastic bag and preserved; People's Exhibits 57-59[93]. (28 RT 2842-2845.) One of the prints taken from the bag was from a joint or palm and needed additional exemplars for comparison before it was found to be from appellant's right side of the palm and the second joint of the left index finger. (28 RT 2848, 2850-2851.)

Appellant cross-examined Ms. Donnelly about the latent prints taken from the plastic bags. (28 RT 2058-2868.) No attempts were made to lift

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93. One fingerprint did not have enough detail to be of any value. (20 RT 2850 2851.)

any prints off of the plastic bags prior to being taken to Canada because to have done so would have contaminated the bags. (28 RT 2859.) Appellant cross-examined Ms. Donnelly about the process used to lift the prints, whether she was familiar with it, and whether she was familiar with the machine used, and she explained she had read about the machine before going to Canada, was familiar with the manufacturer of the machine and knew how the latent print reaction worked. (28 RT 2863-2864.) She also explained the machine was "idiot proof" and was fully automated regarding the procedures to lift prints. (28 RT 2864-2865.) Ms. Donnelly explained how the bags were processed in the machine. (28 RT 2865-2866.)

B. Ms. Donnelly Provided Sufficient Foundation To Testify About Finding Appellant's Fingerprints On The Plastic Bags

As previously established when addressing the testimony of Dr. Meloy, a person is qualified to testify as an expert when they have sufficient special knowledge, skill, experience, training and education on the subject to which their testimony relates. (Evid. Code,§ 720; *People v. Fudge*, *supra*, 7 Cal.4th at p. 1114.) This includes "matter . . . perceived by or personally known to the witness or made known to him at or before the hearing . . ." (Evid. Code, § 801.) "The qualification of expert witnesses, ***including foundational requirements***, rests in the sound discretion of the trial court." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1174 [emphasis added].) An expert may generally base their opinion on any matter known to them – including hearsay not otherwise admissible – which may reasonably be relied upon for that purpose. (*People v. Catlin* (2001) 26 Cal.4th 81, 137 [expert testified another doctor opined on cause of death being parquet poisoning].)

The trial court's discretion to admit expert testimony is necessarily broad, and the competency of an expert in every case is relative to

the topic about which the expert is asked to testify. (*People v. Ramos*, *supra*, 15 Cal.4th at p. 1174; *People v. Fudge*, *supra*, 7 Cal.4th at p. 1114.) The trial court's decision to admit an expert's testimony will not be disturbed on appeal absent a manifest abuse of discretion. (*People v. Ramos*, *supra*, at p. 1174.) Appellant fails to establish the trial court manifestly abused its discretion by allowing Ms. Donnelly to testify about her experience using the vacuum metal deposition chamber to find appellant's fingerprints on the plastic bags.

In the context of latent fingerprint analysis, this Court rejected a claim that a laser derived process to detect fingerprints was not generally accepted as reliable in the scientific community. (*People v. Webb* (1993) 6 Cal.4th 494, 523-524.) The latent print analyst in *Webb* explained the process used to examine and find the fingerprint and then determine whether the print matched the defendant's known fingerprint. (*Id.* at p. 523.) In finding that the prosecution did not need to established the process was generally accepted in the scientific community, this Court held, "Where, as here, a procedure isolates physical evidence whose existence, appearance, nature, and meaning are obvious to the senses of a layperson, the reliability of the process in producing that result is equally apparent . . . ." (*Id.* at p. 524.) Implicit within this holding is the fact that the analyst who processed the fingerprints in *Webb* had the foundation to do so.

In the instant case, Ms. Donnelly went to Canada and performed the analysis on the plastic bags using the vacuum metal deposition chamber, a piece of equipment she studied and was familiar with prior to going to Canada. (28 RT 2839-2842, 2863-2866.) While she had never used this piece of equipment prior to that time, she was familiar with it and gained enough experience to present a paper at the California Association for Identification meeting of the forensic scientists. (28 RT 2828-2829.) Based on these facts, Ms. Donnelly had sufficient special knowledge, skill, experience and training

with the vacuum metal deposition chamber to testify as an expert. (Evid. Code, § 720; *People v. Fudge*, *supra*, 7 Cal.4th at p. 1114.) And the trial court did not abuse its discretion when rejecting appellant's claim that Ms. Donnelly lacked foundation to testify about this process. (*People v. Ramos*, *supra*, 15 Cal.4th at p. 1174.) Finally, the reliability of the fingerprint analysis in the instant case, like that in *Webb*, was apparent. (*People v. Webb*, *supra*, 6 Cal.4th at p. 524.)

Appellant does not question that Ms. Donnelly was a qualified latent print expert witness, and did not challenge her testimony identifying appellant's fingerprint found on the dumpster. Rather, appellant challenges Ms. Donnelly's expertise with the vacuum metal deposition chamber because the first time she used it was to examine the plastic bags in the instant case. (AOB 379-380.) However, the authority upon which appellant relies is inapposite.

In support of his claim, appellant cites *Davenport v. Dept. of Motor Vehicles* (1992) 6 Cal.App.4th 133, 140, and *People v. Williams* (2003) 28 Cal.4th 408, 412, which appellant purports demand "foundational requirements for establishing the reliability of test results . . . [by] showing that (1) the apparatus utilized was in the proper working order, (2) the test used was properly administered, and (3) the operator was competent and qualified. [Citations and internal quotations omitted.]" (AOB 379.) These cases and the three-step test are inapposite because they specifically involve blood-alcohol testing devices (*Davenport*) and preliminary alcohol screening (PAS) testing devices requiring compliance with Title 17 of the California Code of Regulations (*Williams*). Appellant cites no authority applying the three-step test in *Williams* and *Davenport* to fingerprint analysis or any other testing process and respondent is unaware of any such cases.

Appellant also complains he was denied his confrontation rights under Penal Code section 686, the California Constitution, and the Sixth and

Fourteenth Amendments to the United States Constitution, but these rights were not implicated by Ms. Donnelly's testimony. (AOB 377, 381.) Ms. Donnelly was actually present and performed the examination for appellant's fingerprints on the plastic bags and appellant cross-examined her. Therefore, appellant's right to confront witnesses against him were not violated. Ms. Donnelly's inability to describe some of the operations of the machine did not deprive him of any of these rights. Furthermore, appellant was free to call his own expert witness to contradict Ms. Donnelly's testimony or the process which she described, but appellant failed to do so. Appellant fails to establish the trial court abused its discretion by allowing Ms. Donnelly to testify.

Assuming the trial court did commit error by allowing Ms. Donnelly's testimony about the vacuum metal deposition chamber because she lacked foundation to testify about it, any error was harmless. This is apparent given appellant's harmless error analysis throughout the brief explaining the presence of the fingerprints on the plastic bags was meaningless: as appellant argues, the presence of his garbage bags with his fingerprints in the dumpster behind his apartment is readily explainable because that is where he put his trash and someone else could have used his trash bag to wrap Sweets' body after emptying out appellant's trash bag. (AOB 161-162, 205.) Appellant claims that "beyond question, in the view of the prosecutor, all of the guilty verdicts" rested upon the fingerprint evidence (AOB 382), but the prosecutor's view of the evidence is not the standard for determining prejudice. Contrary to appellant's claim (AOB 381-383), the prosecution's entire case did not rest on the fingerprint evidence but, rather, on all of the circumstantial evidence combined, of which the fingerprint evidence was one small part. If it was erroneously admitted, under any standard, it was not prejudicial.

The prosecution adequately established the foundation for Ms. Donnelly's testimony, appellant was given ample opportunity to cross-examine

her about the techniques and device which she used as well as about her expertise using the machine. These questions went to the weight of her testimony and not its admissibility. Appellant fails to establish the admission of Ms. Donnelly's testimony about appellant's fingerprints on the plastic bags constituted a manifest abuse of the trial court's discretion. Appellant's arguments to the contrary lack merit and should be rejected.

VII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO ALLOW MS. JONES' TESTIMONY ABOUT THE PREACHER AND MEXICAN WOMAN WHO CAME TO HER DOOR

In argument 12, appellant claims the trial court erred by finding a lack of foundation for appellant's mother, Ann Jones' testimony that someone came to her door looking for appellant in order to apologize to him in light of Maria's testimony she had gone to the apartment where she was raped with two "church people" who spoke with someone at the apartment. (AOB 347-359.) Even though Ms. Jones could not identify the people who came to her door, appellant claims adequate foundation was laid for Ms. Jones' testimony because if the woman who came to Ms. Jones' door was Maria, it was admissible as a prior inconsistent statement pursuant to Evidence Code section 1235 (AOB 350-354) and if it was not Maria, Ms. Jones' testimony was admissible because the individual acted as Maria's agent pursuant to Evidence Code section 1222 (AOB 354-355). Neither the facts nor law support appellant's claims.

A. Factual And Procedural Background

Maria R. was the first witness to testify for the prosecution. On cross-examination, appellant asked Maria if she returned to the apartment at

some point in time, and Maria responded she returned approximately a week after the rape with the "church people." (24 RT 2082-2083.) The church people, a man and a woman, went to the door of the apartment where Maria was raped while Maria stayed in the car. (24 RT 2083.) Maria did not know what the church people said to whoever they spoke with at the apartment but thought it had something to do with appellant hurting Maria again. (24 RT 2083-2084.) Neither did Maria see to whom the church people spoke.

During the defense, appellant called as his 24th witness his mother, Ann Jones. During her testimony, Ms. Jones recalled a Mexican man and woman coming to her apartment door. (34 RT 3945.) The man identified himself as a preacher from a church which she did not recognize or recall, and the women only spoke Spanish while the man translated. (34 RT 3945-3946.)

When Ms. Jones started to testify about what the man said, the prosecutor interposed a hearsay objection which the court sustained. (34 RT 3945.) The prosecutor also objected that there was no foundation establishing who the individuals were that came to her door. (34 RT 3946.) When Ms. Jones was asked if she knew why they came to her door, the prosecutor made a hearsay objection, but the court allowed Ms. Jones to answer "yes" or "no." Ms. Jones responded that the people were looking for appellant, her son. Ms. Jones then testified she did not know the woman's name and did not believe she would recognize it if she heard it. The prosecutor objected that Ms. Jones' testimony was irrelevant unless the defense could establish who came to Ms. Jones' door, so the court held a conference outside of the jury's presence.

Outside of the jury's presence, there was considerable discussion about foundational matters such as what Ms. Jones recalled, whether she could identify who came to her door – especially the woman, and when these events occurred. (34 RT 3946-3957.) The defense asked to hold a hearing outside the

jury's presence to address these foundational issues with Ms. Jones and determine whether Ms. Jones could testify to these matters. (34 RT 3956-3957.)

The court held an Evidence Code section 402 hearing. Ms. Jones only recalled a few facts about her encounter with the two people. Ms. Jones recalled a man and woman coming to her door sometime later in the evening. (34 RT 3959, 3964, 3969.) She had never seen the people before, the man translated from Spanish into English what the woman said, and the woman did not speak any English. (34 RT 3960, 3962, 3964, 3967.) Maria, however, can speak English and could at the time of the rape, but her English was better – according to defense counsel – by the time of the trial.

The woman, through the translator, told Ms. Jones she wanted to apologize but Ms. Jones did not understand what the woman was apologizing for. The woman said she was sorry, she was upset, she had been beaten up by her husband, she did not know why she had done what she did, and she was just confused. (34 RT 3959, 3967-3968.) Ms. Jones did not know what the woman was talking about and called for appellant because when they initially came to the door, they said they were "here to see the tall man." (34 RT 3959, 3968.)

Both appellant and the prosecution fervently attempted to elicit from Ms. Jones when this conversation occurred, but Ms. Jones could not recall what year, what month or what time of the year the people came to her home except that it was not summertime. (34 RT 3964-3967.) Similarly, Ms. Jones gave only a vague description of the woman, repeatedly saying when she saw Maria testify, Maria looked familiar from somewhere and looked as though she had gained weight since the last time Ms. Jones had seen her. (34 RT 3960-3961, 3963, 3966, 3969.) After being questioned extensively about the woman who came to her door and whether Maria was that woman, the following exchange occurred:

Q. [Defense counsel] Was there anything else about the woman you saw testify that caused you to believe it was the same woman [who came to your door]?

A. [Ms. Jones] To be honest?

Q. Yes.

A. No.

Q. Just seeing her kind of in profile?

A. When she walked in [the courtroom], when I turned my head and saw her, and I thought, gee, she's gained a lot of weight. ***I still don't know why I said that, but I just – you know, I just felt like I knew her. From where I don't know.***

(34 RT 3969; emphasis added.)

The court found there was a lack of foundation for Ms. Jones to testify about the unknown woman who came to her door at some point in time to apologize. (34 RT 3969.) However, the court left the matter open, stating "If there is more, you can bring it back to me." (34 RT 3969.) Nothing more became of the issue.

B. Appellant Failed To Establish A Foundation For Allowing Ms. Jones' Hearsay Testimony About Statements Made By The Preacher And Mexican Woman

During the Evidence Code section 402 hearing Ms. Jones was given every opportunity by appellant and the prosecution to establish what she recalled about her encounter with the two people who came to her door. She could not identify the woman or man who came to her door nor could she recall when this occurred but thought it ***was not*** during the summer; the time of year Maria was raped and, according to Maria, when the two "church people" went to appellant's apartment. Even though Ms. Jones stated Maria looked familiar – though overweight from the previous time she had seen Maria – she did not know why Maria looked familiar. In order for Ms. Jones' testimony to be

admissible as an exception to the hearsay rule, appellant had to establish it constituted a prior inconsistent statement by Maria. To establish this, appellant needed to provide the foundation connecting Maria with what the woman said to Ms. Jones when she came to Ms. Jones' door. Appellant failed to do so, so the trial court did not abuse its discretion when finding appellant failed to establish a sufficient foundation for this aspect of Ms. Jones' testimony.

The trial court's determination that the moving party failed to establish foundation for the admission of evidence is reviewed for abuse of discretion. (*People v. Sanders* (1995) 11 Cal.4th 475, 514.) The facts and law in *Sanders* are directly on point with those in the instant case.

In *Sanders*, a prosecution witness was cross-examined about identifying the defendant of a murder/robbery involving a restaurant; the witness had been a patron who was shot during the robbery. (*People v. Sanders*, *supra*, 11 Cal.4th at pp. 498-501, 512-513.) Sanders sought to impeach the witnesses' testimony by making an offer of proof that the witness had collaborated with a prison inmate to fabricate an identification of one of the co-defendants but did not offer the testimony of the prison inmate whom the witness purportedly collaborated with. (*People v. Sanders*, *supra*, at pp. 513-514.) This Court upheld the trial court's finding that there was insufficient foundation to cross examine the witness about the fabrication. (*Id.* at p. 514.) Referencing Evidence Code section 403, subdivision (a)(4), this Court held:

> '(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when [¶] . . . [¶] (4) [t]he proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.' (See fn. 6) In light of the undisputed background information provided to the court concerning Quine's questionable reliability and limited contact with Rogoway, ***the trial court properly required defendant to***

> ***carry the burden of producing evidence as to the existence of the preliminary fact that Rogoway had indeed collaborated with Quine before permitting cross-examination on that point.***[fn.]

(Evid. Code § 403, subd, (a)(4), emphasis added.)

In the instant case, Ms. Jones could not identify the woman (or man) who came to her door or recall when they contacted her nor did the defense offer the testimony of either the man or the woman who came to Ms. Jones' door. According to Maria, she never spoke with Ms. Jones and Ms. Jones had not seen the woman who came to her door before or after this occasion – she simply had a vague recollection of Maria. Pivotal to appellant's attempt to impeach Maria was the attribution to Maria of the statements made by the woman who came to Ms. Jones' door, but this appellant could not do. Appellant could not lay any foundation, pursuant to Evidence Code section 403, subdivision (a)(4), of the preliminary fact that Maria made the statements to Ms. Jones through the interpreter or even that Ms. Jones spoke to Maria. Just like the defendant in *Sanders*, appellant carried the burden of producing evidence as to the existence of this preliminary fact but failed to carry it, so the trial court did not abuse its discretion by refusing to allow testimony by Ms. Jones about her encounter with the unknown woman. (*People v. Sanders*, *supra*, 11 Cal.4th at p. 514.)

Appellant argues that he established sufficient foundation to admit to Ms. Jones' testimony pursuant to Evidence Code section 1222, the hearsay exception for statements made by a person with authorization to make the statement on behalf of another party when there is sufficient evidence of such authority. (AOB 354-355.) Appellant failed to make this argument in the court below, so it should be deemed forfeited for purposes of appeal. Furthermore, this exception clearly does not apply. Nothing in the record establishes that Maria authorized the church people to say anything on her

behalf, and Ms. Jones' testimony does not contradict this.

Evidence Code Section 1222 only allows the admission of hearsay evidence when two prerequisites are established by the party seeking to admit the hearsay. It specifically provides:

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:
>
> (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and
>
> (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

(Evid. Code, § 1222.) Appellant established neither of these prerequisites in the court below, despite the exhaustive Evidence Code section 402 hearing.

There is absolutely no evidence that the people who came to Ms. Jones' door and spoke with her were authorized by Maria to speak on her behalf, especially to apologize on Maria's behalf. In fact, Maria thought the church people were going to talk to appellant about Maria's fear of him hurting her again. (24 RT 2082-2083.) Under Evidence Code section 1222, subdivision (a), there must be authorization to make a statement or authorization concerning the subject matter of the statement, and no such authorization exists in the instant case. (See *People v. Herman* (1945) 72 Cal.App.2d 241, 246.) Also, Evidence Code section 1222, subdivision (b), requires evidence of such authority to make the statement, and no such evidence exists in the instant case. *Herman* is directly on point.

In *Herman*, the defendant was convicted of unlawfully taking a car after he sold the car to an individual named Miller but then took it from Miller's possession following a dispute over the purchase price. (*People v.*

Herman, *supra*, 72 Cal.App.2d at pp. 243-244.) A police officer investigating the report of the vehicle being stolen spoke with defendant's wife and son, claiming to be an attorney investigating the theft, and the defendant sought to have the substance of this conversation admitted into evidence. (*Id.* at p. 246.) The court in *Herman* found that since there was no evidence the police officer was representing or was authorized to represent Miller, the victim, the latter would not have been bound by any statements made by the officer; therefore, they were not admissible. (*Ibid.*)

Similarly, in the instant case, there was no evidence that the woman who came to Ms. Jones' door was representing or was authorized to represent Maria. Nothing in Maria's testimony indicated she had authorized the woman to speak on her behalf or to apologize. Nothing in Ms. Jones' testimony established the people who came to her door indicated they represented or were authorized to represent Maria. Therefore, just as in *Herman*, the objection to Ms. Jones' testimony was properly sustained, and there are no facts remotely establishing the requisites necessary to allow hearsay under Evidence Code section 1222. Appellant's arguments to the contrary lack merit.

Appellant claims that because Maria stayed in the car while the church people went to appellant's apartment, it raised an inference that the church people were authorized to represent her and it is presumed that the "preacher acted with [Maria's] interest" because confidential relationships are presumed to exist between a priest and parishioner. (AOB 354-355.) These claims are untenable because no one could recall who the church people were, nothing established that they were in fact clerics or acting in a clerical capacity, and nothing in the record established that Maria stayed in the car for any other reason other than that she was afraid of appellant. The most that can be gathered from Maria's testimony is that she was afraid appellant was going to hurt her and she thought they conveyed this to appellant. (24 RT 2082-2083.)

What the record definitively established is that Maria did not know who the people contacted at appellant's mother's apartment or what they said. Under these facts, it is inconceivable that Maria intended to convey authority to anyone to make authorized statements on her behalf to appellant.

