In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **STEVEN ALLEN BROWN,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S052374

County Superior Court Case No. 32842
Joseph A. Kalashian, Judge

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE

On December 18, 1992, the Tulare County District Attorney filed an information charging appellant in count 1 with the murder of April Holley, in violation of Penal Code[1] section 187, subdivision (a). Four special circumstances were alleged as to count one: first, that appellant committed the murder during the commission of a first degree burglary (§§ 459, 190.2, subd. (a)(17)); second, that he committed the murder during the commission of rape (§§ 261, 190.2, subd. (a)(17)); third, that appellant committed the murder during the commission of sodomy (§§ 286, 190.2, subd. (a)(17)); and fourth, that appellant committed the murder during the commission of a lewd and lascivious act with a child under 14 years of age (§§ 288, subd. (b), 190.2, subd. (a)(17)). Appellant was charged in count 2 with burglary (§ 459); in count 3 with forcible rape (§ 261, subd. (2)); in count 4 with a lewd and lascivious act on a child under 14 years of age (§ 288, subd. (b)); and in count 5 with forcible sodomy (§ 286, subd.(c)). The information alleged, as to counts 2 through 5, that the offenses were serious felonies (§ 1192.7, subd. (c)(4)). (I CT[2] 127-131.)

On December 21, 1992, appellant was arraigned, pled not guilty to all counts, and denied the special allegations. (I CT 3.)

On November 13, 1995, a jury was sworn to try the case. (I CT 68-69.) On November 14, 1995, opening statements were given, and the prosecution began its case. (I CT 70.)

On December 19, 1995, the court granted appellant's section 1118.1 motion as to the burglary charge (count 2). (I CT 92.)

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

[2] "CT" refers to the Clerk's Transcript on Appeal; "RT" refers to the Reporter's Transcript on Appeal; "AOB" refers to Appellant's Opening Brief.

On January 5, 1996, the jury found appellant guilty of first degree murder as charged in count 1 of the information. The jury found true the sodomy and lewd and lascivious act special circumstances, but found the rape special circumstance allegation not true. The jury found appellant guilty as charged in counts 4 and 5, but not guilty in count 3. (I CT 102.)

On January 16, 1996, the penalty phase of the trial began. Defense counsel informed the court that appellant did not want to present any evidence at the penalty phase nor did he want to be present. The court found appellant made a knowing, intelligent, and voluntary waiver of his right against self-incrimination, his right to confront and cross-examine witnesses, and his right to subpoena witnesses. (I CT 103.)

The jury returned a verdict of death. (I CT 104.)

On February 23, 1996, the court denied appellant's motion for a new trial. (I CT 107.) The court also denied the application to modify the verdict under section 190.4, finding that "the mitigating circumstances are substantially and overwhelmingly outweighed by the aggravating circumstances . . . ." (I CT 108.) The court sentenced appellant to six years in state prison on count 4 and six years in state prison on count 5, with count 4's sentence to be served consecutively to the sentence imposed in case number 29128 and count 5 also to be served consecutively per section 667.6. The court ordered the death penalty on count 1 and imposed a total determinate term of 63 years.[3] (I CT 107-113.)

On February 28, 1996, the formal Commitment and Judgment of Death was filed in the Tulare County Superior Court. (II CT 540-544.)

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[3] The court sentenced appellant for both the present case and case number 29128, the burglary and assault on Margaret A. (See Arg. II, *infra*.)

STATEMENT OF FACTS

Guilt Phase Trial

The Holley Family

In early December 1988,[4] Naomi Holley[5] and her 11-year-old daughter April Holley lived at 162 West Addie in the Matheny Tract, outside the city of Tulare, California. (14 RT 1960, 1983-1985.) Tammy Holley, Naomi's other daughter, also lived at the West Addie residence; however Tammy was in jail the first weekend in December. (14 RT 1998, 2007, 2011-2013.)

Naomi knew appellant. He was a visitor at her house over the last three or four years. (14 RT 2003-2004.) Naomi believed appellant had spent the night at her house once, in September 1988. (14 RT 2006.) Naomi barely knew Charles Richardson. Richardson had been to her house a couple of times. Naomi did not believe that appellant and Richardson had ever visited her house at the same time. (14 RT 2005.)

Tammy Holley knew both appellant and Charles Richardson, having partied with both of them. (14 RT 2021-2023.) Tammy had known appellant for about three years and Richardson for about a month. (14 RT 2023.) Tammy did not recall ever seeing appellant and Richardson together. (14 RT 2023.)

On Friday evening, December 2, a neighbor drove Naomi and April to Melody Lewis's house. Naomi had arranged for April to stay with Lewis until Sunday.[6] (14 RT 1987-1988, 2028-2029, 15 RT 2208.) Lewis lived

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[4] Dates referred to in the Statement of Facts are in 1988, unless otherwise indicated.

[5] Respondent will refer to certain individuals by their first names for ease of identification.

[6] References to Friday, Saturday and Sunday are to December 2, 3 and 4, 1988.

in Tulare with her boyfriend, Richard Schnabel, along with Schnabel's three children and Lewis's three children. (14 RT 2026.)

Naomi spent Friday night at Orville Bailey's house, returning to her own home on Saturday afternoon. (14 RT 1988-1990.) Jimmy Lee Creel, a friend of Naomi's, stopped by on Saturday and asked Naomi to go to a party in Porterville. Naomi agreed to attend the party. (14 RT 1991, 2009.) When she left for Porterville, Naomi locked her house with a padlock on the outside of the front door. Naomi was the only person with a key to the padlock. (14 RT 1996.) The back door to the house was not locked. (14 RT 1996-1997.) Naomi left a light on in the kitchen, but she did not leave the television on. (14 RT 1997.) Naomi spent the night in Porterville because it was too foggy to drive back to Tulare. (14 RT 1993.)

Meanwhile, on Saturday at the Lewis and Schnabel household, one of Schnabel's daughters, Tawne, discovered she was missing $20. Lewis found $20 in April's jacket pocket. (14 RT 2030.) Schnabel wanted Lewis to take April home, so Lewis drove April to various locations in the Matheny Tract in Lewis's white Oldsmobile, looking for Naomi. They drove to April's house several times, but they could not find Naomi. (14 RT 2030, 2032-2034, 2036-2038.)

Lewis also drove to Orville Bailey's house, because she needed her sister, Deanna Bailey, to babysit the kids. Lewis picked up Deanna and returned home. (14 RT 2040.) Lewis and Schnabel left to go Christmas shopping just as it was getting dark. They left April at their house with Deanna. (14 RT 2040-2041, 2057.)

Schnabel's daughter Teresa returned home between 4:00 and 5:00 p.m. on Saturday, after shopping with some friends. (14 RT 2043-2045.) Schnabel and Lewis had already left when Teresa arrived home. (14 RT 2045.)

Teresa recalled that April used the phone two or three times, and it appeared to Teresa that April was talking to her mother. (14 RT 2046.) April called her best friend, 11-year-old Lisa Matthews, twice that evening. The first time she called Matthews, who lived in the Matheny Tract, was around 7:30 p.m. (15 RT 2098-2099, 2102.) April wanted Matthews to spend the night with her at the Holleys' home. Matthews said she would have to ask permission and she would call back. (15 RT 2103.) Matthew's grandmother told her that she could not spend the night with April. (15 RT 2104.) Matthews called April back about 20 minutes after their first conversation, and told her that she was going to come and spend the night, even though her grandmother said she could not. (15 RT 2104.) Matthews walked out her gate toward the Holleys' home, but turned back because of the cold and fog. (15 RT 2105.)

April told Shannon and Teresa Schnabel that Matthews was going to spend the night with her and that it was okay with Naomi. (14 RT 2046, 2058.) April asked if Shannon could take her home. (14 RT 2046, 2055, 2058.) Both Shannon and Teresa assumed that April's mother was home. (14 RT 2047, 2058.)

Shannon and Teresa left between 7:00 and 8:00 p.m. to take April home. (14 RT 2047-2048, 2059.) It was dark and very foggy when they left, and the trip to April's house took between 15 and 30 minutes because of the fog. (14 RT 2047-2048, 2059.)

When they arrived at April's house, Shannon and Teresa asked April if she was sure her mother was home. April answered affirmatively. (14 RT 2048, 2059.) April walked to the front door, which was locked. (14 RT 2048, 2059.) She walked to the back of the house and waved, and told them she would be okay. (14 RT 2059.) Teresa assumed that April went into the house through the back door. (14 RT 2048.) It appeared that

a television was on inside the house. (14 RT 2049.) Teresa did not see anyone else in the area. (14 RT 2050.)

As Shannon and Teresa drove away, they made a U-turn. Teresa saw an older car with its lights on parked on the side of the road across the street from the Holleys' house. She did not see anyone inside the car. (14 RT 2051-2052.) When Lewis and Schnabel returned from shopping around 10:00 p.m., Teresa and Shannon told them they had taken April home. (17 RT 2041-2042.)

Matheny Tract Neighbors

Appellant and his girlfriend, Rhonda Schaub, lived in a trailer in the Matheny tract with appellant's sister, Lisa Saldana,[7] and her boyfriend, Mike Clifton. (18 RT 2925-2926, 3084-3086.) Saldana owned a 1974 Brown Pontiac Firebird that was "kind of loud when you would give it the gas." (18 RT 2928, 3086-3087.) Saldana allowed appellant to drive her car. (18 RT 3087.) When Clifton got home from work on Saturday between 5:00 and 6:00 p.m., Saldana was at the trailer, but appellant was not. (18 RT 2928-2929.) Between 5:30 and 5:45 p.m., Saldana had loaned her car to appellant to take Schaub to work. (18 RT 3087-3088.) Clifton did not see Saldana's car or appellant the rest of that evening. (18 RT 2929.)

Irene Garcia lived on Addie Street near the Holleys. (15 RT 2127-2128.) Garcia lived in the mobile home located on the front of her property, and Lorraine Hughes rented the mobile home located on the back of Garcia's property. (15 RT 2208-2209, 2128-2129, 2162.)