Assuming arguendo Ms. Jones' testimony about what the two people said to her was somehow admissible, its omission was harmless under any standard. This is abundantly clear considering the assertions which appellant makes in argument 13 of the opening brief, claiming he was prejudiced by the lapse of time between the offense involving Maria and the prosecutor's filing of charges against him. (AOB 363-367, 374.) Appellant claims the faded memories of Maria and Ms. Jones prejudiced him (AOB 374), but this can only be true if the trial court properly limited Ms. Jones' testimony. Appellant attempts to argue this evidence both ways – that the trial court abused its discretion by limiting Ms. Jones' testimony because sufficient foundation for it was established and Ms. Jones' faded memory prejudiced him since she could not identify the person who came to her door which rendered this aspect of her testimony inconsequential.[94/]

Respondent does not concede that if error occurred, it was of a constitutional magnitude, but that the offer of proof by Ms. Jones was so vague as to have been meaningless if it had been admitted. All Ms. Jones could recall was that a "preacher" came to her door interpreting for a Mexican women who wanted to say she was sorry about what she had done and that she had been upset and confused after being beaten up by her husband. (34 RT 3959, 3967-3968.) However, before Ms. Jones testified appellant had attacked Maria's

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94. At this juncture, respondent is not addressing the trial court's denial of the speedy trial motion concerning the offenses involving Maria. Rather, appellant's assertions in that argument belie his claim that the trial court abused its discretion by finding a lack of foundation for Ms. Jones' testimony about the people who came to her door.

credibility and memory. Appellant had pointed out inconsistencies in Maria's claims about what occurred (24 RT 2045-2052, 2073, 2077-2081; 2098, 2103-2104) and impeached her with her criminal background as a prostitute and drug user (24 RT 2069-2073, 2084-2086). Contrary to appellant's claim, precluding Ms. Jones' testimony did not deny him his right to put on a defense, given these attacks on Maria's credibility. (AOB 355.)

Additionally, appellant's claim that his convictions for murdering Glover and Sweets should be reversed as well because proof of these offenses relied heavily upon believing appellant committed the offenses against Maria. (AOB 356-359.) Appellant overstates both the potency of Ms. Jones' testimony purportedly impeaching Maria and the dependency of Glover and Sweets convictions upon the offenses committed against Maria. Contrary to appellant's assessment of the prosecution's case against him, it did not stand or fall on whether Ms. Jones was permitted to testify about her encounter with the Mexican women. (AOB 356-358.) As previously asserted, Maria's credibility was impeached in several ways, and appellant's analysis ignores not only the other evidence of appellant's guilt of murdering Glover and Sweets but also the cross-admissible evidence involving the offenses against Karen and Bertha R. Appellant's claim of prejudice should be rejected, assuming arguendo Ms. Jones' testimony about her encounter with the Mexican women should have been admitted.

The trial court did not abuse its discretion by refusing to allow Ms. Jones to testify about her vague recollections of the preacher and Mexican women who came to her door. Appellant failed to lay a sufficient foundation for this hearsay testimony or that it fit within an exception to the hearsay rule. Appellant's claims to the contrary should be rejected.

VIII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION BASED ON PROSECUTORIAL DELAY IN CHARGING HIM WITH THE ATTEMPTED MURDER OF MARIA R.

In argument 13, appellant claims the trial court committed error by not dismissing count one, the attempted murder of Maria R., due to prosecutorial delay. (AOB 360-375.) Appellant's claim of prejudice is primarily twofold: first, neither Maria nor his mother, Ms. Jones, could adequately recall the two individuals who came to Ms. Jones' door, resulting in his inability to find the two people; second, the time between the attempted murder and a charging of the offense resulted in Maria and Ms. Jones' loss of memory. (AOB 363-367.) Appellant also claims the prosecutor's reasons for delaying prosecution of the Maria attempted murder were not credible nor reasonable. (AOB 363-375.) Not so. The law and facts defied appellant's arguments because he did not establish prejudice and, nonetheless, the prosecutor's explanation of the ongoing investigation into all the offenses amply justified the delay.

A. Procedural And Factual History

On October 22, 1993, appellant filed a motion to dismiss for lack of speedy trial. (8 CT 1216-1229.) The motion did not focus upon the charges involving Maria but, rather, on all of the charges. In the motion, one of appellant's assertions concerned the charges involving Maria; the loss of Ms. Jones' memory "regarding her schedule in 1985 and 1986 . . . seriously impairs any effort to investigate and prepare a potential alibi defense to any of the charged offenses on Mr. Jones' behalf." (8 CT 1227.) However, appellant also acknowledged that the People were prejudiced because of the loss of

memory by Maria. (8 CT 1228, fn. 5.) With the motion, appellant submitted the sworn affidavits under penalty of perjury of counsel and two investigators which purported to document witnesses who could not be found and evidence which was either destroyed or no longer available. (24 CT 4140-4159, 4193-4221.) Most of the assertions in these affidavits were later established to be false.

On November 22, 1993, the prosecutor filed points and authorities in opposition to the motion to dismiss for lack of speedy trial. (25 CT 4283-4302.) The prosecutor addressed several of the claims in appellant's motion. Regarding the charges involving Maria, the investigation stopped because Maria did not follow up with the district attorney's office; she failed to show up for an interview with an investigator. (25 CT 4283-4284.) It was not until February 1992 that appellant's fingerprints were found on the plastic bag containing Sweets' body by using a new machine only available in Canada. (25 CT 4286.) Also, the prosecution intended to use the cross-admissibility of the evidence as to each count to establish the offenses, so evidence of the murders was integral to the timing of the filing of all the charges, including the attempted murder charges. (25 CT 4294.)

On December 14, 1993, the trial court heard appellant's motion to dismiss for lack of a speedy trial. (8 RT 329-361.) During the hearing, the prosecutor stated the delay in filing charges occurred because of reasons other than needing PCR analysis and the fingerprint analysis in Canada – the prosecutor explained that the previous lead investigator "was guessing . . . was using his instincts . . . had no facts to back up his impressions . . . had not eliminated third party culpability suspects . . . had not put the case together with the investigative work that came to be." (8 RT 330.) The prosecutor included an affidavit showing what work was done following the resignation of the prior investigator. (8 RT 330.)

Appellant argued the prosecution had the basic information concerning the attempted murder counts in 1985 and 1986 but did not pursue it. (8 RT 331.) Regarding the attempted murder counts, appellant complained the prosecution had all the information necessary to charge these offenses in 1987 when appellant was tried for the offenses he committed against Bertha, but by the time of the preliminary hearing in 1992, Maria and Karen claimed drug use impaired their memories. (8 RT 331-332.) Appellant claimed the prejudice resulting from the delay regarding Maria was that the prosecution charged attempted murder and the statute of limitations precluded the defense from requesting instructions on lesser included offenses. (8 RT 332.)

However, appellant conceded the delay in filing the charges was not intentional nor negligent but, nonetheless, was prejudicial to him. (8 RT 332.) Appellant also acknowledged Maria failed to follow up with the prosecution when the offenses originally occurred by not showing up to an interview. (8 RT 351.) Appellant's primary complaint about the Maria offenses was that her memory had faded and she did not recall the names of the people who accompanied her to appellant's apartment, i.e., the church people. (8 RT 351-352.)

Initially, the court stated that the need to do PCR testing was enough justification for the delay and wanted to know what other information the prosecution needed to develop besides the DNA evidence. (8 RT 337.) The prosecutor informed the court an investigator needed to locate and interview witnesses from 1985 and 1986 and determine whether they existed, what they remembered, and whether they were cooperative. (8 RT 337-338.) These efforts began in 1989. Also, even though they started doing DNA analysis in 1989, it was not until 1990 that they were able to get results. (8 RT 337-338.)

Additionally, the prosecutor established several witnesses whom the defense declared under penalty of perjury could not be found were found by the prosecution, information provided by the prosecutor contradicted claims under penalty of perjury that appellant was never notified certain witnesses had died, and facts stated in the declarations under penalty of perjury were untrue or false at the time the declarations were made by the defense; i.e., that appellant's academic records were unavailable, the dumpster company was out of business and their records unavailable, and appellant's sister's car was unavailable. (8 RT 339-348.)

When making its findings, the court began by indicating it was deciding the issue under both state and federal constitutional standards, and under the federal standard there had to be some deliberate delay and actual prejudice – the court found neither. (8 RT 357.) The court also acknowledged that the People were not required to file "at the soonest opportunity" even though they may have had the "ability to file sooner." (8 RT 357-358.) The court found that the prosecutor's ongoing investigation was reasonable and charges were filed "at the earliest clear opportunity to do so when it could be done responsibly. So there is clear justification." (8 RT 358.) Regarding state law, the court stated "under the California balancing test, the more liberal view, the court would, I think, just pick up the case and have to do a balance between the justification and the prejudice that may be shown." (8 RT 358.) The court found the defense's claim of prejudice was "purely speculative" and that the witnesses were prosecution witnesses whose memories had faded and "it's going to hit actually the prosecution probably more so than anything else, or what's being proffered to the court is that this person might have been able to help the defendant, but you can't put your finger on it." (8 RT 358-359.) The court found this offer of proof insufficient to establish prejudice based on the law. (8 RT 359.)

The court also found the defense made "clear misrepresentations" in the declarations under penalty of perjury which mitigated against any prejudice; the court noted several misrepresentations, including the fact that appellant's school records were available and were extensive despite appellant's assertions to the contrary and that appellant's sister's car was available and known about by appellant before the affidavits were filed which stated the car was not available. (8 RT 359-360.) The court specifically stated "the defense had this material and, in fact, was misrepresenting it to the court. Very, very biased." (8 RT 360.) The court stated the bottom line was that there had been no showing of any actual prejudice, most of the witnesses had been located, and memory loss would have been problematic even if charges have been brought earlier. (8 RT 360.) The court noted the issue could be raised again at the end of trial but stated that under both the state and federal law there was no due process violation of appellant's right to speedy trial. (8 RT 361.)

Following appellant's conviction and imposition of the death penalty, appellant filed a motion to dismiss based partially upon the delay in filing the charges of attempted murder of Maria. (37 CT 7055, 7059-7062.) Appellant speculated that had the "case been prosecuted in 1985 when it occurred, the defense's ability to locate the minister would have been greatly improved." (37 CT 7060.) Appellant also reiterated his assertion that the statute of limitations "had run on most of the additional charges which could have been brought against" him which placed him at a "huge and insurmountable disadvantage" because "the jury did not get any lesser included offense instructions . . . until after all the evidence had been presented." (37 CT 7061.) The court rejected these claims finding it was completely speculative as to whether the minister could have been located if the charges had been filed earlier and even if the minister had been located, the court questioned the significance of his testimony, given the strength of the evidence establishing the

charges involving Maria. (56 RT 6049-6050.) The court also acknowledged "the attempted murder was a charge based on the call of the evidence. . . ." (56 RT 6050.)

B. Substantial Evidence Supports The Trial Court's Denial Of Appellant's Motion

On appeal, appellant only challenges the filing of the charges involving Maria based upon his state and federal constitutional rights to a speedy trial. Notably, appellant does not challenge the filing of the charges involving Karen M. which were alleged to have occurred in October 1986; approximately 13 months after the charges involving Maria.[95/] Neither does appellant challenge the filing of any of the murder offenses. Appellant, therefore, concedes the propriety of the trial court's denial of his speedy trial motion based upon those offenses. As the prosecutor explained in his opposition to appellant's motion, all of the offenses were filed together because the prosecutor intended to rely upon the cross-admissibility of the evidence to prove the various offenses – both the murders and the attempted murders. (25 CT 4294.) Nonetheless, appellant failed to carry his burden of establishing that he suffered prejudice because the prosecutor delayed filing the charges involving Maria; especially, considering the multiple falsehoods contained in the affidavits which purported to establish prejudice and the speculative nature of his claims of prejudice. The trial court did not abuse its discretion when denying his motion.

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95. Regarding the offenses involving Karen, the prosecutor explained the need to develop the case to ensure that Karen could recall enough facts to testify about what occurred because no report was initially taken; rather, it was treated as a "drunk hooker" case. (8 RT 335-337.)

Under both state and federal law, a delay between the time of an offense and the filing of an accusatory pleading (i.e., a pre-indictment delay) can result in a violation of due process of law. (*United States v. Lovasco* (1977) 431 U.S. 783, 795 [97 S.Ct. 2044, 52 L.Ed.2d 752, 762-763]; *People v. Catlin* (2001) 26 Cal.4th 81, 107.) Under the California Constitution, appellant must first establish prejudice occurred as a result of pre-indictment prosecutorial delay. *(People v. Catlin, supra,* 26 Cal.4th at p. 107; *People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 911.) In California,

> there is no presumption [of a due process violation] and a three-step analysis is employed to determine whether the defendant's rights have been violated. First, the defendant must show he has been prejudiced by the delay. Second, the burden then shifts to the prosecution to justify the delay. Third, the court balances the harm against the justification.

(*People v. Dunn-Gonzalez, supra,* at p. 911; *People v. Catlin, supra,* 26 Cal.4th at p. 107.)

Likewise, a Fifth and Fourteenth Amendments due process violation based on pre-indictment delay requires a showing of prejudice before the court considers the reasons for the delay. (*United States v. Lovasco, supra,* 431 US at p. 790.) Similar to a state constitutional claim, to establish a federal constitutional claim, proof of prejudice is necessary, but prejudice is not sufficient, in and of itself, to establish a due process claim because the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused. (*Id.* at p. 790.) As this Court has noted,

> the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to [defendants'] rights to a fair trial ***and that the delay was an intentional device to gain tactical advantage over the accused.***

(*People v. Martinez* (2000) 22 Cal.4th 750, 765 [emphasis added], quoting *United States v. Marion* (1971) 404 U.S. 307, 324 [92 S.Ct. 455, 30 L.Ed.2d 468]; see also *United States v. Lovasco, supra,* 431 U.S. at p. 795.) In another case, the high court

referenced *Marion* and *Lovasco* when stating,

> the Fifth Amendment requires the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense.

(*United States v. Gouveia* (1984) 467 U.S. 180, 192 [104 S.Ct. 2292, 81 L.Ed.2d 146].) As appellant conceded during the pretrial hearing on his motion, the prosecutor did not intentionally or negligently delay filing charges in the instant case. (8 RT 332.) Therefore, appellant fails to establish a federal constitutional violation of due process.

Nonetheless, under both the state and federal Constitutions, the defendant has the burden of showing prejudice before the prosecution is required to offer up any explanation for the delay, and this showing of prejudice "'must be supported by particular facts and not . . . by bare conclusionary statements.' [Citation.]" (*Serna v. Superior Court* (1985) 40 Cal.3d 239, 250; see also *People v. Morris* (1988) 46 Cal.3d 1, 37, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5.) If the defendant does not show prejudice, the prosecution is not required to present reasons for, or otherwise justify, the delay. (*People v. Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at p. 911.) "Prejudice is a factual question to be determined by the trial court." (*People v. Hill* (1984) 37 Cal.3d 491, 499.) The trial court's prejudice ruling "must be upheld on appeal if it is supported by substantial evidence." (*People v. Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at p. 912.) Substantial evidence supports the trial court's denial of appellant's motion in the instant case.

Appellant failed to establish prejudice resulted from the delay in filing the charges involving Maria. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 107.) While appellant's affidavits claimed numerous witnesses could not be located and evidence had been destroyed, the prosecutor rebutted most of these claims and, in fact, established the affidavits included numerous false statements. Several witnesses whom appellant claimed could not be located were located by the prosecution, appellant's school records still existed contrary to claims they had been destroyed, records

concerning the dumpster in which Sweets' body was found were located contrary to claims they had been destroyed, and appellant's sister's car was in impound with the police contrary to claims that its whereabouts were unknown. (8 RT 339-348.) Justifiably so, the trial court found a lack of credibility with appellant's attempt to establish prejudice because of the numerous factual misrepresentations in the affidavits signed under penalty of perjury. (8 RT 359-360.) Prejudice as a factual question for the trial court and appellant failed to establish any prejudice. (*People v. Hill*, *supra*, 37 Cal.3d at p. 499.)

Appellant claims he was prejudiced by Maria's inability to recall who accompanied her to his mother's apartment and his investigators' inability to find anyone matching the description given by Maria and his mother of the two people. (AOB 363-367.) Appellant speculates that these individuals may have been able to corroborate his mother's claim that the two people who came to her door – one of whom may or may not have been Maria – apologized to appellant. (AOB 366-367.) This Court's decision in *Morris* is directly on point and contradicts appellant's claims.

In *Morris*, the authorities received information of Morris's involvement in a murder in early 1979 but the file containing this information was inadvertently archived as a closed case until the middle of 1982, and charges were not brought until four years after the offense. (*People v. Morris*, *supra*, 46 Cal.3d at p. 37.) Morris claimed the four-year delay prejudiced him. Like appellant, Morris claimed prejudice resulted because a witness could not recall whether Morris or someone else used a car associated with the murder – which was part of the information received in 1979 – and Morris could not recall his whereabouts on the day of the murder to establish an alibi. (*Id.* at p. 38.) Because the witness testified her recollection was no better at the time of the hearing than four years prior when she initially spoke to the police and because Morris' faded memory was speculative at best, the trial court did not commit error by denying Morris's motion. (*Ibid.*)

In the instant case, the investigation of the charges involving Maria stopped when Maria stopped cooperating with the authorities by failing to show up for an interview. (25 CT 4283-4284.) Appellant conceded this fact. (8 RT 351.) The prosecution did not resume investigating the attempted murder counts until 1989,[96] three years after the offense. (8 RT 338.) As the trial court found, appellant's assertions that Maria and his mother's memories would have been better if the charges were brought prior to 1992 is purely speculative. (8 RT 358.) Appellant presented no evidence that either Maria or his mother's recollection would have been better if the charges were brought in 1990 rather than 1992, so like the claim in *Morris*, appellant's claim was properly denied as speculative. (*People v. Morris*, *supra*, 46 Cal.3d at p. 38.) And as the court found following trial, it was completely speculative as to whether the "preacher" who went to appellant's mother's home could have been found if the attempted murder of Maria had been filed earlier. (56 RT 6049-6050.) It was even more speculative as to what the preacher might have testified to and whether it would have made a difference.

Furthermore, even if appellant did establish prejudice, the court was required to consider the prosecution's justification for the delay. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 107; *People v. Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at p. 911.) The record irrefutably establishes the prosecution stopped investigating the offenses when Maria stopped cooperating with the authorities; appellant conceded this. (25 CT 4283-4284; 8 RT 351.) Balancing appellant's harm – which is purely speculative –against the prosecution's justification – which is unrefuted – appellant fails to establish the trial court abused its discretion when denying his motion. That is, appellant presented no evidence that either Maria or his mother's recollections would have been better in 1989 or 1990 after the prosecution resumed investigation of the case as

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96. Appellant erroneously asserts the trial court found the prosecution had all the necessary evidence to charge the attempted murder counts in 1987 (AOB 369) because, as the prosecutor explained, additional investigation was necessary and was begun in 1989. (8 RT 335-339.)

opposed to 1992 when the charges were filed or that additional witnesses could have been found.

Additionally, the prosecution is under no obligation to file charges against a suspect as soon as they have marshaled enough evidence to prove guilt beyond a reasonable doubt but before their investigations are complete. (*United States v. Lovasco, supra*, 431 US at pp. 792-795.) This contradicts appellant's claim that the prosecution should have filed the charges earlier. (AOB 369-375.) In the instant case, the charges brought against appellant were being investigated as a series of crimes involving both attempted murder and murder. (25 CT 4294.) The trial court acknowledged the prosecution was not required to file at the soonest opportunity, even if it could have filed sooner, and found that given the ongoing investigation, the prosecution filed at the earliest reasonable opportunity. (8 RT 358.) The law and substantial evidence, as set forth more fully in the Procedural and Factual History above, support the trial court's determination.

Appellant also claims the prosecutor's reason for delay were disingenuous because the six-year statute of limitations expired to file rape and sodomy charges against him for the offenses involving Maria and the prosecutor's reasons for the delay in filing the charges concerned DNA testing and fingerprint testing involving the murder counts. (AOB 371-373.) First, as previously established, the prosecutor was investigating the offenses as a series of crimes with the intent to file all of the charges at the same time, so because the DNA and fingerprint testing were integral to the murder charges, they were, therefore, integral to all the charges. Second, appellant had no constitutional right to be arrested and charged, and the prosecution has the discretion to decide "whether and when to file criminal charges." (*People v. Webb* (1993) 6 Cal.4th 494, 528.) So the trial court found when rejecting appellant's motion to dismiss following trial. (56 RT 6050.)

Given Maria's initial reticence to cooperate with investigators, the lack of any police report that Karen initially complained she was sexually assaulted by

appellant, the need to do DNA testing, the need to use the new machine only available in Canada to obtain fingerprints from the plastic bag in which Sweets' body was found, and the time necessary to process all this information, the prosecution reasonably waited until they were satisfied with their investigation into all the offenses, both the murders and the attempted murders, before filing charges. Appellant's claim that he was denied due process under the state and federal Constitutions lacks merit, and the trial court's decision to deny appellant's pretrial motion and motion to dismiss following trial were supported by substantial evidence. Appellant's claims to the contrary should be rejected.

IX.

THE TRIAL COURT'S ALTERATIONS TO THE JURY INSTRUCTIONS DEFINING MURDER, FIRST-DEGREE DELIBERATE AND PREMEDITATED MURDER, AND MALICE AFORETHOUGHT DID NOT REMOVE ANY ELEMENTS OF MURDER FROM THE JURY'S CONSIDERATION

In argument 15, appellant claims the trial court erroneously instructed the jury by failing to instruct on malice aforethought, by failing to instruct the jury that murder required an unlawful intent, and by failing to instruct that malice, premeditation and deliberation must have existed jointly with the conduct causing the deaths of Sweets and Glover. (AOB 384-403.) Appellant asserts the trial court's attempt to combine CALJIC No. 8.10 (defining murder) with No. 8.20 (deliberate and premeditated murder) and No. 8.11 (definition of malice aforethought) and elimination of the phrase "malice aforethought" resulted in the jury not having to find an unlawful intent to kill. (AOB 385-393.) Appellant argues that because this was a capital case, the court's error was reversible per se; in the alternative, appellant claims the error was not harmless beyond a reasonable doubt because the instructions removed the element of malice. (AOB 393-396.) Appellant also argues the instructions effectively defined, at most, voluntary manslaughter and not murder and asks this Court to reduce his murder

conviction to manslaughter. (AOB 396-403.) Appellant's arguments do not consider the totality of the instructions which the court gave, and though the trial court did not use the phrase "malice aforethought," it adequately defined this concept and required the jury to find an unlawful intent to kill in conjunction with the other elements of first degree, deliberate and premeditated murder. Nonetheless, if error did occur, was harmless beyond a reasonable doubt.

A. Jury Instructions On First-Degree, Deliberate And Premeditated Murder And Second-Degree Murder

The jury was instructed on first-degree, deliberate and premeditated murder and second-degree murder as follows:

> The crime of murder is a violation of Penal Code Section 187.
>
> Murder is classified into two degrees, and if you should find the defendant guilty of murder, you must determine and state in your verdict whether you find the murder to be of the first or of the second degree.
>
> If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.
>
> The jury is to consider two alternate theories of first degree murder in counts three and five in regard to Trina Carpenter and Sophia Glover counts. These two theories are:
>
> One, deliberate and premeditated murder; and
>
> Two, murder occurring during the commission or attempted commission of rape. The second theory is referred to as felony murder.
>
> A finding of guilt of first degree murder in counts three and five may be based upon either one or both of the proposed theories. The jury does not have to agree unanimously as to which theory has been proved, but all twelve jurors must be convinced beyond a reasonable doubt that defendant is guilty under one or the other, or both theories.

The jury is to consider only one theory of first degree murder, to wit: deliberate and premeditated murder, as to counts two and four in regard to Joann Sweets and Tara Simpson.

You will now hear the definition of first degree deliberate and premeditated murder, followed by the definition of first degree felony murder. You will then be given the definition of second degree murder.

All murder which is intentional, deliberate, and premeditated is murder of the first degree. To prove such crime each of the following elements must be proved beyond a reasonable doubt:

One, a human being was killed;

Two, the killing was unlawful;

Three, the killing was intentional; and

Four, the killing was deliberate and premeditated.

A killing is unlawful if it is neither excusable nor justifiable.

The word 'intentional' means willful.

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 preexisting 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 at in a short period of time, but a mere unconsidered and rash impulse, even

though it include [*sic*] an intent to kill, is not such 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. He need not harbor ill will or hatred of the person killed.

[¶] . . . [¶]

Murder of the second degree is the unlawful killing of a human being when there is manifested an intention unlawfully to kill a human being but the evidence is insufficient to establish deliberation and premeditation.

To prove second degree murder the following elements must be proved:

One, a human being was killed;

Two, the killing was unlawful and neither excusable nor justifiable;

Three, the defendant harbored the specific intent unlawfully to kill.

The intent must precede rather than follow the act.

Murder of the second degree is also proved when each of the following elements is proved beyond a reasonable doubt :

One, a human being was killed;

Two, the killing was unlawful; neither excusable nor justifiable;

Three, the killing resulted from an intentional act;

Four, the natural consequences of the act are dangerous to human life; and

Five, the act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

When the killing is the direct result of such an act it is not necessary to establish that the defendant intended that his act would result in the death of a human being.

> To constitute murder in the first or second degree there must be, in addition to the death of a human being, an unlawful act which was a proximate cause of that death.

(45 RT 5133-5137.)

B. The Jury Was Properly Instructed, And Even If They Were Not, Any Error Was Harmless Beyond A Reasonable Doubt

It is well established a trial court must instruct the jury with all the general principles of law relevant to issues raised by the evidence. (*People v. Earp* (1999) 20 Cal.4th 826, 885.) The trial court properly instructed the jury regarding all the general principles of law relevant to the issues of first-degree, deliberate and premeditated murder and second-degree murder – including the concept of malice aforethought.

The standard jury instructions defining murder (CALJIC No 8.10) and malice aforethought (CALJIC No. 8.11) include the following language and requirements:

> Every person who unlawfully kills a human being... with malice aforethought... is guilty of the crime of murder in violation of section 187 of the Penal Code. ¶ ***In order to prove such crime, each of the following elements must be proved: 1. A human being was killed. 2. The killing was unlawful***, and 3. The killing was done with malice aforethought. . . . ***A killing is unlawful if it was not a justifiable nor excusable.***

(34 CT 6301, emphasis added.)

> Malice is expressed when there is manifested an intention unlawfully to kill a human being. ¶ . . . The mental state constituting malice aforethought does not necessarily require any ***ill will or hatred of the person killed***. ¶ The word "aforethought" does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act.

(34 CT 6321, emphasis added.) Though the instructions given in the instant case did not include the phrase "malice aforethought," they did express each of the necessary elements and requirements of the definitions of murder and malice aforethought set out in these standard jury instructions. The emphasized language above was in the

instructions given to the jury, and virtually all of the language of CALJIC No. 8.20 defining deliberate and premeditated murder was used, with the exception of the phrase malice aforethought. (34 CT 6322-6323.)

The trial court spent considerable time with both counsel discussing the instructions and, particularly, the instructions on first and second degree murder. (39 RT 4358-4360, 4363, 4369-4370, 4372-4381.) Over appellant's objection, the court decided to alter the standard jury instructions defining murder (CALJIC No. 8.10), malice aforethought (CALJIC No. 8.11), and deliberate and premeditated murder (CALJIC No. 8.20). (39 RT 4359-4360, 4372-4373; see also 34 CT 6301, 6316, 6321-6323, 6407-6408, 36 CT 6788-6789.) The court also stated its intention to instruct only on the concept of express malice. The court ultimately instructed the jury with modified instructions on first-degree murder, felony murder, and second-degree murder. (45 RT 5133-5137.) Particularly addressing malice aforethought, rather than including this phrase and its definition in the instructions, the court created a custom instruction which included the primary components of express malice without using the phrase "malice aforethought." This included the court adding an additional element to the standard instruction defining first-degree murder to include "three, the killing was intentional." (45 RT 5134; 36 CT 6788.) The other enumerated factors included, "one, a human being was killed; two, the killing was a lawful . . . four, the killing was deliberate and premeditated." (45 RT 5134.)

Indeed, this Court held, "express malice and an intent unlawfully to kill are one and the same. [Citation.] . . .***when an intentional killing is shown, malice aforethought is established***. [fn. omitted.]" (*People v. Saille* (1991) 54 Cal.3d 1103, 1114, emphasis added.) This Court reiterated this principle, relying upon *Saille*, when discussing attempted murder. (*People v. Smith* (2005) 37 Cal.4th 733, 739.) Consistent with this Court's holdings in *Saille* and *Smith*, rather than using the phrase "malice aforethought" in the instruction defining murder and deliberate and premeditated murder, the court added the element which required the jury to find "the killing was

intentional." (45 RT 5134.) However, this is not the only instruction which the court gave in the stead of using and defining malice aforethought. When the instructions are considered in their totality, it is apparent that to find first-degree deliberate and premeditated murder the jury had to find an unlawful intent to kill existing jointly with premeditation and deliberation.

In *Saille* this Court recognized, "'The adverb "unlawfully" in the express malice definition means simply that there is ***no justification, excuse, or mitigation*** for the killing recognized by the law. [Citation.]'" (*People v. Saille*, *supra*, 54 Cal.3d at p. 1115, emphasis added.) Consistent with *Saille*, the court instructed the jury "A killing is unlawful if it is neither excusable nor justifiable." (45 RT 5134.) The jury was also instructed that

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

(45 RT 5134-5135.) Additionally, the jury had to find "the killing was preceded and accompanied by a clear, deliberate intent . . . to kill . . . formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation . . ." (45 RT 5135.) Addressing deliberation and premeditation, the jury was instructed "a mere unconsidered and rash impulse, even though it included an intent to kill, is not such deliberation and premeditation as will fix an ***unlawful killing*** as murder of the first-degree." (45 RT 5135, emphasis added.) Considering these instructions in their totality, the jury had to find an unlawful intent to kill for there to be first-degree murder.

Consequently, to find first-degree murder, the jury had to find an intentional, unlawful killing occurred and the intent to kill preceded and accompanied the killing. Therefore, contrary to appellant's analysis, the jury could not find him guilty of first-degree deliberate and premeditated murder unless they found an unlawful

intent to kill; that is, appellant committed an intentional[97] unlawful killing – one that was neither excusable nor justifiable – that was accompanied by premeditation and deliberation.

Furthermore, the jury was properly instructed regarding second-degree murder. (45 RT 5136-5137.) These instructions defined second-degree murder in the context of deliberate and premeditated murder, requiring an intention unlawfully to kill a human but without evidence of deliberation and premeditation.[98] Specifically, the jury was instructed "Murder of the second degree is the unlawful killing of a human being when there is manifested an ***intention unlawfully to kill*** a human being but the evidence is insufficient to establish deliberation and premeditation."[99] (45 RT 5136, emphasis added.) Accordingly, the jury was instructed the difference between first-degree murder and second-degree murder was a lack of deliberation and premeditation, but the instructions made clear both first and second degree murder required an intent unlawfully to kill. (45 RT 5136-5137.)

During closing arguments the prosecutor acknowledged an unlawful intent to kill had to exist for there to be first-degree, deliberate and premeditated murder. The prosecutor asserted "we have four intentional homicides, intentional murders during sexual acts" (45 RT 4971) and to convict appellant of first-degree murder appellant had to intend to kill and to kill unlawfully (45 RT 4983-4984). When addressing second-degree murder the prosecutor stated it was

> ***the same thing as premeditated murder, except you don't have deliberation and premeditation.*** ¶ Murder of the second degree is the

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97. *People v. Saille, supra*, 54 Cal.3d at p. 1114.

98. The "COMMENT" for CALJIC No. 8.30 ("Unpremeditated Murder of the Second-Degree") states, "Pursuant to Penal Code § 188, when an intentional killing is shown, malice aforethought is shown." (CALJIC No. 8.31 COMMENT.)

99. As more fully set forth in the footnote, supra, the instructions went on to further define the elements of second-degree murder. (45 RT 5136-5137.)

> unlawful killing of a human being when there is manifested an ***intention to unlawfully kill a human being*** . . .

(45 RT 4984-4985, emphasis added.) Addressing attempted murder, appellant "must have harbored or had ***a specific intent to kill unlawfully*** another human being. I have to show that ***he intended to kill another human being unlawfully*** . . ." (45 RT 4975, emphasis added.) Also, the prosecutor told the jury that to find special circumstances, they had to find the crimes were committed with the intent to kill. (45 RT 5027-5028.)

While the prosecutor's arguments are not statements of the law, they are synchronous with the jury instructions the trial court gave following closing arguments. Considering the jury instructions as a whole and the prosecutor's arguments, the jury was properly instructed with the concept of malice aforethought; i.e., an intent unlawfully to kill. (*People v. Saille*, *supra*, 54 Cal.3d at p. 1114.)

Parsing the instructions, appellant claims the trial court's instruction to the jury "did not require an intent to violate the law. But given that malice is a 'deliberate intention unlawfully to take away the life of a fellow creature' [citations] . . ." the court removed the element of malice from the jury's consideration. (AOB 391.) Summarizing his argument appellant asserts the trial court's error was threefold by

> (1) failing to instruct on express malice aforethought, which requires an intent to kill unlawfully, (2) instructing the jury that first-degree murder only requires a willful killing, meaning one without an intent to kill unlawfully, and (3) failing to instruct that a premeditated, deliberate and malicious (or an intent-to-kill-unlawfully) state of mind must have existed jointly with the conduct . . .

(AOB 392-393, see 396-397.) Appellant is wrong. The instructions required the jury to find an unlawful intent to kill because the court instructed the jury that first-degree murder required the prosecutor to establish "the killing was unlawful . . . the killing was preceded and accompanied by a clear, deliberate ***intent on the part of the defendant to kill*** . . . ." and premeditation and deliberation required intent to kill which was unlawful. (45 RT 5134-5135, emphasis added.) The court's instruction specifically required a showing that "the killing was unlawful; . . . the killing was intentional and the killing

was deliberate and premeditated . . . The word 'intentional' means a willful" and the jury was instructed first-degree murder required a finding "that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill . . . ." (45 RT 5134-5135.)

Assuming arguendo the trial court's modification of the standard jury instructions did remove the element of malice aforethought – an intention to unlawfully kill – from the definition of first-degree, deliberate and premeditated murder, any error was harmless. For purposes of due process under the state Constitution, this Court considers the failure to instruct with an element of an offense under the *Watson* standard to determine prejudice, but for purposes of federal due process consideration, this Court considers the issue under the *Chapman* harmless beyond a reasonable doubt standard to determine prejudice. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *People v. Flood* (1998) 18 Cal.4th 470, 490, 492-504.) Even under the more stringent *Chapman* standard, the record establishes there was no prejudice.

The facts of the instant case establish the jury found express malice. This Court described express malice as requiring a showing "the assailant either desire[s] the result [i.e., death] or know[s], to a substantial certainty, that the result will occur. [Quotations and citations omitted.]" (*People v. Smith* (2005) 37 Cal.4th 733.) The factual question posed by the omitted instruction necessarily was resolved unfavorably to appellant under the instructions on the special circumstance allegations, which required a finding of an intent to unlawfully kill. (*People v. Coffman* (2004) 34 Cal.4th 1, 96.) The facts and findings of the jury in the instant case definitively establish the jury, in fact, found express malice. (See *People v. Catlin* (2001) 26 Cal.4th 81.) In *Catlin*, the trial court instructed the jury that first-degree deliberate and premeditated murder required a finding of "express malice" but only instructed the jury with the definition of implied malice. (*Id.* at pp. 147-149.) Catlin complained the failure to define express malice resulted in a defective verdict. (*Id.* at pp. 148-149.) To the extent Catlin challenged the verdict based on the failure to define express malice or delete the

term from the instructions, this Court rejected the claim because the jury found the special circumstance that the murders were committed by poison so "whether the jury found express or implied malice, as long as it found one or the other form of malice, the murders were in the first degree." (*People v. Catlin* (2001) 26 Cal.4th at p. 150.)

In the instant case, appellant was charged with the special circumstance of murdering Glover and Sweets while engaged in the commission of sodomy, pursuant to Penal Code section 190.2, subdivision (a)(17). The jury was instructed that to find these special circumstance allegations to be true they had to find appellant committed sodomy with the intent to kill. (45 RT 5143.) Other instructions defined sodomy, and it goes without saying the jury knew sodomy was unlawful. The jury was also instructed they could not find this special circumstance true if "the sodomy was merely incidental to the commission of the murder." (45 RT 5143.) The jury found the sodomy special circumstance allegations to be true. Therefore, the jury necessarily found appellant had an unlawful intent to kill – the intent to kill while committing the unlawful act of sodomy– when murdering Glover and Sweets. That is, the jury necessarily found appellant committed murder while manifesting "an intention unlawfully to kill a human being" – the definition of express malice (CALJIC No. 8.11) – by finding the sodomy special circumstance to be true. The jury's finding of the sodomy special circumstance definitively established that they found appellant unlawfully intended to kill Glover and Sweets.

Appellant cites and relies upon this Court's decision *In re Christian S.* (1994) 7 Cal.4th 768, 771, which considered the issue of whether the Legislature had abrogated the doctrine of imperfect self-defense when amending the Penal Code to eliminate the defense of diminished capacity, and *People v. Rios* (2000) 23 Cal.4th 450, which considered the elements of voluntary manslaughter. (AOB 387-388, 396-397.) In *Christian S.*, this Court found the doctrine of imperfect self-defense was still viable and reasoned express malice within the meaning of Penal Code section 188 required an intent to act unlawfully. (*In re Christian S., supra*, 7 Cal.4th at pp. 778-779.) In *Rios*,

this Court rejected the argument that provocation and imperfect self-defense were elements of voluntary manslaughter. (*People v. Rios*, *supra*, 23 Cal.4th at pp. 469-470.) Appellant cites these cases and other authority for the proposition that express malice requires more than intent to kill; it requires an unlawful intent to kill.

Appellant's analysis omits the fact that malice is only negated under specific, limited circumstances. Specifically,

> a defendant who intentionally and unlawfully kills lacks malice . . . in limited, explicitly defined circumstances: either when the defendant acts in a 'sudden quarrel or heat of passion' (§ 192, subd. (a)), or when the defendant kills in 'unreasonable self-defense'--the unreasonable but good faith belief in having to act in self-defense. [Citations.]

(*People v. Breverman* (1998) 19 Cal.4th 142,153-154; *People v. Rios*, *supra*, 23 Cal.4th at p. 460.) This Court in *Rios* held,

> Thus, ***where the defendant killed intentionally and unlawfully***, evidence of heat of passion, or of an actual, though unreasonable, belief in the need for self-defense, is relevant only to determine whether malice has been established, thus allowing a conviction of murder, or has not been established, thus precluding a murder conviction and limiting the crime to the lesser included offense of voluntary manslaughter.