Hughes had a phone in her mobile home, and the Holleys often used Hughes's phone. (15 RT 2210.) On Saturday, Hughes was waiting for a

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[7] Lisa Saldana was named Lisa Wilson at the time of trial. (18 RT 3084-3085.)

phone call from her husband, who had left earlier in the day for Monterey. (15 RT 2211.) April came to Hughes's trailer three times on Saturday; the first time was around 4:00 p.m., the second time around 5:00 p.m., and the third time around 7:45 or 8:00 p.m. (15 RT 2212-2215, 2129-2130.) The first two times Hughes saw April, she was getting out of a white car. (15 RT 2213-2214.) April knocked on the door of the trailer the first two times she came by, but Hughes did not answer the door because she was waiting for a call from her husband. (15 RT 2212-2114.)

It was dark and foggy when April knocked on the door of Hughes's trailer the third time, but Hughes did not answer the door. (15 RT 2215.) Hughes did not see a car when April stopped by the third time. When April left, she walked toward her house. (15 RT 2215-2216.)

Around 8:25 or 8:30 p.m., Margaret Thomas, who lived next door to the Holleys, heard her dogs barking. (15 RT 2300, 2305, 2315.) A car pulled up to the Holleys' house. (15 RT 2306, 17 RT 2636.) The car was a "little loud and old sounding." (15 RT 2307.) Thomas knew it was shortly after 8:00 p.m. because she looked at the clock. (17 RT 2636.)

Jeremy Johnson, who attended school with April and whose family was friends with the Holleys, lived in the Matheny Tract with his parents, grandparents, and two sisters. (15 RT 2110-2111, 2121.) He could see the Holleys' house from his property. (15 RT 2112-2113.) Johnson had seen April on Friday, and she said she was spending the weekend at someone's house. (15 RT 2115.)

On Saturday night, Johnson's family was trimming their Christmas tree and his aunt was visiting. (15 RT 2116, 2122.) Sometime between 9:00 and 10:00 p.m., Johnson's aunt left the house and he went out with her to close the gate. (15 RT 2116-2117, 2123.) As he turned to go back into

the house, Johnson heard a scream that lasted a "short three seconds" coming from the direction of April's house.[8] He recognized the screamer's voice: it was April. (15 RT 2117-2118, 2120.) It sounded like she was struggling or fighting, and "[m]aybe scared." (15 RT 2118-2119.)

Around 9:00 p.m. on Saturday, Irene Garcia was preparing menudo in the kitchen when she heard a gunshot. (15 RT 2131-2132.) Garcia also heard a scream near the time of the shot. (15 RT 2132.) It was an "ugly" scream, "like being strangled." (15 RT 2132.) The scream sounded like that of a young girl, and it came from the direction of April's house. (15 RT 2133.)

Irene Garcia's sister and brother, Rutilla Villalobos and Abel Marquez, were visiting her that weekend. (15 RT 2137, 2149.) Villalobos heard a gunshot between 9:00 and 9:30 p.m. (15 RT 2139, 2141.) Marquez heard two gunshots close together, around 9:30 p.m. (15 RT 2151-2152.) About 15 minutes after the gunshots, Marquez heard a man and a woman "'cussing,'" with someone saying "'fuck you, asshole.'" (15 RT 2152-2153, 2157.) The voices sounded like they were coming from the street. (15 RT 2154-2155.)

Rafael Del Real, Garcia's son, reported he heard three gunshots around 8:00 p.m. coming from the direction of the Holleys' house. (15 RT 2165.) Around 9:00 p.m., Del Real heard some screams "coming from April Holley's house." (15 RT 2166.) The screams sounded "more like a female's voice." They sounded like "stressed-out screams . . . ." (15 RT 2167.) Another visitor at Garcia's home heard two voices around 9:30 p.m., coming from the direction of the Holleys' home. They sounded

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[8] Jeremy did not say anything at the time about hearing the scream, because screaming was common in the Matheny Tract. (15 RT 2118.) On Sunday, after he heard that April was dead, Jeremy told his parents about the scream he had heard the night before. (15 RT 2119, 2124.)

like they were arguing, and he heard some screams coming from the same direction. (15 RT 2169-2172.)

Bobby Joe Marshall, Jr., Joe Mills and Appellant

Fifteen-year-old Bobby Joe Marshall, Jr.[9], lived in a trailer in the Matheny tract along with his father, Bobby Joe Marshall, Sr., his mother Nancy Louise Marshall, his sister Nancy Lee Marshall, his brother Mike Marshall, and Mike's girlfriend. Charlie Richardson had been living with them in the trailer for about three months as of December. (17 RT 2718-2722, 2796, 2799, 2809-2811, 18 RT 3010-3011.) Appellant and Schaub had lived in the Marshalls' trailer for two or three weeks, during the same period that Richardson was living there, but they had left before December. (17 RT 2799-2800, 2809-2810, 18 RT 2964-2966.) The trailer house had three bedrooms, and Richardson stayed in the first bedroom. (17 RT 2723, 2724, 2775, 2797, 18 RT 3002-3003.) Bobby Joe knew the Holley family, and he was aware that April had a crush on him. (17 RT 2725-2726.)

Kimberly Fleeman and Rhonda Schaub are sisters, and Bobby Joe is their cousin. (18 RT 2885-2886.) Bobby Joe visited Fleeman at her home in Tulare between 6:30 and 7:00 Saturday evening. (18 RT 2896-2897.) He arrived in Lisa Saldana's car. (RT 18 2897-2898.) There were two people in the car with Bobby Joe, but Fleeman could not see them well. (18 RT 2898.) Fleeman told Bobby Joe "'[i]f that's [appellant] in the car, I want him out of here now.'" (18 RT 2899.) Bobby Joe walked over to the car, and then it drove away, but Bobby Joe stayed. He asked to borrow money from Fleeman, but she refused to lend him any money. (18 RT 2899.)