(*People v. Rios*, *supra*, 23 Cal.4th at p. 461, emphasis added.) The circumstances – heat of passion, unreasonable self-defense --are "mitigating circumstances," which may reduce murder to manslaughter by negating malice. (*People v. Martinez* (2004) 31 Cal.4th 673, 685.) Unless there is evidence of such mitigating circumstances in the prosecution's case, it is incumbent upon the defendant to present such evidence. In the

instant case, contrary to appellant's suggestion otherwise (AOB 396),[100/]

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100. Appellant specifically complains that the evidence "shows that there could have been provocative conduct by the victims, who might have balked at providing anal sex, that led to a sudden quarrel or heat of passion, which in turn would have negated malice." (AOB 396.) Such is not the case because there was absolutely no evidence suggesting sudden quarrel or heat of passion, and appellant did not request a heat of passion instruction or request that the jury be instructed with voluntary manslaughter. Appellant's assertion lacks any credibility in light of the definition of "heat of passion" in CALJIC No. 8.42 (set forth in full below) because appellant can hardly claim heat of passion based on forced anal sex with the unwilling murder (and attempted murder) victims. Specifically, heat of passion is defined:

CALJIC 8.42
SUDDEN QUARREL OR HEAT OF PASSION AND PROVOCATION EXPLAINED
(Penal Code § 192, subdivision (a))

> To reduce an unlawful killing from murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.
>
> The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up [his] [her] own standard of conduct and to justify or excuse [himself] [herself] because [his] [her] passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted [him] [her] were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. Legally adequate provocation may occur in a short, or over a considerable, period of time.
>
> The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment.

there was no evidence of either heat of passion, provocation, self-defense, or imperfect self-defense. Even if there was such evidence, the jury was instructed they could not find first-degree deliberate and premeditated murder if there existed "a sudden heat of passion or other condition precluding the idea of deliberation" or "a mere unconsidered and rash impulse" (45 RT 5135), and the jury found none by finding him guilty of first-degree murder. Each of the murder victims had been brutally beaten and strangled to death and then left either naked or mostly naked in dumpsters (Simpson, Carpenter, and Sweets) or in a grassy area by an alley (Glover). The fact that there was evidence Glover and Sweets had been sodomized (and the jury found the sodomy special circumstance regarding each of these murders to be true) negated the existence of any mitigating circumstances reducing these intentional, unlawful killings from murder to manslaughter by negating the element of malice. (*People v. Rios*, *supra*, 23 Cal.4th at p. 461.) Therefore, even if the court did commit error when instructing the jury, it was harmless beyond a reasonable doubt. (*People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 324.)

Appellant argues that his convictions should be reduced from first-degree deliberate and premeditated murder to manslaughter because of the purported error in the jury instructions. (AOB 396-403.) Appellant also argues the

> issue of malice was necessarily decided in this case because the prosecutor chose to omit it from the jury instructions . . . as if the prosecutor recognized the failure of proof and informally amended his information to replace first-degree murder counts of manslaughter charges.

> If there was provocation, whether of short or long duration, but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return, and if an unlawful killing of a human being followed the provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter.

(AOB 403.) Appellant's logic fails for three reasons: first, appellant concedes in his Argument 19 he was properly charged with second-degree murder, which requires malice, regarding Glover and Sweets (AOB 440-447); second, it does not take into account the totality of the instructions; and third, appellant fails to explain how an issue can be "necessarily decided" if it is supposedly not presented to the jury. In fact, the jury found express malice by finding the sodomy special circumstance to be true.

As for appellant's claim that the issue of malice was omitted, under the *Chapman* standard of review, any error in instructing the jury was harmless beyond a reasonable doubt, so his conviction should remain intact. Appellant's claim that the prosecutor recognized the failure of proof completely lacks substance. As previously established, the prosecutor vigorously urged the jury convict appellant of first-degree, deliberate and premeditated murder. The prosecutor presented evidence and argued that appellant carefully chose his victims and committed the murders to heighten sexual pleasure (45 RT 4971, 4985-5003); hardly an argument recognizing the failure of proof or suggesting the lack of malice – the hallmark of manslaughter.

Assuming arguendo there was prejudice, appellant should be retried for the first degree murders of Simpson and Carpenter, on which the jury hung so double jeopardy does not preclude retrial, in addition to being retried for the murders of Glover and Sweets. The authority upon which appellant relies when asking to have his convictions reduced to manslaughter is inapplicable. Contrary to appellant's assertion, the prosecutor did not charge appellant with the lesser crime of voluntary manslaughter. (AOB 398.) Appellant references Penal Code section 1157, and authority applying it,[101] concerning conviction of a crime which is distinguished into degrees but for which

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101. Appellant references *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, which involved a retrial following a reversal for failing to hold a competency hearing and under circumstances where the jury who found Marks guilty, failed to specify the murder as first-degree. On retrial, this Court found Marks could only be tried for second-degree murder, pursuant to Penal Code section 1157. (*People v. Marks, supra*, 1 Cal.4th at p. 78.)

there was a failure to fix the degree of the crime upon a finding of guilt. (AOB 398-400.) These are not the facts of the instant case because the jury specifically found appellant guilty of first-degree murder. Moreover, this Court refused to apply Penal Code section 1157 and the *Marks* decision when a jury was only instructed with felony first-degree murder and the verdict did not specify guilt of first-degree murder but simply murder. (*People v. Mendoza* (2000) 23 Cal.4th 896, 910-911.)

In rejecting Mendoza's argument to reduce the degree of murder to one which was not charged, i.e., second-degree murder, this Court noted it

> would be both absurd and unreasonable, for it would require courts to deem a conviction to be of a degree that was never at issue and that the jury was neither asked nor permitted to consider. . . . This result would be 'neither just nor fair' and would permit 'form [to] triumph[ ] over substance.' [Citation.]

(*People v. Mendoza* (2000) 23 Cal.4th at p. 911.) Similarly, in the instant case, the jury was only instructed with first and second degree murder, so reducing appellant's conviction to manslaughter would produce an absurd and unreasonable result; especially in light of the depravity of the crimes committed.

Appellant's claims that the court committed error when instructing the jury should be rejected. Even if the court did commit error, it was harmless beyond a reasonable doubt. Furthermore, appellant's argument that prejudice resulted and his conviction should be reduced to manslaughter should be rejected.

X.

THE TRIAL COURT DID NOT COMMIT ERROR WHEN INSTRUCTING THE JURY AT THE END OF THE GUILT PHASE OF THE TRIAL.

In five separate arguments appellant challenges various jury instructions which this Court has already approved and found not to have the deficiencies about which appellant complains. In argument 16 appellant claims the trial court erred by giving the consciousness of guilt instruction (CALJIC No. 2.03). (AOB 404-417.) In

argument 17 appellant complains the jury instruction on motive (CALJIC No. 2.51) altered the prosecutor's burden of proof, shifting the burden to appellant and requiring him to establish the absence of motive. (AOB 418-425.) In argument 18 appellant sets forth a laundry list of jury instructions (CALJIC Nos. 1.00, 2.21.1, 2.21.2, 2.22, 2.27, 2.90, 2.01, 2.02, 8.83 & 8.83.1) which purportedly undermined and diluted the requirement that the prosecutor establish his guilt beyond a reasonable doubt. (AOB 426-439.) In argument 19 appellant asserts the trial court committed error by instructing the jury with first-degree deliberate and premeditated murder as well as felony murder because the information only charged him with second-degree malice murder pursuant to Penal Code section 187. (AOB 440-447.) In argument 20 appellant complains the trial court committed error by instructing the jury they did not have to unanimously agree on whether appellant committed premeditated murder or felony murder. (AOB 448-456.) This Court has reject each one of these arguments in other cases, so each argument will be addressed separately but briefly with reference to the appropriate authority.

A. The Consciousness Of Guilt Instruction Did Not Violate Any Of Appellant's State Or Federal Constitutional Rights

In argument 16 appellant complains that the consciousness of guilt instruction was duplicative of other instructions, partisan, argumentative and permitted improper inferences. (AOB 404-417.) Appellant made no objection to this instruction and made no request that it be modified when the jury instructions were being discussed. (39 RT 4347.) It should be noted appellant was actively engaged during the discussions about the jury instructions, making objections and requesting modifications to several. (39 RT 4346-4348.) This Court found the defendant forfeited claims of error by joining in the request of the same instruction, as well as others, about which appellant complains on appeal. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1223.) Therefore, appellant should be deemed to have forfeited his claims of error in the instant

case.

Assuming arguendo appellant's claim is not forfeited, appellant's assertion that this instruction was duplicative of the general circumstantial evidence instructions (CALJIC Nos. 2.00, 2.01 & 2.02.)[102/] and his assertion that they were "impermissibly argumentative" (AOB 405-409) are essentially the same. On numerous occasions this Court has rejected the argument that the consciousness of guilt instruction is argumentative and improperly permitted the jury to draw irrational inferences, including in the case which appellant ineffectively attempts to distinguish – *People v. Nakahara* (2003) 30 Cal.4th 705, 713. (See also *People v. Guerra* (2006) 37 Cal.4th 1067, 1136-1137; *People v. Jackson* (1996) 13 Cal.4th 1164, 1222-1225 [rejecting several contentions attacking three separate consciousness of guilt instructions].) Appellant's arguments complaining about the purported faults of this instruction and attempts to distinguish the cases which have already rejected his arguments are not persuasive and should, again, be rejected in the instant case.

B. The Jury Instruction Addressing Motive Did Not Lessen Or Shift The Burden Of Proof Nor Did It Permit The Jury To Find Appellant Guilty Based On Motive Alone

Appellant first asserts the instruction on motive (CALJIC No. 2.51) allowed the jury to convict him based on motive alone. (AOB 418-420.) Appellant's argument should be deemed forfeited because appellant failed to request a modification to the instruction. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1134.) This Court in *Guerra* addressed and rejected the exact same argument. (*Ibid.*) Specifically, this Court held,

> Defendant next argues the motive instruction erroneously informed the jury that evidence of motive alone was sufficient to establish guilt because . . . the motive instruction did not explicitly state that evidence of motive alone is *not* sufficient to prove guilt. [Citation.] This claim is

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102. (AOB 404-405.)

> not cognizable, however, because defendant was obligated to request clarification and failed to do so. [Citation.] In any event, we find no error in the instruction and no prejudice.

(*People v. Guerra, supra*, 37 Cal.4th at p. 1134.) Just as in *Guerra*, considering the rest of the instructions the jury received in the instant case, "[c]ertainly, the jury's verdict in this case was not based solely on motive." (*Id.* at p. 1135.)

Appellant also argues the jury instruction "lessened the prosecutor's burden of proof." (AOB 420-424.) But this argument was also addressed and rejected in *Guerra*. (*Ibid.*) Guerra asserted "motive and intent were indistinguishable . . . and that the jury would not have been able to distinguish instructions involving motive and intent. . . ." (*People v. Guerra, supra*, 37 Cal.4th at p. 1135.) Appellant makes the same argument. (AOB 422-424.) In the instant case, appellant references the prosecutor's closing argument as well as case authority which purports to use "motive" and "intent" interchangeably, including a case addressed and distinguished in *Guerra* – *People v. Maurer* (1995) 32 Cal.App.4th 1121. (AOB 420-423.) This Court in *Guerra* distinguished *Maurer* and noted motive describes the reason a person chooses to commit a crime, but the reason is different from a required mental state such as intent. (*People v. Guerra, supra*, 37 Cal.4th at p. 1135.) Furthermore, the jury in *Guerra* found a rape/murder special circumstance allegation to be true, and because the jury was instructed that the murder had to have been committed to carry out the sex offense and had to find the sex offense was not merely incidental to the murder, the instructions as a whole "did not refer to motive and intent interchangeably." (*Ibid.*; *People v. Cash* (2002) 28 Cal.4th 703, 738-739.) The same analysis defies appellant's claims in the instant case.

Here, appellant was charged with two sodomy/murder special circumstances which the jury found to be true. The jury received the same instructions as those given in *Guerra* regarding the sodomy/murder special circumstance – the murder had to have been committed to carry out the sodomy, and the sodomy was not incidental to the murder. (45 RT 5143.) *Guerra* is, therefore, dispositive and

undermines appellant's argument.

Finally, *Guerra* also addressed and rejected the argument that the motive instruction shifted the prosecution's burden of proof and implied Guerra had to prove his innocence. (*People v. Guerra, supra* 37 Cal.4th at p. 1134.) A variation of this claim was also rejected by this Court in *People v. Prieto* (2003) 30 Cal.4th 226, 254. Appellant makes the same claim as that rejected in *Guerra* and *Prieto*. (AOB 424.) Just as in *Guerra* and *Prieto*, appellant's claim should be rejected.

Appellant's complaints attacking the motive instruction should be rejected.

C. The Instructions Considered In Part And In Whole Did Not Lessen The Prosecutor's Burden Of Proving Appellant Guilty Beyond A Reasonable Doubt

In argument 18, appellant claims that a combination of several jury instructions "undermined and diluted the requirement of proof beyond a reasonable doubt." (AOB 426-439.) Particularly, appellant complains the "series of standard CALJIC instructions" given by the court resulted in a finding of guilt based on less than a reasonable doubt. (AOB 426.) The instructions appellant targets include those given addressing reasonable doubt (CALJIC No. 2.90), circumstantial evidence (CALJIC Nos. 2.01, 2.02, 8.83 & 8.83.1), the instructions concerning the duties of the jury (CALJIC No. 1.00), discrepancies in testimony (CALJIC No. 2.21.1), willfully false witnesses (CALJIC No. 2.21.2), weighing conflicting testimony (CALJIC No. 2.22), the definition of premeditation and deliberation (CALJIC No. 8.20), the sufficiency of evidence of one witness (CALJIC No. 2.27), and motive (CALJIC No. 2.51). (AOB 427-435.) Appellant acknowledges cases which rejected several of his arguments but urges the Court to reconsider them. (AOB 435-439.) Indeed, this Court has addressed and rejected appellant's complaints in other cases, and appellant presents no reasoning or analysis to revisit those cases and their holdings.

This Court has rejected claims attacking the instruction on reasonable doubt (CALJIC No. 2.90) based upon the use of the terms "moral evidence" and " moral certainty" as well as attacks on the instructions relating to circumstantial evidence (CALJIC Nos. 2.01, 8.83). (*People v. Robinson* (2005) 37 Cal.4th 592, 637.) Likewise, this Court has rejected attacks on the interrelation of instructions which purportedly lowered the prosecution's burden of proof: sufficiency of circumstantial evidence generally (CALJIC No. 2.01); sufficiency of circumstantial evidence to prove intent (CALJIC No. 2.02); sufficiency of the evidence to prove special circumstances (CALJIC No. 8.83); sufficiency of the evidence to prove mental state regarding special circumstances (CALJIC No. 8.83.1). (*People v. Jurado* (2006) 38 Cal.4th 72, 126-127; *People v. Guerra* (2006) 37 Cal.4th 1067, 1138-1139.) *Robinson*, *Jurado* and *Guerra*, as well as the cases cited therein, addressed and soundly reject the same arguments and reasoning appellant makes attacking these instructions. (AOB 427-430.) Appellant presents no reason to revisit these claims.

Likewise, this Court has addressed and rejected appellant's argument attacking language in CALJIC No. 1.00. (AOB 430-431.) Specifically, this Court held,

> CALJIC No. 1.00, which directs the jury not to "infer or assume" that defendant "was more likely to be guilty than not guilty" merely because he had been arrested, charged, or brought to trial, does not undercut the burden of proof. [Citation.]

(*People v. Jurado*, *supra*, 38 Cal.4th at p. 127; see also *People v. Guerra*, *supra*, 37 Cal.4th at p. 1139.) This Court in *Jurado* and *Guerra* also rejected arguments attacking instructions addressing willfully false witnesses (CALJIC No. 2.21.2), weighing conflicting testimony (CALJIC No. 2.22) and the instruction defining premeditation and deliberation (CALJIC No. 8.20). (*People v. Jurado*, *supra*, 38 Cal.4th at pp. 126-127; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1139; *People v. Millwee* (1998) 18 Cal.4th 96, 158-159 [specifically rejecting attack on CALJIC No. 2.21.2].) Appellant's arguments attacking these instructions should be rejected. (AOB 430-434.)

Furthermore, this Court has held the instruction on discrepancies in testimony (CALJIC No. 2.21.1) is not required to be given sua sponte. (*People v. Wader* (1993) 5 Cal.4th 610, 644-645, incl. fn. 5.) Therefore, given this Court's decisions in *Wader* and *Millwee* as well as the benign language of CALJIC No. 2.21.1 itself,[103/] in comparison to CALJIC Nos. 2.21.2 and 2.22, this Court should also reject appellant's argument that CALJIC No. 2.21.1 somehow reduced the burden of proof.

Appellant complains the jury instruction regarding a single witness' testimony (CALJIC No. 2.27) was "flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts." (AOB 434.) This argument has been rejected. (*People v. Wade* (1995) 39 Cal.App.4th 1487, 1496-1497.) Appellant references this Court's decision in *People v. Turner* (1990) 50 Cal.3d 668, but claims "this Court's understated observation [in *Turner*] does not begin to address the unconstitutional effect of CALJIC No. 2.27 . . ." without any further analysis as to how the instruction is deficient. (AOB 434.) While this Court in *Turner* found problematic some language in a different version of this instruction than given in the instant case, it nonetheless concluded the instruction did not alter the prosecution's burden of proof in light of the totality of the instructions given. (*People v. Turner*, *supra*, 50 Cal.3d at p. 697.) As this Court has already noted, since *Turner* the language

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103. The trial court specifically instructed the jury as follows:

> Discrepancies in a witness' testimony or between his or her testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or here [*sic*] it differently.
>
> Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

of CALJIC No. 2.27 his been changed. (*People v. Gammage* (1992) 2 Cal.4th 693, 702, incl. fn. 5.) Appellant's bald assertion attacking the instruction on a single witness' testimony (CALJIC No. 2.27) should be rejected.

Finally, appellant argues that the instruction on motive (CALJIC No. 2.51) that "the presence of motive 'may tend to established guilt,' while the absence of motive 'may tend to establish innocence. . . .' diminished the prosecution's burden of proof." (AOB 431.) This Court has repeatedly addressed and rejected this argument. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 254; *People v. Nakahara*, *supra*, 30 Cal.4th at p. 714.) This Court in *Prieto*, 30 Cal.4th at page 254, quoting other authority, held:

> "CALJIC No. 2.51 [does] not concern the standard of proof . . . but merely one circumstance in the proof puzzle-motive." [Citation.] "[T]he instruction merely uses innocence as a direction signal or compass. It does not tell the jurors they must find innocence, nor does it lighten the prosecution's burden of proof, upon which the jury received full and complete instructions." [Citation.]

Appellant's argument should again be rejected.

Each of appellant's claims attacking the various instructions have been addressed by this Court and rejected; in some cases, several times. While appellant acknowledges this Court has rejected many of his arguments and this Court considers the totality of the instructions, appellant argues considering the instructions in their totality is flawed. (AOB 435-436.) Appellant's argument assumes that the language of the instructions was erroneous; however, as previously established, this Court has not found the defects about which appellant complains were corrected by other instructions but, rather, has found the instructions do not contain the defect about which appellant complains. Appellant's predicate assertion that "the flawed instructions were 'saved' by the language of . . ." other instructions lacks substance and support. (AOB 436.) That is, the instructions about which appellant complains were not "flawed." Appellant's arguments to the contrary should be rejected. (AOB 437-439.)

Appellant's multifaceted attack on the jury instructions is contradicted by established case authority by this Court. Appellant's state and federal constitutional rights were not violated, and his arguments to the contrary should be rejected.

D. Appellant Was Properly Charged In The Information With The First-Degree Murders Of Glover And Sweets Pursuant To Penal Code Section 187, Subdivision (a)

In argument 19, appellant claims the trial court committed error by instructing the jury on first-degree premeditated murder and felony murder because he was only charged with second-degree malice murder in the information pursuant to Penal Code section 187. (AOB 440-447.) Appellant claims the wording of the information was insufficient to allege first-degree murder and only alleged second-degree murder. (AOB 440-441.) However, appellant does acknowledge established California Supreme Court authority contradicting his position. (AOB 442-446.) Appellant's arguments lack merit based upon established law.

The information charged appellant in counts four and five as follows: "On or about May 9, 1986 BRYAN MAURICE JONES did willfully, unlawfully murder JOANN SWEETS, a human being in violation of PENAL CODE SECTION 187(a) . . . ¶ On or about August 15, 1986 BRYAN MAURICE JONES did willfully, unlawfully murder SOPHIA GLOVER, a human being, in violation of PENAL CODE SECTION 187 (a)." (31 CT 5804-5805.) Pursuant to Penal Code section 187, subdivision (a), murder is defined as follows: "Murder it is the unlawful killing of a human being, or a fetus, with malice aforethought."