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[9] Bobby Joe Marshall, Jr. will be referred to as Bobby Joe. His father will be referred to as Bobby Joe, Sr.

That evening, Bobby Joe and his friend Joe Mills decided they would go raccoon hunting in Corcoran. Around 7:00 p.m., they walked over to Lonnie Howard's house, about one and a half blocks from the Marshalls' trailer. (17 RT 2640-2642, 2645-2647, 2649, 2727-2728, 2730, 2776.) Both Bobby Joe and Mills took along .22-caliber rifles. It took them about five to seven minutes to walk over to Howard's residence, which was in the Matheny Tract. (17 RT 2648, 2729-2730.)

Bobby Joe, Mills, and Howard loaded up the dogs and left for Corcoran, but they turned back before going very far because of the fog. (17 RT 2650-2651, 2731.) After returning to Howard's home and unloading the dogs, Bobby Joe and Mills headed back toward the Marshalls' trailer, with Bobby Joe leaving first and Mills later catching up with him. (17 RT 2732-2733.) Bobby Joe and Mills fired their gun once as they walked back to the Marshall's place. They did it to scare someone who was walking on the other side of the road. (17 RT 2652-2653, 2733-2734.[10])

Bobby Joe and Mills walked into the trailer and put their guns away. Bobby Joe's father told him someone had called and informed him that Bobby Joe was buying and using drugs. (17 RT 2734.) Bobby Joe, Sr., would not identify the caller. He and Bobby Joe began arguing. (17 RT 2734-2735, 2801.)

After five or ten minutes, Bobby Joe and Mills left the trailer and went over to the Hernandezes' home. The Hernandezes' home was located across the canal from the Marshalls' trailer. (17 RT 2736.) Bobby Joe was looking for Richardson, whom he suspected made the phone call to his father. (17 RT 2735-2736.) Richardson was not at the Hernandezes'

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[10] Mills stated they had both fired their guns; Bobby Joe said he did not fire his gun. (*Ibid.*)

house, so Bobby Joe and Mills walked back to the Marshalls' trailer. (17 RT 2738.)

Bobby Joe, Sr., still would not say who made the phone call. Bobby Joe and Mills left around 8:15 p.m., and walked to the Holleys' house to see if Richardson was there. (17 RT 2738, 2748.) They knocked on the door of the Holleys' house, but no one answered. (17 RT 2655, 2739.) A television was on inside the house. (17 RT 2739.) According to Mills, he and Bobby Joe went to the Holleys' house looking for Tammy Holley, to see if she could get some drugs for them. (17 RT 2654.)

When they left the Holleys' place, Bobby Joe and Mills walked back to the Marshalls' trailer. At Beacon and Canal streets, they met Richardson and Robert Hernandez. (17 RT 2657-2658, 2661, 2740.) Richardson said he did not tell Bobby Joe's father that Bobby Joe was using drugs. (17 RT 2743.) Bobby Joe asked Richardson if he could get them some cocaine, and gave Richardson some money. (17 RT 2658, 2662 2743.) Richardson walked to a nearby house, while Robert Hernandez stayed with Bobby Joe and Mills. (17 RT 2662, 2744-2746.) Richardson came back in about 10 minutes. He told Bobby Joe and Mills that he wasn't able to purchase any drugs, and he returned Bobby Joe's money. (17 RT 2662-2663, 2747.)

Bobby Joe and Mills went back to the Marshalls' trailer about 8:45 p.m., where they sat in a car and listened to the radio. (17 RT 2748-2749.) A short time later, appellant pulled into the driveway. He was driving the loud brown Firebird. (17 RT 2644-2645, 2664, 2749.) According to Bobby Joe, appellant did not get out of the car, but talked to Bobby Joe, Sr., who was outside the trailer. (17 RT 2750, 2783.) Mills said appellant went inside the Marshalls' trailer. (17 RT 2665, 2695.)

Bobby Joe, Sr. said appellant arrived around 9:00 p.m., and he told appellant to leave. (17 RT 2802-2803.) According to Bobby Joe, Sr., appellant backed out onto the road, and Bobby Joe and Mills walked to the

side of the car. (17 RT 2804.) Bobby Joe, Sr., did not see appellant leave, nor did he see if Bobby Joe and Mills left with appellant. (17 RT 2805.)

Mills said that after appellant came out of the trailer, Bobby Joe asked appellant if he would take them to Linnell Camp so they could buy some drugs. Appellant agreed. (17 RT 2664, 2669, 2750.) Bobby Joe wanted to go to Linnell Camp because Richardson had been unable to get any drugs for them. (17 RT 2752.)

According to Mills, after Bobby Joe asked appellant to take them to Linnell Camp, appellant drove away by himself. (17 RT 2664-2665.) He drove north on "Canal . . ., hit Wade and then turned back on West Canal." (17 RT 2665, 2692.) Appellant drove south down Canal in the direction of Addie Street, but Mills did not watch where he went after that point. (17 RT 2667.) Appellant did not say where he was going. (17 RT 2687.) Appellant returned to the Marshalls' trailer after about 20 or 30 minutes. He came from the direction of Addie Street.[11] (17 RT 2668.)