This Court has long acknowledged that the definition of murder in Penal Code section 187, subdivision (a), includes first-degree murder, felony murder, and second-degree murder. (*People v. Witt* (1915) 170 Cal. 104, 107-108; see also *People v. Hughes* (2002) 27 Cal.4th 287, 368-369.) In *Hughes* this Court rejected the argument Penal Code section 189 had to be invoked in the information to charge felony murder when the information charged malice murder under Penal Code section 187. (*People v. Hughes, supra*, 27 Cal.4th at pp. 368-370.) This Court also rejected Hughes' four-part attack claiming: (1) the trial court lacked jurisdiction to try him for the crime of felony murder; (2) the information failed to put him on notice that the prosecution

planned to proceed under a theory of first degree felony murder; (3) the felony murder instructions violated his right to have all elements of the charged crime proved beyond a reasonable doubt; and (5) charging both malice murder and felony murder in one count of the information violated Hughes' right to a unanimous verdict and unconstitutionally subjected him to double jeopardy. (*People v. Hughes*, *supra*, 27 Cal.4th at pp. 369-370.)

Appellant makes essentially the same arguments made and rejected in *Hughes,* but rather than complaining about felony murder under Penal Code section 187, appellant claims Penal Code section 187 does not include first-degree murder. (AOB 440-446.) Appellant bases his argument on this Court's decision in *People v. Dillon* (1983) 34 Cal.3d 441, arguing *Dillon* overruled *People v. Witt*, *supra*, 170 Cal. at page 104. (AOB 443.) This Court in *Hughes* rejected arguments that *Dillon* overruled *Witt.* (*People v. Hughes*, *supra*, 27 Cal.4th at p. 371.) Nonetheless, appellant complains this Court "has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon.*" (AOB 444.) Not so. This Court in *Hughes* explained an accused receives adequate notice of the prosecution's theory of the case from the evidence at the preliminary hearing or postindictment proceedings. (*People v. Hughes*, *supra*, 27 Cal.4th at pp. 369-370.) Suffice it to say, Penal Code section 187, subdivision (a), adequately defines first-degree murder for purposes of charging appellant. (*People v. Witt, supra*, 170 Cal. at page 107-108.)

Citing *Dillon*, appellant also claims Penal Code section 189 rather than Penal Code section 187 defines first-degree murder and felony murder. (AOB 443-444.) According to appellant, Penal Code section 187 only defines second-degree murder so, therefore, to charge him with first-degree murder the prosecution was required to charge him under Penal Code section 189 rather than 187. (AOB 441-446.) However, appellant misconstrues this Court's decision in *Dillon. Dillon* sought to have this Court "abolish the felony-murder rule . . . to conform the common law of this state to contemporary conditions and enlightened notions of justice." (*People v. Dillon*,

supra, 34 Cal.3d at p. 462.) This Court rejected Dillon's argument after conducting a thorough review of the legislative history and finding "in California – in distinction to Michigan – the first degree felony-murder rule is a creature of statute." (*Id.* at pp. 463, 471-472.) In the next section of the opinion, this Court in *Dillon* rejected the argument that felony murder was unconstitutional. (*Id.* at pp. 472-476.) Contrary to appellant's analysis, this Court in *Dillon* did not address what must be alleged in an information to charge first-degree murder, felony murder, or second-degree murder. That is, *Dillon* did not explicitly or implicitly disapprove or overrule this Court's decision in *Witt*.

Appellant also argues that the United States Supreme Court's decision in *Apprendi v. New Jersey* (2000) 530 US 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], required the prosecutor to charge appellant pursuant to Penal Code section 189 rather than 187. (AOB 446-447.) Indeed, *Apprendi* does require that "any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Apprendi v. New Jersey*, *supra*, 530 US at p. 476.) However, appellant was on notice of the first-degree murder charges in the information, the facts were submitted to the jury and the jury was fully instructed regarding first-degree deliberate and premeditated murder, first-degree felony murder as well as second-degree murder. Appellant's claim that the jury convicted him "of uncharged crimes" has no basis in law or the facts. (AOB 447.) Appellant's claim that he was deprived of his Sixth and Fourteenth Amendment due process rights should be rejected.

Appellant's argument that the information only charged him with second-degree murder because it charged him under Penal Code section 187 rather than section 189 should be rejected. Appellant was on notice of the charges against him – including the first-degree murder charges involving Glover and Sweets – the trial court had jurisdiction to try him on these charges, and the jury was properly instructed and found him guilty of the first-degree murders of Glover and Sweets. Appellant's arguments to the contrary should be rejected.

E. The Jury Was Not Required To Agree Unanimously On A Specific Theory Of First Degree Murder

In argument 20, appellant contends the trial court erred by not requiring the jury to agree unanimously on a specific theory of guilt to support a verdict of first degree murder. (AOB 448-456.) Appellant contends the error violated his right to have the prosecution establish proof of the crimes charged beyond a reasonable doubt, to due process, and to a reliable determination of allegations that he committed a capital offense under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and the correlated provisions of the California Constitution. (AOB 448, 452-453.) This claim of instructional error, including its constitutional components, has been forfeited, because appellant failed to assert the claim in the trial court. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1189-1192.) Moreover, as appellant acknowledges, variations of this claim have been repeatedly rejected by this Court, and appellant's argument is similarly lacking in merit.

Appellant claims that malice murder and felony murder have different elements that need to be proved beyond a reasonable doubt in order to convict. (AOB 448-452, citing *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475-477.) Appellant acknowledges that this Court has rejected several arguments pertaining to the relationship between malice murder and felony murder, but argues that this Court has not addressed irreconcilable contradictions in the law of first-degree murder in California. (AOB 448-450.) However, this Court's holdings have clarified any confusion, finding that although the two forms of murder have different elements, only a single statutory offense of murder exists. Felony murder and premeditated murder are not distinct crimes, and need not be separately pleaded. (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; *People v. Hughes*, *supra*, 27 Cal.4th at p. 369; *People v. Kipp* (2001) 26 Cal.4th 1100, 1131; *People v. Silva* (2001) 25 Cal.4th 345, 367; *People v. Carpenter* (1997) 15 Cal.4th 312, 394-395.)

This Court has repeatedly rejected contentions identical to appellant's, and has frequently held that jurors need not unanimously agree on a theory of first degree murder as either felony murder or murder with premeditation and deliberation. (*People v. Benavides* (2005) 35 Cal.4th 69, 100-101; *People v. Lewis* (2001) 25 Cal.4th 610, 654; *People v. Riel* (2000) 22 Cal.4th 1153, 1200.) This rule of law passes federal constitutional muster. (*Schad v. Arizona* (1991) 501 U.S. 624 [111 S.Ct. 2491, 115 L.Ed.2d 555].)

The *Schad* holding, contrary to appellant's analysis, also supports a rejection of appellant's contention that his due-process rights were violated when the trial court failed to require unanimity on each element of the murder charge. (AOB 453-456.) In *Schad*, the United States Supreme Court held that federal due process did not require the jury to agree on one of two alternative statutory theories of first degree murder, i.e., premeditated murder and felony murder. Although the majority agreed that due process imposes some limits on the degree to which different states of mind may be considered merely alternative means of committing a single offense, the court did not agree on the application or extent of such limits. (*Schad v. Arizona*, *supra*, 501 U.S. at pp. 632, 651, 656.)

In writing for the plurality in *Schad*, Justice Souter explained there exists no single test for determining when two means are so disparate as to exemplify two inherently separate offenses. (*Schad v. Arizona*, *supra*, 501 U.S. at pp. 633-637, 643.) Along with history and widespread practice, the relevant mental states must be considered to determine whether they demonstrate comparable levels of culpability. In addressing the culpability level of premeditated murder and felony murder, Justice Souter concluded:

> Whether or not everyone would agree that the mental state that precipitates death in the course of robbery is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental element of a single offense.

(*Schad v. Arizona*, *supra*, 501 U.S. at pp. 642-644.) Thus, the plurality held that unanimous agreement as to the underlying theory of first degree murder was unwarranted. (*Id.* at p.645.) Accordingly, unanimous agreement as to the underlying theory of murder in this case was not required.[104] (See *People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1132; *People v. Lewis*, *supra*, 25 Cal.4th at p. 654; *People v. Box* (2000) 23 Cal.4th 1153, 1212; *People v. Riel*, *supra*, 22 Cal.4th at p. 1200.) Appellant misstates the holding in *Schad* when asserting it simply considered the "underlying brute facts" that make up a particular element of an offense such as whether the element of force or fear in a robbery was established by the defendant's use of a knife or use of a gun. (AOB 454-455.)

In any event, any alleged instructional omission in this case was harmless because the jury was only instructed they could consider the theory of felony murder for purposes of finding appellant guilty of murdering Carpenter and Glover – not Sweets. (45 RT 5133-5134.) The jury did not reach a verdict regarding Carpenter (35 CT 6568–6569) and found appellant guilty of murdering Sweets (38 CT 7287). Therefore, the theory of felony murder was irrelevant to the jury's verdict finding appellant guilty of the first-degree murder of Sweets.

While the jury was instructed on the theory of felony murder based upon murdering Glover during the commission of rape, the jury did not return a verdict regarding the rape/murder special circumstance. (35 CT 6573.) Given the jury's first-degree murder verdict regarding Sweets and the similarity of the evidence establishing appellant's guilt regarding both offenses, it's apparent the jury was not concerned with felony murder as opposed to deliberate and premeditated first-degree murder. In any event, as this Court has found in the numerous cases addressing the issue, the trial court was not required to instruct the jury it had to unanimously agree whether appellant was

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104. This Court has also rejected the assertion that a unanimous jury verdict as to either felony murder or premeditated murder was required pursuant to *Apprendi v. New Jersey*, *supra*, 530 U.S. at page 466. (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 713.)

guilty of deliberate and premeditated first-degree murder or felony murder regarding Glover. (*People v. Benavides*, *supra*, 35 Cal.4th at p. 101.)

Because this Court has repeatedly considered and rejected claims identical to the claim raised attacking the numerous instructions about which appellant complains herein, and because appellant offers no persuasive reason for this Court to reconsider its prior decisions, appellant's argument must again be rejected.

XI.

SUFFICIENT EVIDENCE SUPPORTS APPELLANT'S CONVICTIONS

In argument 21 appellant claims there is insufficient evidence to establish any of his convictions or special circumstances and the court erred by not dismissing the charges involving Simpson and Carpenter following the close of evidence. (AOB 457-485.) Appellant's sufficiency of the evidence arguments mirror his harmless error arguments. (AOB 460-467.) Appellant dissects the evidence of each of the crimes without considering the totality of the evidence or the cross admissibility of the evidence. When the evidence is considered in a light most favorable to the judgment and in its totality, ample evidence supports the verdicts and does not support appellant's argument the court should have granted the motion to dismiss the charges involving Simpson.

When an appeal from a criminal conviction is based on a claim of insufficient evidence, the standard of review is whether after viewing all of the evidence in the light most favorable to the prosecution, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Johnson* (1980) 26 Cal.3d 557, 576-578.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Sanchez* (1995) 12 Cal.4th 1, 32.) In

addition, in evaluating the sufficiency of the evidence an appellate court must presume in support of the judgment the existence of every fact the trier of fact could reasonably have deduced from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes, supra*, 42 Cal.3d at p. 303; *People v. Johnson, supra*, 26 Cal.3d at pp. 576-577; *People v. Hearn* (2002) 116 Cal.Rptr.2d 298.)

The often repeated rule is that, when a verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it. When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trier of fact. (*People v. Smith* (2005) 37 Cal.4th 733, 739.) It is of no consequence that the trier of fact, believing other evidence, or drawing different inferences, might have reached a contrary conclusion. (*People v. Bolin* (1998) 18 Cal.4th 297, 331, 333.) The test is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139; *People v. Mincey* (1992) 2 Cal.4th 408, 432.) Appellant's "hurdle to secure reversal is just as high even when the prosecution's case depends on circumstantial evidence." (*People v. Akins* (1997) 56 Cal.App.4th 331, 336.)

A. Sufficient Evidence Supports The Jury's Verdict That Appellant Murdered Glover And Committed The Special Circumstance Of Murder During The Commission Of Sodomy

Contrary to appellant's assertion otherwise, there was ample evidence supporting the jury's verdict that appellant sodomized and murdered Glover. (AOB 460.) While much of it was circumstantial, it was compelling when compared to the offenses appellant committed against his other victims.

Glover's body was found in close proximity to the residence appellant had access to just as Sweets' body was found in close proximity to his apartment

approximately three months before. As appellant acknowledges (AOB 460), Glover's nude body was found wrapped in a blanket near the Wilsie house. (25 RT 2248-2251, 2308-2309.) At this time, appellant had a key to the Wilsie house so he could stay there and watch over it following the death of Tillie Wilsie. (26 RT 2606-2607, 2621.) Similarly, the partially nude body of Sweets was found wrapped in bedding in the alley in a dumpster behind appellant's apartment where he was staying at the time her body was found. (25 RT 2302, 2362, 2367, 2398.) In an alley near where Glover's body was found, Wilsie's neighbor found Glover's clothes neatly piled. (25 RT 2268-2269, 2288-2291, 2294.)

Glover was last been seen at 11 p.m. the night before her body was found. Glover lived on the streets[105], and she was seen being beaten up to the point she was knocked out of her clothing by a man who demanded money from her[106] – a common occurrence for drug addicted prostitutes[107] – and Glover had drugs in her system[108]. DNA analysis of the sperm found on the anal swab was consistent with appellant's DNA, even though there was a co-contributor of spermatozoa; appellant could not be eliminated as recently having had sex with her. (30 RT 3244-3245, 43 RT 4810-4812.)

Glover's body was found near the Wilsie residence on August 15, 1986. Two months later appellant committed the sexual assaults against Bertha R. at the Wilsie residence, and four days after that appellant committed the attempted murder and sex offenses against Karen M. at the Wilsie residence. (25 RT 2263-2265; 26 RT 2532, 2639-2640.) Glover had drugs in her system (30 RT 3243), and both Bertha and Karen

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105. (25 RT 2286-2288, 2292-2293.)

106. (32 RT 3440-3441, 3455-3456, 3459.)

107. Appellant admitted extensive evidence about the drug underworld and the harsh and brutal life of prostitutes involved in it. Several witnesses testified to a savage beating inflicted upon another drug addicted prostitute. (33 RT 3573-3582, 3600, 3604, 3610-3619, 3670-3674, 3718-3722.)

108. (30 RT 3243.)

were drug users – Bertha smoked marijuana with appellant (26 RT 2642) and while Karen declined appellant's offer to do drugs with him, she was using cocaine and heroin and had a bottle of whiskey with her when appellant picked her up (26 RT 2524-2528, 2567-2569). Drug use by the victims was a common thread running through all of the offenses.

Both Bertha and Karen were strangled into submission (26 RT 2643-2645, 2537-2538), forced to orally copulate appellant (26 RT 2650-2652, 2650-2656), and either raped or sodomized (26 RT 2646-2647, 2650-2656). Similarly, Glover died of strangulation, having severe trauma to her head, neck, and chest (30 RT 3237-3241, 3244), and there was evidence she had been sexually assaulted (30 RT 3244-3245, 26 RT 2458-2462).

Appellant ignores the evidence of the other crimes and only considers the evidence directly associated with Glover's murder when claiming there is insufficient evidence to support his conviction. (AOB 460.) The evidence must be considered in its totality, and not in isolation. Appellant also points to the fact that there was more than one contributor of semen, but appellant could not be ruled out as one of the contributors. Appellant also points to the fact that there were no hairs matching appellant's hair found on Glover's body or on the blanket (AOB 460), but this too is meaningless because these hairs were not significant for purposes of comparison. (33 RT 3546, 3555, 3564-3565[109].) And there was definitive evidence Glover had sex. The fact Glover's clothing was neatly folded in the alley is consistent with appellant's conduct involving Maria R. and Karen M. –luring women into having consensual sex and then violently attacking them to heighten his sexual experience.

Considering these facts in their totality and in a light most favorable to the judgment, there is ample evidence to support appellant's conviction of not only

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109. To be significant for comparison, a hair needs to be from the head or pubic region, but hairs from the body, arms, legs, back, or chest are not good enough for comparison. (33 RT 3555.)

murdering Glover, but also of the special circumstance of committing murder during the commission of sodomy. Appellant's analysis to the contrary should be rejected.

B. Ample Evidence Supports The Jury's Verdict Finding Appellant Guilty Of Murdering JoAnn Sweets

The evidence establishing appellant murdered Sweets, committing sodomy during the commission of the murder, was compelling. Appellant's analysis that his conviction was based on "conjecture and surmise" (AOB 461) exemplifies the paradigm of considering the evidence in the light most favorable to the defense rather than the conviction. The law is clear; the evidence must be considered in a light most favorable to the conviction, even when the evidence is primarily circumstantial. (*People v. Sanchez, supra,* 12 Cal.4th at p. 32.) The evidence considered in this light supports the conviction.

Sweets' nude body was found in a dumpster behind appellant's apartment[110], wrapped in bedding[111] similar to the way Glover's body was wrapped, placed in plastic bags which had appellant's fingerprints on them, covered with a blanket either appellant's mother or sister had made[112], and carpet fibers matching the carpet fibers in appellant's apartment were found on Sweets' shirt, sheet, mattress pad and the Afghan[113]. Sweets' body was found on May 9, 1986, approximately seven months after appellant strangled, attempted to murder, and sexually assaulted Maria R. at the same apartment. (25 RT 2365-2366.) Sweets suffered massive injury to her face and neck, and had been murdered by strangulation. (30 RT 3212-3214, 3218.)

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110. (25 RT 2302, 2362, 2367, 2398.)

111. (25 RT 2399.)

112. (25 RT 2351, 23952397, 28 RT 2783-2785, 2794-2797, 2802-2805, 2007-2011.)

113. (29 RT 30933095, 3130-3134.)

Furthermore, the sheet in which Sweets was wrapped had semen stains with DNA consistent with appellant's DNA, even though there was evidence of a semen co-contributor. (28 RT 2928, 43 RT 4843-4846.) This certainly constitutes substantial, credible evidence supporting the jury's verdict.

Appellant's analysis consists of dissecting this evidence and offering explanations for it, i.e., how his fingerprints got on the plastic bags, how his mother's Afghan ended up covering the body, and why his carpet fibers were found on Sweets' shirt, the sheet, mattress pad and Afghan. (AOB 461, 463-465.) Appellant also argues it is "most significant . . . that no prints were found on the masking tape" holding the garbage bags together (AOB 461), references the testimony of Joyce Euwing that she saw individuals putting carpet into a dumpster in which Sweets' body was found (AOB 462-463), and references the testimony that there could have been multiple contributors to the sperm found on the sheet in which Sweets was wrapped (AOB 463, 465-466). All of these explanations and theories were offered to the jury below, and they rejected them. Euwing's testimony was impeached in several ways; she gave conflicting descriptions of people she identified putting the carpet in the dumpster (32 RT 3378, 34093410, 38 RT 4247-4248, 4252, 4269), the individual whom she identified putting the carpet in the dumpster had an alibi (38 RT 4222-4223, 4227-4229, 4232-4233), and she told a police officer a friend of hers originally identified the individual she later identified as the person she saw putting the carpet in the dumpster (38 RT 4290).

The jury was the ultimate finder of fact. Even if this Court finds appellant's arguments compelling, it cannot substitute its judgment for that of the jury's determinations and credibility judgments. (*People v. Smith, supra*, 37 Cal.4th at p. 739.) The fact that appellant can offer explanations for the evidence, alternative theories of who committed the offenses, and discredit evidence and witnesses is of no consequence on appeal.