Bobby Joe and Mills left with appellant, who agreed to take them to Linnell Camp. (17 RT 2668-2669, 2750.) Before they went to Linnell Camp, however, appellant told them that Schaub wanted to talk with him. (17 RT 2750-2751.) Appellant, Bobby Joe and Mills drove to the cotton gin where Schaub was working. The cotton gin is about six or seven miles from the Matheny Tract, and they arrived there around 10:00 p.m.[12] (17 RT

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[11] Bobby Joe testified that he was "almost positive" appellant did not leave after first pulling into the driveway, and that he and Mills went with appellant at that time. (17 RT 2791.) Bobby Joe testified that it was "possible" appellant left and came back, but he did not believe that appellant did so. (17 RT 2793.)

[12] Bobby Joe testified that they arrived at the cotton gin around 9:20 p.m. and left around 9:50 p.m. (17 RT 2754.) Schaub testified that

2669, 2671, 2699, 2752-2754.) The three of them went inside the cotton gin, where they visited with Schaub for about 15 to 20 minutes.[13] (17 RT 2671, 2754, 2969.) Schaub said she had not asked Bobby Joe to come see her. (18 RT 2969-2970.)

After they left the cotton gin, they drove to Visalia, and then appellant, Mills and Bobby Joe went to Linnell Camp, where they purchased about $25 worth of cocaine. (17 RT 2672-2674, 2755.) They left Linnell Camp, but stopped after about a mile. Appellant, Bobby Joe and Mills used some of the cocaine, drove back to Visalia, and finally returned to the cotton gin around 12:30 a.m. Appellant told Bobby Joe and Mills to wait in the car because he was going to lie to Schaub since he did not bring her lunch. Schaub saw appellant, but not Bobby Joe and Mills. Appellant told Schaub that they had gone to Linnell Camp. (17 RT 2674-2676, 18 RT 2970, 3003.) After appellant returned to the car, they went to

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appellant, Bobby Joe, and Mills arrived at the cotton gin after 9:00 p.m. (18 RT 2971, 3000.)

[13] Schaub testified that in December of 1988 she was working as a weight master at the cotton gin on the 6:00 p.m. to 6:00 a.m. shift. (18 RT 2966-2967.) Schaub substituted for Saldana when Saldana did not want to work. (18 RT 2967.) Schaub said that on Saturday, she went to work at the cotton gin at 8:00 p.m., clocking in at 8:14 p.m. (18 RT 2968, 2985.) Schaub drove Saldana's car to the cotton gin, and, when Schaub arrived, Schaub and Saldana changed places, with Schaub clocking in. (18 RT 2968.) Schaub said Saldana left with appellant. (18 RT 2968.)

However, Saldana testified that she did not work at all on Saturday, and that Schaub was not at the trailer between 6:00 and 8:00 p.m. on Saturday. (18 RT 3098-3099.) Saldana was of the opinion that Schaub lied. (18 RT 3099-3100.) Time sheets for Mid Valley Cotton indicated that Saldana did not work on Saturday or Sunday. (18 RT 3550, 3552.) The time sheets indicated that Schaub clocked in at 8:14 p.m. on Saturday, and clocked out at 6:07 a.m. on Sunday. (18 RT 3352.)

Tulare, to Billy Rummerfield's house.[14] (17 RT 2675-2677, 2756-2758.) Bobby Joe and Mills stayed in the car and used some more of the cocaine they had purchased. (17 RT 2757-2759.)

Bobby Joe, Sr. reported that in the meantime, Richardson returned to the Marshalls' trailer around 11:00 p.m. According to Bobby Joe, Sr., Richardson was acting "real quiet-like," which was unusual. (17 RT 2812-2813.)

Bobby Joe said that after leaving the cotton gin, he, appellant and Mills went out "in the country," where they used some more cocaine. (17 RT 2759.) They finally drove back to the Matheny Tract, where they ran out of gas on Wade Street and pushed the car to the side of the road.[15] (17 RT 2680, 2760.)

Appellant, Bobby Joe and Mills walked down Wade Street, and Bobby Joe and Mills parted with appellant at East and West Canal Streets. (17 RT 2679.) Bobby Joe and Mills headed east toward the Marshalls' trailer, while appellant took West Canal toward Addie. (17 RT 2679.)

Bobby Joe and Mills reached the Marshalls' trailer about 2:05 a.m., and Bobby Joe went into the trailer, where he saw Richardson. (17 RT 2762-2763, 2765.) Bobby Joe went back outside, and he and Mills sat in a car listening to the radio. (17 RT 2681-2682, 2765.) Bobby Joe and Mills used some drugs and then went inside the trailer around 2:00 or 2:30 a.m. (RT 17 2682, 2765.) Bobby Joe went to sleep around 3:00 a.m. (17 RT 2765.)

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[14] Mills and Bobby Joe differed as to whether they went to Rummerfield's home before or after the second visit to the cotton gin. (17 RT 2676, 2756-2759.)

[15] Mills testified that they ran out of gas on Luton Street. (17 RT 2678.)

Between 2:30 and 3:00 Sunday morning, Mike Marshall returned to the Marshalls' trailer after partying with friends. (18 RT 3010, 3013-3014.) Mike saw Richardson standing across the street on the canal bank. (18 RT 3015.) Mike went into the trailer and went to bed. (18 RT 3016.)

At approximately 4:30 Sunday morning, appellant knocked on the door of Saldana's trailer. Mike Clifton opened the door and let appellant inside. (18 RT 2929-2930.) Appellant was acting "kind of paranoid, looking out the windows and stuff like that." (18 RT 2930.) After appellant told Saldana that her car was on Wade Street, they had a heated argument about appellant abandoning the car in a bad neighborhood. (18 RT 2931, 3089-3090.) Saldana never saw appellant leave the trailer between the time he arrived and when he got up around 8:15 or 8:30 Sunday morning. (18 RT 3100.)

The Discovery of April Holley's Murder

Lisa Matthews went to April's house at about 7:00 a.m. on Sunday. (15 RT 2106.) She saw a padlock on the front door and heard a television on inside the house, but she did not see anyone. (15 RT 2107.) Although the back door to the Holleys' house was always open, Matthews did not go around to the back door. The padlock on the front door indicated to her that nobody was home, so she left. (15 RT 2107-2109.)

Sunday morning, Orville Bailey was doing work on his former house that was located in Matheny Tract. The house had burned down about a month earlier. (15 RT 2173, 2175.) Roger Rummerfield was helping Bailey. (15 RT 2177, 2218-2221, 2223.) Sometime between 11:30 a.m. and noon, Rummerfield had to use the bathroom. Since the bathroom in Bailey's home was destroyed, Rummerfield went over to the Holleys' house. Rummerfield had lived with the Holleys previously, for about six months. (15 RT 2177-2178, 2222-2223.) Rummerfield also had known appellant to visit the Holleys. (15 RT 2254.)

When Rummerfield arrived at the Holleys' house, he noticed the front door was padlocked. (15 RT 2224.) A television was "blaring loud." (15 RT 2224.) Rummerfield went to the back of the house and asked if anybody was home. (15 RT 2225.) The back door was "cracked halfway open," so Rummerfield walked into the house and asked if anybody was there. (15 RT 2227.)

Rummerfield walked to the bathroom, where he found April lying in the bathtub. (15 RT 2227.) She was lying on her right side with her head at the drain end of the bathtub. (15 RT 2223-2224.) There was enough water in the tub to cover about half of April's face. (15 RT 2233.) One of April's arms was behind her back, and the other arm was down between her legs. (15 RT 2234-2235.) Rummerfield did not see anything to suggest that April had been sexually assaulted, nor did not observe any blood or any external injuries to April. (15 RT 2245-2246.) Rummerfield grabbed April's wrist and felt for a pulse, but did not find any. (15 RT 2232.) Rummerfield "freaked out and ran out the door." (15 RT 2232.)

About 5 to 10 minutes after Rummerfield left Bailey, he came running down Canal street waving his arms and yelling: "'Orville, call an ambulance, something happened to April.'" (15 RT 2178-2179, 2236.) Rummerfield did not say what had happened to her.[16] (15 RT 2236.)

Rummerfield went to Don and Margaret Thomas's home and asked them to call an ambulance. Rummerfield said, "'I think April is dead.'" (15 RT 2238-2239, 2300, 2303, 2315, 2318.) Margaret Thomas called the police. (15 RT 2319.) Rummerfield returned to the Holley house and

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[16] Orville, however, testified that Rummerfield said something had happened to April, that she had "drowned or dead or something." (15 RT 2178-2179.)

kicked down the front door so the ambulance personnel could get to April when they arrived. (15 RT 2236-2237.) There was no one else in the house. (15 RT 2237.)

Don Thomas followed Rummerfield to the Holleys' house and entered after Rummerfield kicked in the door. (15 RT 2318.) Thomas did not touch anything, but he did see April in the bathtub. (15 RT 2240, 2319.) Margaret Thomas also entered the house and observed April in the bathtub. (15 RT 2240, 2303-2304.) Neither Don nor Margaret saw any blood or external injuries on April. (15 RT 2304, 2321.) Don Thomas did not see anyone in the house other than his wife and Rummerfield before the emergency personnel arrived. (15 RT 2320.) Thomas did not hear any discussion about April being sexually assaulted. (15 RT 2321.)

Bailey went to the Holleys' house and entered through the front door. (15 RT 2182, 2238.) He walked into the bathroom, where he studied April for about a minute, looking for any movement or sign of life. (15 RT 2183.) There was very little water in the tub, although there could have been as much as 2 to 4 inches. (15 RT 2183, 2190.) April was lying on her right side, with her head at the drain end of the tub and the right side of her face lying in the water. (15 RT 2184-2185, 2189.) Bailey believed April was dead. (15 RT 2183.)

April was wearing a long T-shirt that covered the area where her underpants would be. Bailey could not see April's buttocks and he did not see any blood. (15 RT 2186-2187.) Bailey left the bathroom and did not return. (15 RT 2187.) He did not see anyone else enter the house until the authorities arrived. (15 RT 2188.) Bailey never heard any discussion on Sunday suggesting April had been sexually molested. (15 RT 2189-2190.) Based on his observations of April, Bailey suspected that she had been the victim of foul play, but "[i]n what way I didn't know." (15 RT 2206.) He

may have talked to people at the scene about what he had observed. (15 RT 2203.)