C. Sufficient Evidence Supports Appellant's First-Degree Murder Convictions As Well As The Sodomy Special Circumstances, And The Charges Involving Simpson And Carpenter Were Not Subject To Penal Code Section 1118.1

Appellant's claims there is insufficient evidence that the murders of Glover and Sweets were first-degree murders. (AOB 467-473.) Appellant references *People v. Anderson* (1968) 70 Cal.2d 15, 25, and its "tripartite test" – evidence of planning, motive, and manner of killing – claiming there is insufficient evidence of these to establish first-degree murder. (AOB 4627-468, 470, 473.) While appellant acknowledges this is only a "framework" to assist reviewing courts, his analysis treats this framework as the sine qua non for establishing murder. (AOB 468-472.) It is not. (*People v. Sanchez, supra,* 12 Cal.4th at p. 33.) The *Anderson* factors need not be accorded any particular weight, are not exhaustive, and were intended simply to assess whether the evidence supports an inference that the killing(s) occurred as the result of pre-existing reflection rather then rash impulse. (*People v. Hughes* (2002) 27 Cal.4th 287, 370-371.) The evidence in the instant case supports premeditated and deliberated murder.

Again, appellant's arguments simply attempt to spin the evidence in such a way as to try to support the defense rather than his guilt, only considering parts of the picture rather than the totality of it. For example, appellant acknowledges Glover and Sweets were both savagely beaten, but reasons this evinced an "impulsive attack" which was "the result of rage, not planning." (AOB 469.) Appellant also claims there was "no particular and exacting manner" of killing by focusing on the strangulation aspect of the murders while ignoring the totality of the evidence. (AOB 471-473.) However, this very evidence is only a small part of the bigger picture establishing appellant's method of picking up women, luring them to his apartment, strangling them into submission, and sexually assaulting them.

There was ample evidence appellant planned his crimes, picked up women – typically prostitutes – and brought them back to his home where he choked

them into submission and sexually assaulted them. Glover and Sweets were not only beaten savagely but were strangled – and Maria R., Bertha R., and Karen M. also were strangled into submission before they were sexually assaulted. This evinces more than an impulsive attack; it establishes a pattern of behavior of choking women into submission and, in the case of Glover and Sweets, to the point of death. Furthermore, Maria R. testified appellant choked her with a leather rope to the point of unconsciousness (24 RT 2048-2050) and Glover was found with a scarf wrapped around her neck which could have been used as a ligature to strangle her to death (30 RT 3244). Contrary to appellant's limited consideration of the evidence, there was evidence of planning and a particular manner of killing.

Under a separate heading, appellant also claims there is no evidence of motive. (AOB 70.) But motive is not an element of first-degree murder. (See *People v. Smith* (2005) 37 Cal.4th 733, 740.) Rather, it is simply one factor in the rubric of the finite *Anderson* analysis. (See *People v. Sanchez* (1995) 12 Cal.4th 1, 32-33.) Furthermore, appellant's analysis that there was insufficient evidence of motive fails to consider the testimony of Dr. Meloy regarding sexual homicide. Dr. Meloy studied this field and published papers on the topic. (30 RT 3254-3255.) The gravamen of sexual homicide is sexual arousal achieved by violent acts in conjunction with a sexual act. (30 RT 3258-3260.) The offenses committed against Maria R., Bertha R., and Karen M. involved acts of violence in conjunction with forced sexual acts, and there was evidence of violence in conjunction with the sodomizations of both Glover and Sweets. Appellant's motive in committing the murders and acts of violence was to heighten his sexual experience. Appellant's assertion that there was no prior relationship or conduct between appellant and Sweets or Glover is a red herring because a prior relationship is not a requisite of motive or of establishing premeditation and deliberation.

Ample evidence supports the finding appellant committed first-degree, premeditated and deliberated murders and not simply unconsidered or rash impulsive killings. Appellant's analysis to the contrary should be rejected.

Appellant claims insufficient evidence supports the sodomy special circumstances for the Glover and Sweets murders. (AOB 473-474.) Appellant argues that because there were multiple contributors to the sperm found in Glover's anal swab, appellant was either "not involved in the attack on Ms. Glover . . . , or she consented to anal sex . . . ." (AOB 473.) Appellant employs similar reasoning regarding the sperm associated with Sweets. (AOB 473-474.) Appellant's argument assumes that both Glover and Sweets were either sodomized against their will by multiple attackers at the same time or consented to sodomy with two individuals, but appellant rejects the possibility that sodomy could have taken place at different times or that some acts were consensual and others nonconsensual. Appellant's argument ignores the fact that both Maria R. and Karen M. initially agreed to have sex with appellant before he choked and sexually assaulted them, thereby debunking the argument that a person who consents to sex acts cannot be sexually assaulted.

Appellant claims the trial court should have granted his Penal Code section 1118.1 motion for acquittal regarding Tara Simpson because there was no evidence connecting him to her murder. (AOB 474-475.) Appellant makes a similar argument regarding Carpenter when claiming the trial court failed to sua sponte enter a judgment of acquittal. (AOB 476-477.)

Initially, appellant references no authority requiring a court to sua sponte dismiss a count based upon sufficiency of the evidence or, more importantly, that failure by the court to sua sponte dismiss a count pursuant to Penal Code section 1118.1 is a viable issue on appeal. (AOB 475-478.) The case referenced by appellant– *People v. Smith* (1998) 64 Cal.App.4th 1458, 1464 –held failure to make a motion to acquit forfeits the issue on appeal. (*Id.* at p. 1468.) Because appellant did not move to dismiss the charges involving Carpenter, pursuant to Penal Code section 1118 .1, his assertion that the trial court should have done so should be deemed forfeited for purposes of appeal. (*People v. Smith*, 64 Cal.App.4th at p. 1468.)

Nonetheless, appellant's analysis on the facts lacks merit. The test applied by trial courts to a motion for acquittal is whether, including reasonable inferences to be drawn from the evidence, there was any substantial evidence of each element of the offense charged. (*People v. Coffman* (2004) 34 Cal.4th 1, 90.) This Court independently reviews the trial court's denial of a motion for acquittal. (*People v. Cole* (2004) 33 Cal.4th 1158, 1213.) Appellant's analysis of the Simpson and Carpenter murders concedes all of the elements of murder existed since appellant's argument focuses on only the "evidence connecting [him] to Trina Carpenter . . . [and] the evidence was also insufficient with respect to the Tara Simpson charges." (AOB 477.) The trial court properly denied appellant's motion for acquittal based upon the totality of the evidence.

Appellant summarizes the evidence of the Simpson and Carpenter murderers in isolation and not in consideration of the common factors between these two murderers and the murder of Sweets, the attempted murders of Maria R. and Karen M. as well as the offenses involving Bertha R. In light of the cross admissibility of this evidence, appellant's claims should be rejected.

Simpson, Carpenter and Sweets were found in dumpsters behind appellant's apartment – Carpenter having been set on fire just as Simpson's body had been. A car matching the description of appellant's was seen by the dumpster with Carpenter's body shortly before it was found on fire. (25 RT 2222-2223, 2229.) Furthermore, there was evidence of asphyxia regarding all three[114] as well as drug use[115]. There was also evidence all three had recently had sex[116] (sperm consistent with

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114. Simpson (30 RT 3190-3191), Carpenter (30 RT 3201, 3206, 3208), Sweets (30 RT 3212, 3218).

115. Simpson (30 RT 3197-3199), Carpenter (30 RT 3207), and Sweets (30 RT 3218).

116. Simpson (30 RT 3197), Carpenter (26 RT 2458-2459, 2479-2481, 2508, 30 RT 3203, 3207), Sweets (26 RT 2458-2462, 2486).

appellant's was found in the Carpenter[117] and Sweets[118] cases) and all three had trauma to the neck and face region[119]. Considering the offenses suffered by Maria R., Bertha R. and Karen M. involved strangulation and sexual assault and all three used drugs – appellant asked Karen M. if she wanted drugs and smoked marijuana with Bertha R. – and this evidence was cross-admissible, the trial court properly denied appellant's Penal Code section 1118.1 motion regarding the count involving Simpson. Furthermore, even if the issue is not forfeited regarding Carpenter, contrary to appellant's assertion otherwise, the court was not derelict in making its own motion to dismiss the charges involving Carpenter pursuant to Penal Code section 1118.1. (AOB 476.)

Appellant requests that this Court direct the lower court to enter a judgment of acquittal regarding the Simpson and Carpenter charges because of insufficient evidence. (AOB 475-476.) Appellant also claims the penalty should be reversed because the jury should not been allowed to consider the Simpson and Carpenter evidence for purposes of determining his penalty. (AOB 477-478.) Appellant's claims lack merit in light of the totality of the evidence, and the court granted the People's motion to dismiss these two counts at sentencing. (38 CT 7317.) Appellant's penalty should remain intact.

D. Sufficient Evidence Supports The Jury's Verdict Finding Appellant Guilty Of The Offenses Committed Against Karen M.

Appellant asserts it is "mystifying the jury could find [Karen M.] credible beyond a reasonable doubt." (AOB 480.) Appellant's argument challenging his convictions for the offenses involving Karen M. addresses her credibility. (AOB 478-484.) It is well-established that credibility issues rest within the sole province of the

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117. (28 RT 2914-2916, 2925-2926, 2935-2936.)

118. (28 RT 2928.)

119. Simpson (30 RT 3183-3184), Carpenter (30 RT 3202-3203, 3205-3206, 3208-3210) Sweets (30 RT 3212-3214).

jury. This Court has consistently recognized:

> In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation omitted.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation omitted.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation omitted.]

(*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

While appellant acknowledges the jury makes credibility determinations, appellant references authority from other jurisdictions in an attempt to bolster his argument that Karen M.'s testimony was inherently unreliable. (AOB 481-484.) However, none of the facts or law reference by appellant establish that the offenses committed against Karen M. were physically impossible or inherently improbable. *(People v. Young, supra,* 34 Cal.4th at p. 1181.)

Appellant argues there is insufficient evidence to support the offenses involving Karen M. because she was a "career prostitute" who admitted lying to receive favorable treatment for cases pending against her, she was drunk when appellant sexually assaulted and attempted to murder her, she did not file a report with the police when they responded to the scene and was dressed when the police arrived. (AOB 478-481.) However, none of these facts render Karen M.'s testimony and the other evidence supporting the offenses against her physically impossible or inherently improbable. The fact Karen M. admitted to prostituting herself and seeking favorable treatment for her testimony in no way made it inherently improbable. In fact, she did not receive favorable treatment in pending unrelated cases in return for her testimony. (26 RT 2588-2589, 2591-2592.) Likewise, the fact Karen M. admitted being under the influence of drugs and intoxicated after being forced to drink whiskey did not render her testimony inherently improbable. If anything, it lent credibility to her inability to recall the events with clarity. (26 RT 2550-2556.) These factors are exactly the credibility issues for the jury's consideration. Also, Karen M. testified appellant forced her to drink whiskey and, as appellant concedes (AOB 480), an empty bottle of whiskey

was found at the Wilsie home by Marjorie Wilsie when she found Karen M. passed out at the house. (26 RT 2609-2612.) This lends credibility to Karen's testimony. Contrary to appellant's argument otherwise, even a "dead drunk" prostitute can be strangled and sexually assaulted. (AOB 480.)

Furthermore, as with his other claims of insufficient evidence, appellant ignores the evidence of the offenses appellant committed against Maria R. and Bertha R. Both Maria R. and Bertha R. were choked by appellant, and Bertha R. described being choked exactly the way Karen M. described appellant choking her – coming from behind and wrapping his arm around her neck. (26 RT 2643, 2536-2538, 2549-2550.) Karen M. was picked up in the same car as Bertha R. – the light blue 280Z –and both were taken back to the Wilsie residence. (26 RT 2525-2526, 2637-2638.) Considering the totality of the evidence, there is nothing "mystifying"[120/] about the jury's verdict finding appellant guilty of the charges involving Karen M.

Appellant's lengthy attack on the jury's verdict finding him guilty of the attempted murder, rape and sodomy of Karen M. lacks merit. Appellant's claims do not establish the evidence proving these offenses as either physically impossible or inherently improbable but, instead, simply go to credibility. Therefore, they should be rejected.

Appellant's challenge to the sufficiency of the evidence of the charges against him are not based on the totality of the evidence so they should be rejected. Ample evidence supports the verdicts, so appellant's judgment should be upheld.

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120. (AOB 480.)

XII.

THE TESTIMONY BY BERTHA R. DURING THE PENALTY PHASE WAS PROPERLY ADMITTED UNDER PENAL CODE SECTION 190.3, FACTOR (B)

In argument 23, appellant references Penal Code section 190.3, factor (a), claiming the trial court erroneously admitted victim impact testimony by Bertha. (AOB 490-509.) Appellant argues that because the offenses involving Bertha occurred in 1996 and victim impact evidence was not found constitutional by the United States Supreme Court until 1991, its use was in violation of prohibition against ex post facto laws. (AOB 490-494.) Appellant also argues Bertha's testimony was irrelevant regarding any of the capital offenses of which he was convicted. (AOB 495.) Additionally, appellant complains victim impact evidence was received that did not relate to the murder victims but, rather, to his other victims and the prosecutor improperly commented upon it during closing arguments. (AOB 498-507.) Appellant's arguments lack merit because not all victim impact evidence must relate to the murder victims involved in the instant offense. This Court has found victim impact evidence does not violate the prohibition against ex post facto laws and has held the testimony of a defendant's victims of prior violent crimes admissible pursuant to Penal Code section 190.3, factor (b).

Prior to trial, appellant sought to preclude Bertha from testifying during the penalty phase, referencing Penal Code section 190.3, factor (c). (31 CT 5763-5766.) The prosecution responded that the Bertha evidence was admissible pursuant to Penal Code section 190.3, factor (b), as prior violent criminal activity and as a prior felony conviction under Penal Code section 190.3, factor (c). (31 CT 5868-5871.) The prosecutor pointed out that evidence admissible pursuant to Penal Code section 190.3, factor (b), cannot be excluded under Evidence Code section 352, citing *People v. Zapien* (1993) 4 Cal.4th 929, 987. (31 CT 5870.) Prior to the penalty phase trial, the court held a hearing regarding the admissibility of testimony by LaVern Allen and Tracy

Entzminger as well as held an Evidence Code section 402 hearing addressing Allen's testimony. (49 RT 5334-5338; 50 RT 5359-5379.) Prior to Bertha testifying, appellant objected to her testimony. (50 RT 5510.)

This Court has addressed and rejected appellant's claim that the admission of victim impact evidence in capital cases violates the prohibition against ex post facto laws, that it violates a capital defendant's federal due process rights, or that is unconstitutionally vague.[121] (*People v. Jurado* (2006) 38 Cal.4th 72, 131-132, citing *People v. Brown* (2004) 33 Cal.4th 382, 394-395.) This Court in *Brown* squarely addressed the claims by appellant, finding not only that the guarantees against ex post facto laws did not apply to victim impact evidence because it was a judicially created rule but also finding no violation of due process occurred when admitting victim impact evidence of a crime committed before the United States Supreme Court's decision in *Payne v. Tennessee* (1991) 501 U.S. 808, 827 [111 S.Ct. 2597, 115 L.Ed.2d 720] holding victim impact evidence was not unconstitutional. (*People v. Brown, supra*, at pp. 394-395.)

Concerning the scope of victim impact evidence, this Court has found that evidence of the impact on the victim of a defendant's prior violent act is admissible. (*People v. Holloway* (2004) 33 Cal.4th 96, 143-144; *People v. Ashmus* (1991) 54 Cal.3d 932, 985.) In *Ashmus* this Court stated, "The issue of other violent criminal activity embraces not only the existence of such activity but also all the pertinent circumstances thereof. [Citation.] ***Such circumstances may include the result of the conduct*** . . . ." (*Ibid.*, emphasis added.) That is, "The impact of a capital defendant's

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121. Appellant's claim that the admission of victim impact evidence under Penal Code section 190.3 is impermissibly vague (AOB 508-509), should be rejected.

past crimes on the victims of those crimes is relevant to the penalty decision." (*People v. Mendoza* (2000) 24 Cal.4th 130, 185 [victim showed scars caused by defendant].) In *Brown* this Court acknowledged victim impact evidence is admissible under both Penal Code section 190.3, factors (a) and (b). (*People v. Brown*, *supra*, 33 Cal.4th at p. 397.)

Holloway addressed a situation almost identical to that in the instant case. In accordance with Penal Code section 190.3, factor (b), a victim whom Holloway had violently assaulted after breaking into her apartment in 1976 testified that as a result of the attack she underwent psychological treatment and detailed how her life changed after his attack. (*People v. Holloway*, *supra*, 33 Cal.4th at p. 143.) This Court found Holloway's victim's testimony properly admitted. (*Id.* at pp. 143-144.) Just as Holloway's victim was allowed to testify to the result of Holloway's conduct, Bertha was allowed to testify to the results of appellant's crimes against her and how her life was changed. Bertha's downward spiral was a direct consequence of appellant's violent and prolonged sexual assault on her.

This Court has acknowledged the propriety of testimony by sexual assault victims about the fact that they continue to experience pain, depression, and fear as well as about the emotional effect on them of a defendant's violent criminal acts. (*People v. Holloway*, *supra*, 33 Cal.4th at p. 143, citing *People v. Mickle* (1991) 54 Cal.3d 140, 187 & *People v. Price* (1991) 1 Cal.4th 324, 479.) Nonetheless, this Court in *Holloway* did not decide the parameters of testimony by victims of prior violent acts, stating

> We need not decide here whether evidence of indirect or idiosyncratic effects of prior criminal violence is irrelevant under factor (b), or its use unconstitutional, for the evidence defendant complains of was neither remote nor unforeseeable.

(*People v. Holloway*, *supra*, 33 Cal.4th at p. 144.) In *Brown*, this Court acknowledged that victim impact testimony is not without its limits and only encompasses evidence

that logically shows the harm caused by the defendant. (*People v. Brown*, *supra*, 33 Cal.4th at p. 396.) Bertha's testimony simply showed the harm caused by appellant; harm that was not remote nor unforeseeable as a result of his attacks on her.

Bertha's penalty phase testimony is only seven pages; neither excessive nor time-consuming. (50 RT 5511-5518.) At the time of the violent sexual attacks by appellant, Bertha had a boyfriend and was a single parent to her son. (50 RT 5512.) Bertha described how her feelings towards sex changed after the attack and how this affected her relationship with her boyfriend. (50 RT 5513.) Bertha also became withdrawn and began drinking excessively, eventually turning to drugs to numb herself, sending her son to be taken care of by her sister. (50 RT 5513-5514.) Even though Bertha sought the help of a therapist, she lost her job and continued to drink. (50 RT 5514-5515.) Bertha turned to prostitution to support her drug habit but eventually sought help, went through a detox program, stop using drugs and alcohol, got a job and turned her life around. (50 RT 5515-5517.)

Bertha's testimony about the consequences of appellant's violent attack– its emotional effect, psychological pain and her use of drugs to numb that pain – logically show the harm appellant caused as a result of his traumatic sexual assault against her. (*People v. Holloway*, *supra*, 33 Cal.4th at pp. 143-144; *People v. Brown*, *supra*, 33 Cal.4th at p. 397 ["Indeed, it is only logical that the effects, both psychological and physical, of a violent and murderous assault such as defendant's would be enduring."].) The trial court properly allowed the testimony of Bertha during the penalty phase.

Appellant erroneously asserts that victim impact evidence is only allowed under Penal Code section 190.3, factor (a). (AOB 495.) In fact, appellant's entire analysis – including his claim of prosecutorial misconduct and error analysis – is based upon the faulty premise that victim impact evidence is only admissible under factor (a). (AOB 495-507.) As the authorities referenced above establish, testimony by victims of violent crimes committed by a defendant is admissible under Penal Code section 190.3,

factor (b). (*People v. Holloway, supra*, 31 Cal.4th at p. 143.) Appellant's argument and analysis are fatally flawed because he fails to acknowledge the admissibility of factor (b) evidence, including how the victims of prior violent crimes were affected.