Early Sunday afternoon, Manuel Hernandez and Kathy Wojtasiewiecz, emergency medical technicians employed by the Tulare District Hospital, were dispatched to the Holleys' house, regarding a possible drowning. (15 RT 2322-2324.) Hernandez and Wojtasiewiecz arrived in minutes and were waived down by Rummerfield. (15 RT 2325.)

Hernandez followed Rummerfield into the house and went to the bathroom. (15 RT 2326-2327.) The water in the tub was 4 to 6 inches deep, and April's body was half submerged in the water. (15 RT 2331-2332.) Hernandez immediately grabbed April out of the bathtub and placed her in the kitchen area. (15 RT 2327-2328.) April's body did not rub against Hernandez, and he did not hit her head on the bathtub or any other object. (15 RT 2328.) Hernandez became certain April was dead when he picked her up. (15 RT 2330.)

After Hernandez placed April's body in the kitchen, he noticed blood on the area of April's buttocks. (15 RT 2322.) Hernandez did not see any blood in the bathroom. (15 RT 2330.)

Hernandez briefed the first sheriff's officer who arrived on the scene, but he did not say anything about the blood he had noticed to any law enforcement personnel. (15 RT 2334-2335.) There were no civilians nearby when he conducted this briefing. (15 RT 2335.)

Tulare County Deputy Sheriff Robert Kent was dispatched to the Holleys' house and arrived around 12:51 p.m. Deputy Kent was the first sheriff's officer on the scene. (16 RT 2482-2484.) Rummerfield was standing outside of the house; there were no other civilians in the yard or in the house. (16 RT 2484, 2486.) There were emergency vehicles present, and Deputy Kent spoke with Manuel Hernandez and Timothy Dutra. (16 RT 2485.) Deputy Kent heard no discussion about whether the victim

was sexually molested, raped, or sodomized. (16 RT 2486.) He was at the site until 6:30 p.m., and during that time, he did not see any civilians enter the house. (16 RT 2489.)

Deputy Sheriff Sergeant Harold Jones arrived at the crime scene around 2:07 p.m. (16 RT 2491-2492.) Sergeant Jones entered the house and observed April's body, which was covered with a sheet. (16 RT 2492-2493.) There were no bloody streaks around April's buttocks when Sergeant Jones first observed April's body. (16 RT 2493-2494.) Sergeant Jones spread the checks of April's buttocks when he examined the body, and he noticed a blood smear or stain around the anus area, and a red liquid ran down the checks of the buttocks. (16 RT 2494.) At that time, Sergeant Jones formed the opinion that April had been sexually assaulted, and he discussed that possibility with other officers who were present. The only non-law enforcement person in the house at that time was the pathologist, Dr. Gary Walter. (16 RT 2495.) Sergeant Jones left the crime scene around 6:30 p.m., and the house was secured by nailing the front and rear doors closed. (16 RT 2499.)

Dr. Walter was contacted by the sheriff's department and asked to come to the crime scene on Addie Street. (15 RT 2338-2339, 2341.) There were a number of law enforcement personnel present when he arrived. (15 RT 2340.)

Dr. Walter was asked to look at the body, which was in the kitchen area. The kitchen was dark, so he performed only a cursory examination of the body, including looking at the genital area. (15 RT 2342.) Dr. Walter was not able to reach any conclusions from his initial examination. (15 RT 2343.)

Dr. Walter was asked whether he could determine the time of death. Based on the state of the body, he estimated April died around 9:00 p.m.

the previous evening, although his determination was not conclusive. (15 RT 2344, 2347-2348.)

When Naomi returned to her house from Porterville, between 5:00 and 6:00 on Sunday evening, she saw police officers in her front yard. (14 RT 1994-1995.) Naomi went to Tulare County Sheriff's Investigator Clyde Raborn's car, where they talked. (14 RT 1995.) Naomi did not know that April had been sexually assaulted, and she did not recall the detective saying anything about April being sexually assaulted. (14 RT 1995.) Naomi asked Sergeant Jones if April had been sexually assaulted, and he told her that they could not yet make that determination. (16 RT 2496-2497.)

Appellant was supposed to pick up Schaub from work at 6:00 a.m. at the end of her shift at the cotton gin. When he did not arrive, Schaub called Bobby Joe, Sr. to pick her up. (18 RT 2967 2971-2972.) After he picked up Schaub, they went to Lyn's Cafe for breakfast. (18 RT 2972.)

Around 7:00 Sunday morning, Mary Noel Coelho, who lived in Tulare, went to the Matheny Tract. She stopped by Idella Meza's house to pick up some cocaine. (18 RT 2941-2944.) Meza is appellant's mother, and Coelho knew both appellant and Saldana. (18 RT 2942.) After purchasing the cocaine, Coelho went over to Saldana's trailer between 7:30 and 8:00 a.m., and she and Saldana used some of the cocaine. (18 RT 2935-2936, 2944-2945.)