Appellant argues that the prosecutor committed misconduct during closing arguments when commenting on the evidence of the impact of appellant's violent crimes. (AOB 501-504.) However, appellant made no objection during the prosecutor's closing arguments about which he now complains on appeal. (53 RT 5929, 5933, 5936 5938-5940, 5942-5943.) Therefore, appellant's claim should be deemed forfeited for purposes of appeal. (*People v. Brown*, *supra*, 33 Cal.4th at pp. 398-399.) Furthermore, the prosecutor had wide latitude to argue the facts of the case. (*People v. Brown, supra*, 33 Cal.4th at pp. 399-400.) The prosecutor did not overstepped the bounds of permissible argument when commenting on the evidence.

Appellant's complaint of error and prejudice should be rejected because they failed to take into consideration the admissibility of factor (b) evidence. Rather, appellant bases his entire argument upon the erroneous premise that all victim impact evidence is relevant only if it relates to the murder victims themselves. Appellant's claim should be rejected and his penalty upheld on appeal.

XIII.

LAVERN ALLEN'S TESTIMONY ABOUT APPELLANT'S FORCED SEXUAL CONDUCT WITH HER WAS PROPERLY ADMITTED UNDER PENAL CODE SECTION 190.3, FACTOR (B)

In argument 24, appellant asserts the trial court erroneously allowed testimony during the penalty phase establishing appellant committed incest with his sister, LaVern Allen, when he was between 11 and 12 years old, so the jury may have imposed the death penalty based on conduct he committed when he was a juvenile. (AOB 510-517.) Appellant relies upon *Thompson v. Oklahoma* (1988) 487 U.S. 815 [108 S.Ct. 2687, 101 L.Ed.2d 702], arguing the imposition of the death penalty is

tantamount to executing a juvenile. (AOB 510, 513-514.) Appellant acknowledges authority by this Court – *People v. Raley* (1992) 2 Cal.4th 870 – which rejected this very argument and asks this Court to reconsider it. (AOB 510-514.) Summing up his argument, appellant speculates, "for some jurors, the finding of incest may have been the 'crusher,' so much so that it enabled them to find that the aggravating circumstances substantially outweighed the mitigating circumstances and justified the death penalty." (AOB 516.) Appellant's arguments are unavailing for several reasons. First, he failed to make these arguments below so they should be deemed forfeited for purposes of appeal. Second, appellant's argument to reconsider this issue is unavailing because it ignores the fact the jury considers both the offense *and* the offender to determine the appropriate penalty. Third, appellant's argument is based upon pure speculation and hypothecation about the jurors' possible thought processes concerning his incestuous conduct with LaVern. Fourth, appellant essentially argues that the prejudicial effect of the evidence outweighed the probative value; an Evidence Code section 352 claim without reference to that section. Appellant's complaints should be rejected.

Appellant does not challenge the trial court's finding that the sexual conduct with his sister was forced and, therefore, admissible under Penal Code section 190.3, factor (b). This was the issue litigated below and decided against appellant. (49 RT 5334-5338; 50 RT 5379-5381.) In the court below, appellant did not assert the jury would base the decision to impose the death penalty upon conduct appellant committed as a juvenile or argue the jury's consideration of this evidence was tantamount to executing a juvenile. Objections must be explicit, timely, based upon specific theories, and seen through a final determination. (Evid. Code, § 353; *People v. Holloway* (2004) 33 Cal.4th 96, 128 [objection that evidence would cause jury to speculate about defendant's prior record did not preserve Evidence Code section 1101 issues].) Because appellant failed to raise this claim below, it should be deemed forfeited for purposes of appeal.

Assuming arguendo the issue is not forfeited, this Court's decision in *Raley* addressed and rejected the argument that evidence of juvenile misconduct is not admissible under Penal Code section 190.3, factor (b). (*People v. Raley*, *supra*, 2 Cal.4th at p. 909.) Particularly, this Court in *Raley* rejected an argument challenging the admission of juvenile misconduct as violative of the Eighth Amendment based upon *Thompson v. Oklahoma* (1988) 487 U.S. 815 [108 S.Ct. 2687, 101 L.Ed.2d 702]. Appellant makes the same argument. (AOB 510, 513-514.) This Court held *Thompson v. Oklahoma*, 487 U.S. 815, did not apply to *Raley* because *Thompson* involved a minor whom the state intended to punish by death whereas the conduct Raley committed as an adult was the conduct resulting in the imposition of the death penalty. (*Ibid.*) This Court stated,

> As we have explained before in rejecting a constitutional attack on the admission of evidence of juvenile misconduct, "the penalty verdict is attributable to [defendant's] current conduct, i.e., murder with a special circumstance finding, not his past criminal activity." [Citation.]

(*Ibid.*) This reasoning is sound and applies to appellant's case. Clearly, appellant was not a minor when he committed the capital offenses in the instant case, and it was the murders of Glover and Sweets with the special circumstances which resulted in the jury's imposition of the death penalty.

Appellant challenges this Court's analysis in *Raley*, claiming that because the jury is allowed to determine the weight to be given the various factors under consideration in the penalty phase, it is possible that they may have imposed the death penalty based upon appellant's violent criminal incestuous conduct as a juvenile. (AOB 511-513.) Appellant complains some jurors may have been so offended by his incestuous conduct that they based his sentence on this and not the offenses for which he was convicted. Besides the speculative nature of his argument, the jury's determination of the penalty is based on both the circumstances of the particular offense ***and*** the character of the offender. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [96 S.Ct. 2978, 49 L.Ed.2d 944]; *People v. Mendoza* (2000) 24 Cal.4th 130, 192

[jury considers aggravating and mitigating evidence to determine if death or life is the appropriate penalty for particular offense and offender].) So the jury was instructed in the instant case. (53 RT 5921-5922.) Therefore, because the jury considers both the offense and the offender to determine the penalty, appellant's foundational premise that his current offense "only makes him . . . *eligible* for death"[122] is erroneous; the current offense must also be considered when determining the appropriate penalty. Indeed, as this Court has held, the death penalty is only imposed based on the current offense and not upon prior violent conduct admitted under factor (b). (*People v. Raley*, *supra*, 2 Cal.4th at p. 909.)

Additionally, appellant's argument is both purely speculative and based upon an Evidence Code section 352 analysis; i.e., that the probative value of the 190.3, factor (b), evidence was outweighed by its prejudicial effect. Appellant's argument is doomed to fail on both fronts. Appellant postulates some jurors may have imposed the death penalty by assigning "enough weight to the crime of incest to tip the balance in favor of death,"[123] or because "the Bible commands that death be meted out to males who commit incest,"[124] or had the "personal faith and deeply-held view of many [who] find incest aberrant and worthy of the severest penalty,"[125] or "even agreed with Dante, that such violators deserve eternal damnation."[126] Such musings necessarily involve an attempt to divine or speculate the thought processes of the jury; an improper consideration when challenging a jury's determination. (Evid. Code, § 1150; *People v. Danks* (2004) 32 Cal.4th 269, 301-302.)

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122. (AOB 513.)

123. (AOB 512.)

124. (AOB 513, 516.)

125. (AOB 512-513.)

126. (AOB 516.)

Furthermore, it is well-established that while the trial court can control the manner in which evidence of past criminal conduct is offered, it does not have discretion to completely exclude evidence of that crime under Evidence Code section 352. (*People v. Anderson* (2001) 25 Cal.4th 543, 586.) When evidence is admissible under Penal Code section 190.3, factor (b),

> 'The court is not given discretion under Evidence Code section 352, to exclude this evidence when offered at the penalty phase where . . . the question for the jury is not one of fact in determining guilt. . . .' (*People v. Zapien, supra*, 4 Cal.4th at p. 987.)

(*People v. Sanders* (1995) 11 Cal.4th 475, 542.) Because appellant concedes the forced sexual conduct with Allen was admissible under factor (b), the trial court did not have discretion to withhold it from the jury's consideration.

Appellant refers to the prosecutor's closing arguments commenting on Allen's testimony purporting to bolster his argument that "the incendiary incest testimony was prejudicial." (AOB 514-516.) Because appellant made no objection to the prosecutor's closing arguments, any complaint about them must be deemed forfeited. (*People v. Brown, supra*, 33 Cal.4th at pp. 398-399.) However, appellant does not assert the prosecutor's argument was improper comment on the evidence but, rather, states "the point is that, as members of decent society, the silent jurors may have held the . . . view" that incest is evil. (AOB 516.) Indeed, this hardly establishes prejudice since the same could be said of murder and sodomy– the crimes appellant was convicted of. In any event, the prosecutor's closing arguments in no way bolster appellant's argument or analysis.

Appellant's argument that his forced sexual conduct with his sister was improperly admitted should be rejected. As this Court held in *Raley*, its admission did not violate the Eighth and Fourteenth Amendments. Appellant's arguments that the jury might have found this so incendiary as to base their judgment upon it ignores the fact that the jury considers both the offense and the offender – not just the offender – and that its admission under Evidence Code section 190.3, factor (b), was not subject to

discretion under Evidence Code section 352. This Court's decision in distinguishing *Rayley* from *Thompson v. Oklahoma, supra*, 487 U.S. at 815, was soundly reasoned and need not be readdressed based upon the arguments propounded by appellant. Appellant's judgment should be upheld.

XIV.

THE JURY WAS PROPERLY INSTRUCTED AT THE PENALTY PHASE TRIAL, INCLUDING THE INSTRUCTION TO DISREGARD ALL PREVIOUS INSTRUCTIONS (CALJIC NO. 8.84.1)

In argument 25, appellant claims the trial court committed error by instructing the jury during the penalty phase, according to CALJIC No. 8.84.1, to disregard all previous instructions and then failing to reinstruct the jury with the guilt phase instructions. (AOB 518-538.) Appellant proffers a laundry list of instructions relevant to the guilt phase which he purports should have been repeated during the penalty phase (AOB 518-519), but appellant misconstrues the authority upon which he relies, i.e., *People v. Babbitt* (1988) 45 Cal.3d 660, when claiming these instructions should have been repeated during the penalty phase. (AOB 522-523.) The authority upon which appellant relies only concerns instructions on evidentiary matters and not the determination of guilt. Appellant's claim lacks merit because the jury was properly instructed during the penalty phase trial.

In *Babbitt*, this Court addressed a claim that the trial court failed to clarify which instructions applied to the guilt and sanity phase of the trial and which applied to the penalty phase of the trial because the jury was not instructed – contrary to the circumstances of the instant case – to disregard instructions from the guilt phase trial. (*People v. Babbitt, supra*, 45 Cal.3d at p. 717.) In a footnote in *Babbitt* this Court advised "[to] avoid any possible confusion in future cases, trial courts should expressly inform the jury at the penalty phase which of the instructions previously given continue to apply." (*Id.* at p. 718, fn. 26.) Later, CALJIC No. 8.84.1 was modified to its current

form to instruct the jury in pertinent part, "Disregard all other instructions given to you in other phases of this trial," and this instruction was given in the instant case. (53 RT 5973.) The use note to CALJIC No. 8.84.1, which this Court has referenced in its decisions, states that this instruction "'should be followed by all appropriate instructions beginning with CALJIC No. 1.01, concluding with CALJIC 8.88.' (Use Note to CALJIC No. 8.84.1 (7th ed.2005) p. 445.)" (*People v. Moon* (2005) 37 Cal.4th 1, 37, fn. 6.) It is this use note which appellant misconstrues.

The language in this use note upon which appellant focuses is the phrase "*all appropriate instructions.*" (*People v. Moon*, *supra,* 37 Cal.4th 1, 37, fn. 6. emphasis added.) Appellant's analysis construes this to mean most of the instructions given during the guilt phase should have been given during the penalty phase; i.e., the definitions of the crimes and special circumstances of which appellant had already been found guilty, sufficiency of the evidence, evidence of other crimes, evidence of other crimes must be proven by a preponderance of the evidence, the definition of preponderance of the evidence, motive, appellant's right not to testify, the definition of admissions, Corpus Delicti, factors to consider in proving identity by eyewitness testimony, concurrence of act and specific intent, mental state, abandonment of attempt, murder, malice of forethought, etc. (AOB 518-519.) Appellant reasons that because there was a substitution on the jury panel and other jurors may have had a "lingering doubt" about his guilt, all these instructions (and more) should have been given. (AOB 524-536.) However, appellant was not entitled to relitigate his guilt during the penalty phase. In fact, some of the instructions he purports should have been given conflicted with the jury's duty during the penalty phase; the instruction that evidence of other crimes must be proven beyond a preponderance of the evidence would have conflicted with the fact that the evidence of his other violent criminal conduct had to be proven beyond a reasonable doubt.

This Court in *Moon* addressed a claim similar to that made by appellant. Moon complained the court failed to give several instructions at the penalty trial which

had been given during the guilt trial. (*People v. Moon*, *supra*, 37 Cal.4th at p. 36.) The instructions in *Moon* which were not given included how to consider statements by attorneys, testimony for which an objection was sustained, and insinuations couched in questions (CALJIC No. 1.02) the prohibition on independent investigation (CALJIC No. 1.03), the definitions of "evidence," "direct evidence," and "circumstantial evidence" (CALJIC No. 2.00), how to consider inconsistent statements by witnesses (CALJIC No. 2.13), assessing the believability of a witness (CALJIC No. 2.20), the weighing of conflicting testimony (CALJIC No. 2.22), and the sufficiency of the testimony of a single witness (CALJIC No. 2.27). (*People v. Moon*, *supra*, 37 Cal.4th at p. 36.) As will be established later, these instructions were given in the instant case. Appellant references another case in which the trial court did not give some instructions during the penalty phase that were given during guilt phase – *People v. Carter* (2003) 30 Cal.4th 1166. (AOB 520-521, 523, 536-537.) In *Carter* the Court did not instruct during the penalty phase on the credibility of a witness (CALJIC No. 2.20), on weighing conflicting testimony (CALJIC No. 2.22), on expert testimony (CALJIC No. 2.80), and pertaining to accomplice testimony and corroboration thereof (CALJIC Nos. 3.11 & 3.12). (*People v. Carter*, *supra*, 30 Cal.4th at p. 1219.) In both cases, this Court found error committed but found it harmless. (*People v. Moon*, *supra*, 37 Cal.4th at p. 39; *People v. Carter*, *supra*, 30 Cal.4th at p. 1222.)

Moon and *Carter* are germane for two reasons: first, they highlight the types of instructions which should be given in both the guilt and penalty phases of a capital trial; and second, they establish the failure to instruct on these instructions is harmless unless appellant establishes otherwise.

First, *Moon* and *Carter* are germane because they highlight the fact that this Court in *Babbitt*, *Moon*, and *Carter* (as well as the use note for CALJIC No. 8.84.1) only concerned instructions addressing consideration of the evidence, not reconsidering guilt. (*People v. Moon*, *supra*, 37 Cal.4th at p. 36 [trial court "failed to instruct the jury generally regarding consideration of the valuation of evidence"]; *People v. Carter*,

supra, 30 Cal.4th at p. 1120 [failure to demonstrate "that the omission of the evidentiary instructions here resulted in prejudice"]. In fact, this Court in *Moon* stated "We again strongly urge trial courts to ensure penalty phase juries are properly instructed on *evidentiary matters*." (*People v. Moon*, *supra*, at p. 37, fn. 7, emphasis added.) Appellant's premise is that the penalty phase instructions should include guilt phase instructions to allow the jury to reconsider appellant's guilt for the offenses the jury already found him guilty of committing. This premise is unsupported by the use note for CALJIC No. 8.84.1 or the *Moon* and *Carter* decisions. The jury was instructed with the residual doubt instruction.[127] (53 RT 5982.) But appellant references no authority, and respondent is unaware of any, supporting the idea that the residual doubt instruction requires the jury to be instructed with all of the guilt phase instructions suggested by appellant.

Second, this Court in *Carter* found the defendant failed to establish prejudice by simply demonstrating "that various other evidentiary instructions were applicable on the facts of this case, but [doing] no more than [speculating] that their absence somehow prejudiced him." (*People v. Carter*, *supra*, 30 Cal.4th at p. 1221.) In the instant case, in a lengthy analysis appellant simply speculates how the instructions he complains should have been given might have helped him. (AOB 524-536.) Speculation cannot establish prejudice. (*People v. Carter*, *supra*, 30 Cal.4th at p. 1221.) Furthermore, appellant was not entitled to have the jury reconsider his guilt. (See *Oregon v. Guzek* (2006) __ U.S. __ [126 S.Ct. 1226, 1231-1232, 163 L.Ed.2d 1112].

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127. The jury was instructed:

> If you have any residual doubts about the circumstances attending the crimes as found in the guilt phase, you may consider such doubts in mitigation under factor "a" of the penalty phase factors.
>
> Residual doubt is defined as that state of mind between "beyond a reasonable doubt" and "beyond all possible doubt."

(53 RT 5982.)

In the instant case the court fully instructed the jury on consideration of the evidence. In pertinent part, the jury was instructed not to consider statements made by attorneys as evidence (53 RT 5974), on direct and circumstantial evidence (53 RT 5975-5976), the believability of witnesses and weighing conflicting testimony (53 RT 5976-5978), residual doubt about the crimes found in the guilt phase (53 RT 5982), criminal acts involving force or violence other than those for which appellant had been convicted and the fact that they must be proven beyond a reasonable doubt to be considered (53 RT 5982-5983), and reasonable doubt as it applied to other crimes activity (53 RT 5983-5984).[128] Besides these instructions, the jury in the instant case received instructions the jury did not receive in *People v. Moon*, *supra*, 37 Cal.4th at page 36: considering statements by attorneys, sustained objections and insinuations couched in questions. (53 RT 5774-5775.)

Contrary to appellant's argument, the jury was fully instructed regarding consideration of all the evidence to determine appellant's penalty. While some of the instructions given during guilt phase were repeated during the penalty phase, appellant erroneously argues the jury should have been instructed with the full panoply of guilt phase instructions which he sets forth in his briefing. (AOB 518-519.) Most of the instructions appellant enumerates were irrelevant to the consideration of the penalty phase of his trial. For the jury to have received these instructions would not only have been unduly confusing but unprecedented. Appellant's arguments should be rejected and his penalty upheld.

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128. Many of these instructions were not given in *Carter*. (*People v. Carter*, *supra*, 30 Cal.4th at p. 1219.)

XV.

APPELLANT'S CHALLENGES TO CALIFORNIA'S DEATH PENALTY STATUTE HAVE ALL BEEN REPEATEDLY REJECTED BY THIS COURT AND JONES PROVIDES NO REASON FOR THIS COURT RECONSIDERING ITS HOLDINGS

In arguments 26 through 30, appellant alleges numerous aspects of California's death penalty sentencing scheme violate the United States Constitution and international law. (AOB 538-609.) As appellant himself concedes throughout his arguments, many of these claims have been presented to, and rejected by, this Court and United States Supreme Court in prior capital appeals. (AOB 538-539, 543-545, 548-549, 557, 560, 573, 579, 589, 591-592, 606.) Because appellant fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should all be rejected. Moreover, as this Court has observed in the past, it is entirely proper to reject appellant's complaints by case citation, without additional legal analysis. (*People v. Harrison* (2005) 35 Cal.4th 208, 260-261; *People v. Welch* (1999) 20 Cal.4th 701, 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.)

A. Intercase Proportionality Review Is Not Required By The Federal Or State Constitutions

In argument 26, appellant contends the failure of California's death-penalty statute to require inter-case proportionality review violates his Eighth and Fourteenth Amendment rights. (AOB 538-546.) Appellant's argument is not well taken, as this Court has repeatedly rejected identical contentions based on United States Supreme Court precedent.

Intercase proportionality review is not constitutionally required in California (*Pulley v. Harris* (1984) 465 U.S. 37, 51-54, 104 S.Ct. 871, 79 L.Ed.2d 29; *People v. Wright* (1990) 52 Cal.3d 367), and this Court has consistently declined to undertake it. (*People v. Harrison*, *supra*, 35 Cal.4th at p. 261; *People v. Morrison*

(2004) 34 Cal.4th 698, 730; *People v. Welch*, *supra*, 20 Cal.4th at p. 772; *People v. Majors* (1998) 18 Cal.4th 385, 432; *People v. Millwee* (1998) 18 Cal.4th 96, 168; *People v. Mayfield* (1997) 14 Cal.4th 668, 812; *People v. Marshall* (1996) 13 Cal.4th 799, 865-866; *People v. Ray* (1996) 13 Cal.4th 313, 360; *People v. Champion* (1995) 9 Cal.4th 879, 950-951.)

Appellant claims that the absence of intercase proportionality review at trial or on appeal violates his right to equal protection of the law under the Fourteenth Amendment of the United States Constitution. (AOB 542-546.) Appellant maintains it is unfair to afford non-capital inmates such review under former Penal Code section 1170, subdivision (f), of the determinate sentencing law, but not to allow such review to capital defendants. Appellant acknowledges that this Court rejected this claim in *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288, but he nevertheless urges a re-examination of the issue. (AOB 543-545.)

This Court has consistently rejected the claim that Equal Protection requires that capital defendants be provided with the same sentence review afforded felons under the determinate sentencing law. (*People v. Moon* (2005) 37 Cal.4th 1, 48; *People v. Cox* (2003) 30 Cal.4th 916, 970; *People v. Lewis* (2001) 26 Cal.4th 334, 395; *People v. Anderson* (2001) 25 Cal.4th 543, 602; *People v. Jenkins* (2000) 22 Cal.4th 900, 1053; *People v. Cox* (1991) 53 Cal.3d 618, 691; *People v. Allen*, *supra*, 42 Cal.3d at pp. 1287-1289.) As aptly noted by this Court in *People v. Cox*:

> . . . [I]n *People v. Allen*, *supra*, 42 Cal.3d 1222, we rejected 'the notion that equal protection principles mandate that the "disparate sentencing" procedure of section 1170, subdivision (f) must be extended to capital cases.' (*Id.*, at pp. 1287-1288.) Section 1170, subdivision (f), is intended to promote the uniform-sentence goals of the Determinate Sentencing Act and sets forth a process for implementing that goal by which the Board of Prison Terms reviews comparable cases to determine if different punishments are being imposed for substantially similar criminal conduct. (42 Cal.3d at p. 1286.) '*[P]ersons convicted under the death penalty are manifestly not similarly situated to persons convicted under the Determinate Sentencing Act and accordingly cannot assert a meritorious claim to the 'benefits' of the act under the equal protection clause*

[citations].' (*People v. Williams*, *supra*, 45 Cal.3d at p. 1330.)

(*People v. Cox*, *supra*, 53 Cal.3d at p. 691, emphasis added.)

Accordingly, appellant's Equal Protection claim must be rejected, since he is not similarly situated to a defendant sentenced under the determinate sentencing law. Appellant's acknowledgment and attempts to distinguish this Court's rejection of proportionality review in *People v. Allen*, *supra*, 42 Cal.3d at 1222, fail to acknowledge this Court's more recent holdings declining to revisit this issue. (AOB 543-545.) Appellant's claim should be rejected.

B. The United States Constitution Does Not Compel The Imposition Of A Beyond-A-Reasonable-Doubt Standard Of Proof, Or Any Standard Of Proof, In Connection With The Penalty Phase; The Penalty Jury Does Not Need To Agree Unanimously As To Any Particular Aggravating Factor

Appellant asserts his death sentence violates the Sixth, Eighth and Fourteenth Amendments for the following reasons: (1) because his death sentence was not premised on findings made beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed, appellant's constitutional right to a jury determination beyond a reasonable doubt of all facts essential to the imposition of the death penalty was violated (AOB 547-553); (2) the penalty jury was not instructed that they could impose a death sentence only if they were persuaded beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors and that death was the appropriate penalty (AOB 552-557); (3) even if proof beyond a reasonable doubt was not constitutionally required for finding that an aggravating factor exists, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate sentence, then proof by a preponderance of the evidence is constitutionally compelled as to each such finding (AOB 557-559); (4) the jury should have been instructed they had to reach a unanimous agreement as to which aggravating factors applied (AOB 560-564). (AOB 547-564.) This Court has previously and repeatedly rejected all of

appellant's contentions.

Unlike the determination of guilt, sentencing is inherently moral and normative, not factual, and therefore not susceptible to *any* burden-of-proof qualification. (*People v. Brown* (2004) 33 Cal.4th 382, 401; *People v. Burgener* (2003) 29 Cal.4th 833, 884-885; *People v. Anderson, supra*, 25 Cal.4th at p. 601; *People v. Welch, supra*, 20 Cal.4th at p. 767; *People v. Sanchez* (1995) 12 Cal.4th 1, 81; see *People v. Daniels* (1991) 52 Cal.3d 815, 890.) This Court has repeatedly rejected claims identical to appellant's regarding a burden of proof at the penalty phase (*People v. Stitely* (2005) 35 Cal.4th 514, 573; *People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Welch, supra*, 20 Cal.4th at pp. 767-768; *People v. Ochoa* (1998) 19 Cal.4th 353, 479; *People v. Dennis* (1998)17 Cal.4th 468, 552; *People v. Holt* (1997) 15 Cal.4th 619, 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"]), so, because appellant does not offer any valid reason to vary from those past decisions, this Court should reject appellant's claims. Moreover, California death penalty law does not violate the Sixth, Eighth, and Fourteenth Amendments by failing to require unanimous jury agreement on any particular aggravating factor. (*People v. Harrison* (2005) 35 Cal.4th 208, 261.) Neither the federal nor the state Constitutions require the jury to agree unanimously as to aggravating factors. (*People v. Fairbank, supra*, 16 Cal.4th at p. 1255; *People v. Osband, supra*, 13 Cal.4th at p. 710.)

Appellant argues, however, that this Court's decisions are invalid in light of *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]. (AOB 548-553, 555-557, 561.) This Court has considered and rejected appellant's argument by finding that neither *Blakely*, *Ring*, nor *Apprendi* have altered or undermined this Court's conclusions regarding the burden of proof in the penalty phase, and do not otherwise affect California's death penalty law. (*People v. Stitely, supra*, 35 Cal.4th at p. 573

[*Blakely*, *Ring*, and *Apprendi* "do not require reconsideration or modification of our long-standing conclusions in this regard"]; *People v. Morrison* (2004) 34 Cal.4th 698, 730-731; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263, 271-272; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; see *People v. Smith*, *supra*, 30 Cal.4th at p. 642.)

In argument 28, appellant takes issue in a multi-part claim with the language of the jury instruction on the consideration of mitigating and aggravating factors – CALJIC No. 8.88. (AOB 565-577.) Appellant argues the instruction is constitutionally flawed because it is vague and ambiguous, but this Court has rejected appellant's claims. Appellant specifically argues the use of the words "so substantial" are "far too amorphous to guide the jury in deciding whether to impose a death sentence" (AOB 566-569), the instruction should inform the jury to impose the death penalty if "appropriate" rather than if the circumstances "warrant" its imposition (AOB 569-571), the instruction fails to include the mandatory "shall impose" language in Penal Code section 190.3 (an argument which appellant acknowledges this court rejected in *People v. Duncan* (1991) 53 Cal.3d 955, 978) (AOB 572-575), but this Court has addressed and repeatedly rejected each one of these claims. (*People v. Moon* (2005) 37 Cal.4th 1, 42-43; *People v. Perry* (2006) 38 Cal.4th 302, 320.) Appellant's claims should again be rejected since this Court has previously addressed and rejected them.

Appellant also makes mutually exclusive arguments. Appellant argues the instruction was improper because it failed to inform the jurors that neither party in a capital case bears the burden of persuasion of the appropriateness or inappropriateness of the death penalty (AOB 576) while previously arguing "the failure to assign a burden of proof renders the California death penalty scheme unconstitutional" (AOB 548). The instruction properly stated the law and is constitutional. (*People v. Moon, supra*, 37 Cal.4th at pp. 1, 42.) Appellant's arguments lack merit.

C. Penal Code Section 190.3, Factor (a), Is Not Impermissibly Overbroad And Does Not Allow For An Arbitrary Imposition Of The Death Penalty

In argument 29, appellant contends the death penalty is invalid because Penal Code section 190.3, factor (a), allows arbitrary and capricious imposition of death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.[129] (AOB 578-588.) Specifically, appellant contends factor (a) has been applied in a manner so that almost all features of every murder have been found to be "aggravating" within the meaning of the statute. (AOB 579-586.) This contention is without merit.

The United States Supreme Court has specifically addressed the issue of whether California's Penal Code section 190.3, factor (a), is constitutionally vague or improper. In *Tuilaepa v. California* (1994) 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750, the Supreme Court commented on factor (a), stating:

> We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

(*Id.* at p. 976.)

This Court has been presented with ample opportunity to revisit the issue raised by appellant since the holding in *Tuilaepa*. However, this Court has consistently rejected arguments such as appellant's and followed the federal Supreme Court's ruling. (See, e.g., *People v. Turner* (2004) 34 Cal.4th 406, 438; *People v. Ochoa* (1998) 19

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129. Penal Code section 190.3, factor (a), states:

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

Cal.4th 353, 478, fn. 13; *People v. Millwee* (1998) 18 Cal.4th 96, 164; *People v. Ray* (1996) 13 Cal.4th 313, 358; *People v. Arias* (1996) 13 Cal.4th 92, 187; *People v. Sanchez* (1995) 12 Cal.4th 1, 81; *People v. Sanders* (1995) 11 Cal.4th 475, 563-564.) There is no need for this Court to revisit the issue.

When attempting to show the prosecutor made inappropriate statements during closing arguments under the guise of Factor (a), appellant purports the prosecutor's reference to appellant as "lazy" was racist. (AOB 586-587.) Respondent takes issue with appellant's assertion that the prosecutor made racist statements because considered in context, the prosecutor's statements were nothing of the sort. (AOB 586-587.) Appellant's attempt to play the race card is unfounded, uncalled for, and adds nothing to his argument.

D. Penal Code Section 190.3, Factor (b), Properly Allows Consideration Of Unadjudicated Violent Criminal Activity And Is Not Impermissibly Vague and Neither Are The Jury Instructions (CALJIC Nos. 8.85 And 8.88) Addressing It

Penal Code section 190.3, factor (b), allows the trier of fact, in determining penalty, to take into account:

> (b) The presence or absence of criminal activity by the defendant, other than the crime[s] for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(53 RT 5990 [CALJIC No. 8.85].)

Appellant makes a multifaceted attack on the consideration of unadjudicated criminal activity at the penalty phase pursuant to factor (b) because it purportedly violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, thereby rendering the death sentence unreliable. (AOB 588-603.) Appellant's complaints must be rejected because Penal Code section 190.3, factor (b), has been held by this Court to be constitutional. Introduction of evidence under factor (b) does not offend the state or federal

Constitutions. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1138; *People v. Cunningham* (2001) 25 Cal.4th 926, 1042; *People v. Samayoa* (1997) 15 Cal.4th 795, 863.)

This Court has "long held that a jury may consider such evidence in aggravation if it finds beyond a reasonable doubt that the defendant did in fact commit such criminal acts." (*People v. Samayoa, supra*, 15 Cal.4th at p. 863.) Factor (b) is not impermissibly vague because both the federal Supreme Court and this Court have rejected this contention. (*Tuilaepa v. California, supra*, 512 U.S. at p. 976; *People v. Lewis* (2001) 25 Cal.4th 610, 677; *People v. Lucero* (2000) 23 Cal.4th 692, 727.) The Supreme Court stated:

> Factor (b) is phrased in conventional and understandable terms and rests in large part on a determination whether certain events occurred, thus asking the jury to consider matters of historical fact.

(*Tuilaepa v. California, supra*, 512 U.S. at p. 976.) The Court concluded: "Factor (b) is not vague." (*Ibid.*) Appellant acknowledges the United States Supreme Court rejected attacks on factor (b) evidence in *Tuilaepa* but asserts this evidence violated equal protection, nonetheless.

Appellant's multifaceted attack on factor (b) and its jury instructions should be rejected because this Court has addressed and rejected each claim previously. This Court has already rejected appellant's assertion that his Sixth amendment rights were violated because the jury was not required to reach a unanimous verdict regarding the factor (b) evidence (AOB 590-596). (*People v. Ward* (2005) 36 Cal.4th 186, 221-222; *People v. Turner* (2004) 34 Cal.4th 406, 439 [no unanimity instruction necessary regarding Factor (b) evidence].) Likewise, this Court rejected appellant's argument that the trial court should have deleted irrelevant factors enumerated in CALJIC No. 8.85 (AOB 596-598). (*People v. Perry, supra,* 38 Cal.4th at p. 319.) In *Perry* this Court also rejected complaints that the jury should be instructed which factors were aggravating and which were mitigating (AOB 598) and complaints concerning the use of the words "extreme" and "substantial" in the jury instructions (AOB 598-599). (*Id.* at p. 319.) This Court in *Turner* rejected appellant's claims that the jury should have

made written findings regarding its verdict (AOB 599-601) and that the California death penalty scheme violate the equal protection (AOB 601-603). (*People v. Turner*, *supra*, 34 Cal.4th at pp. 438-439.)

Appellant maintains California law violates the Sixth, Eighth, and Fourteenth Amendments by failing to require that the jury base a death sentence on written findings regarding aggravating factors because the lack of written findings precludes meaningful review. (AOB 599-601.) This Court has held, and should continue to so hold, that the jury need not make written findings disclosing the reasons for its penalty determination. (*People v. Young* (2005) 34 Cal.4th 1149, 1233; *People v. Maury* (2003) 30 Cal.4th 342, 440; *People v. Hughes* (2002) 27 Cal.4th 287, 405; *People v. Welch*, *supra*, 20 Cal.4th at p. 772; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 479; *People v. Frye* (1998) 18 Cal.4th 894, 1029; *People v. Dennis*, *supra*, 17 Cal.4th at p. 552; *People v. Fairbank*, *supra*, 16 Cal.4th at p. 1256.) The above decisions are consistent with the United States Supreme Court's pronouncement that the federal Constitution "does not require that a jury specify the aggravating factors that permit the imposition of capital punishment." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746, 750 [110 S.Ct. 1441, 108 L.Ed.2d 725], citing *Hildwin v. Florida* (1989) 490 U.S. 638 [109 S.Ct. 2055, 104 L.Ed.2d 728].) Appellant's claim must be rejected.

E. California's Death Penalty Statute Does Not Violate International Law

Appellant contends in argument 30 that his conviction and sentence resulted from due process violations in contravention of customary international law. (AOB 604-609.) Appellant is precluded from raising this issue because it has been forfeited and he lacks standing to assert a violation of international law. Additionally, this Court has previously and repeatedly rejected the notion that California's death penalty statutes somehow violate international law.

Initially, it is observed that appellant should be precluded from claiming violations of international customary law or treaties for the first time on appeal, since he never raised any such claims in the trial court. Convicted defendants are generally precluded from raising claims on appeal if the claim was not previously raised in the trial court. (See, e.g., *People v. Jones* (1997) 15 Cal.4th 119, 181; *People v. Collie* (1981) 30 Cal.3d 43, 64.) Moreover, appellant has failed to show that he has any standing to invoke the jurisdiction of international law in this proceeding, because the principles of international law apply to disputes between sovereign governments and not between individuals. (*Hanoch Tel-Oren v. Libyan Arab Republic* (D.D.C. 1981) 517 F.Supp. 542, 545-547.)

Appellant notes that all Western European countries have abolished the death penalty and that the Eighth Amendment should be interpreted to prohibit capital punishment based on the views of other nations. (AOB 607-609.) However, it is not the international communities' views which are relevant to Eighth Amendment analysis; "it is *American* conceptions of decency that are dispositive[.]" (*Stanford v. Kentucky* (1989) 492 U.S. 361, 369 fn. 1 [109 S.Ct. 2969, 106 L.Ed.2d 306].) Interpretation and application of the provisions of the United States Constitution to questions presented by state or federal statutory or constitutional law is ultimately an issue for the United States Supreme Court and the lower federal courts, not customary international law.

Finally, appellant's claim lacks merit because it has previously been specifically rejected by this Court. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 511 ["International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements"]; accord *People v. Perry, supra,* 38 Cal. 4th at p. 322; *People v. Brown*, *supra*, 33 Cal.4th at p. 404; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1055; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In *Ghent*, this Court held that international authorities do not compel elimination of the death penalty, and do not have any effect upon domestic law unless either self-executing or implemented by Congress. (*Ibid.*) As in *Ghent*, appellant cites no authorities

suggesting the international treatises on which he relies have been held effective as domestic law.

In summary, appellant has forfeited this claim and further has no standing to invoke international law as a basis for challenging his state convictions and judgment of death. Moreover, appellant has failed to state a cause of action under international law, for the simple reason that appellant's various claims of violations of due process in connection with his prosecution, conviction, and sentencing in the instant case are without merit. American federal courts carry the ultimate authority and responsibility for interpreting and applying the American Constitution to constitutional issues raised by federal or state statutory or judicial law.

California's death-penalty law does not violate the International Covenant of Civil and Political Rights, which prohibits the "arbitrary" deprivation of life and bars the "cruel, inhuman or degrading treatment or punishment." The covenant specifically permits the use of the death penalty "if imposed only for the most serious crimes in accordance with law in force at the time of the commission of the crime." When the United States ratified the treaty, it specifically reserved the right to impose the death penalty on any person, except a pregnant woman, duly convicted under the laws permitting imposition of the death penalty. (See 138 Cong. Rec. S-4718-01, S4783 (1992); *People v. Perry* (2006)38 Cal.4th 302, 322; *People v. Brown* (2004) 33 Cal.4th 382, 403-404.) This Court's earlier rejections of similar claims have equal applicability in this case.

Based on the foregoing, all of appellant's challenges to California's capital punishment statutes and procedures must again be rejected by this Court.

XVI.

THERE WAS NO CUMULATIVE ERROR

In issue 31, appellant contends the cumulative effect of the alleged errors which occurred in this case undermined the fundamental fairness of appellant's trial and warrants the reversal of the judgment of conviction and sentence of death. (AOB 610-613.) As previously discussed at length throughout this brief, no error occurred; therefore, there cannot be any cumulative error.

Assuming for the sake of argument that those claims of error appellant ascribes to the guilt and penalty phases of his trial were in fact error, each would be harmless under the applicable standard of review. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009, 1038; see *People v. Heard* (2003) 31 Cal.4th 946, 982; *People v. McDermott* (2002) 28 Cal.4th 946, 1005 [no individual error, so rejecting claim of cumulative error]; accord *People v. Slaughter* (2002) 27 Cal.4th 1187, 1223 [taken individually or cumulatively, errors harmless].) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Box* (2000) 23 Cal.4th 1153, 1214.) Because the issues claimed as error by appellant either were all not error, have been forfeited, were invited, or were harmless, there could be no prejudice to appellant, and therefore no cumulative effect. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1141.)

Accordingly, assuming arguendo any error occurred, viewed cumulatively such errors would not have significantly influenced the fairness of appellant's trial or detrimentally affected the jury's determination of the appropriate penalty. (*People v. Avila* (2006) 38 Cal.4th 491, 615.) Therefore, the entire judgment must be affirmed. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1038.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: September 28, 2006

Respectfully submitted,

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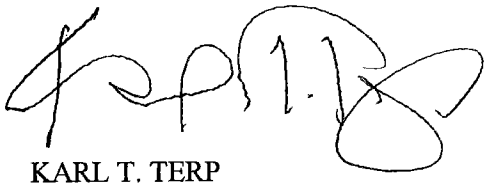

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 87693 words.

Dated: September 28, 2006

Respectfully submitted,

BILL LOCKYER
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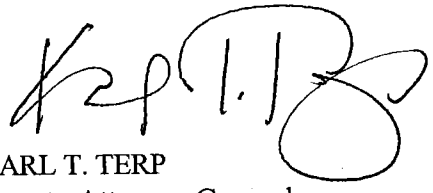

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Bryan Maurice Jones** No.: **S042346**

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 and 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 September 28, 2006, 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 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, 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 September 28, 2006, at San Diego, California.

Helen A. Jellen
Declarant

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Signature

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