After Coelho had been at the trailer for about 15 minutes, appellant came out of the back room. (18 RT 2946.) Appellant, who appeared nervous, went to the front door of the trailer, where he pushed the curtain back. He said there were a lot of police out there, and that something had

happened.[17] (18 RT 2946, 3091, 3094.) Coelho had not seen any police officer when she had arrived.[18] (18 RT 2947.) Mike Clifton heard Coelho and Saldana talking about April. Coelho left the trailer by 9:00 a.m. (18 RT 2938.)

Schaub and Bobby Joe, Sr., arrived at the Marshalls' trailer around 8:00 a.m. on Sunday. Schaub stayed only a few minutes. After waking up Bobby Joe, she walked to Saldana's trailer. (18 RT 2973.) Schaub went into the back bedroom of the trailer where she and appellant slept, and she woke up appellant. (18 RT 2974.) Appellant went back to sleep, and Schaub went to sleep with him. (18 RT 2976.) Appellant got out of bed sometime in the morning, but he did not stay up. (18 RT 2976, 2988.)

Between 9:00 and 9:30 Sunday morning, Nancy Lee Marshall called Fleeman and asked for a ride into Tulare. (18 RT 2887-2888.) Fleeman arrived at the Marshalls' around 10:00 or 10:30 a.m. (18 RT 2888.) Fleeman went inside the trailer and talked with her aunt, Nancy Louise Marshall, for 15 to 20 minutes. (18 RT 2890.) Richardson, Bobby Joe, Sr., Bobby Joe, Nancy Lee, Ken Marshall, and Mills were there.[19] (18 RT

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[17] Saldana previously had seen appellant acting paranoid because of his drug use. It was common for appellant to look out the windows and to get nervous. (18 RT 3101.)

[18] Later that day, or the next day, Coelho learned of April's death. She did not tell anyone about how appellant behaved, because she did not want to get involved. (18 RT 2948.) She confided in her sister about three years later. (18 RT 2949.)

[19] Bobby Joe testified that when he got out of bed around 9:00 a.m., both Richardson and Mills had left. (17 RT 2767.) Both Bobby Joe, Jr. and Sr. testified that they never saw Fleeman on Sunday morning. (17 RT 2768, 2816.) Bobby Joe, Sr. testified that he did not see appellant at the trailer on Sunday morning. (17 RT 2817.) Mills testified that he got up on Sunday morning, dressed, and then left. (17 RT 2684.) Mills testified that he saw Richardson at the Marshalls' trailer on Sunday morning. Richardson came through the front door, grabbed some clothes, and left.

2889-2990.) There was a fight going on, and they were all screaming and yelling. (18 RT 2909.)

When Fleeman walked down the hallway of the trailer to use the bathroom located inside the master bedroom, she saw Bobby Joe, Richardson, and the feet of a third person inside another bedroom. (18 RT 2891-2892.) While she was in the bathroom, Fleeman overheard a conversation in which Bobby Joe said, "'[w]e've got to get our stories straight.'" (18 RT 2893-2894.)[20] Appellant said, "'[t]he little bitch deserved everything she got.'" (18 RT 2894.)[21] Fleeman stayed at the trailer for 30 to 40 minutes and left without taking Nancy Lee anywhere.[22] (18 RT 2895-2896.)

Between 11:00 a.m. and 12:00 p.m. on Sunday, Mike Clifton and J.D. Rushing got some gasoline for Saldana's car. (18 RT 2932, 2934.) They drove the car back to Saldana's trailer. (18 RT 2932.)

(17 RT 2704.) Mills also testified that he saw Kim Fleeman drive up in a white van and enter the Marshalls' trailer after Richardson had left. (17 RT 2685, 2704.) Mills left shortly after Fleeman arrived. (17 RT 2715.) Mills never saw appellant at the trailer on Sunday morning. (17 RT 2704.)

[20] Bobby Joe denied having any conversation with Richardson and appellant on Sunday morning. (17 RT 2768.)

[21] Fleeman was familiar with the voices of Richardson, Bobby Joe and appellant. (18 RT 2893.) She gave her statement to an investigator in July 1990. (18 RT 2900.) She waited that long because "[t]he more I thought about it, whoever did it needed to be punished." (18 RT 2923.) Fleeman then retracted her statement because she was threatened. Nancy Lee called and threatened to kill her. Fleeman later returned to the District Attorney's Office and stated that her original statement was true. (18 RT 2900-2901, 2915.) Fleeman held no grudges against Bobby Joe, but did against Bobby Joe Sr., whom she accused of molesting her. (18 RT 2917-2918.)

[22] Later Sunday, Nancy Louise called Fleeman and told her of April's death. (18 RT 2896.)

Around 2:00 p.m., Clifton's neighbor, Bradley Hunter, told Clifton that April had been found drowned, molested, and raped. (18 RT 2939-2940.) Schaub also learned of April's death from Hunter. (18 RT 2976-2977.)

Richardson returned to the Marshalls' trailer with two individuals between 5:30 and 6:00 Sunday evening. Bobby Joe, Sr. testified that Richardson left town and "went up north." (17 RT 2817.) Bobby Joe Sr., heard rumors on Sunday that April had been raped and drowned in the bathtub. (17 RT 2815.)

Physical Evidence

On December 5, 1988, Dr. John McCann, a pediatrician with a sub-specialty in childhood sexual abuse, and Dr. Leonard Miller, a pathologist, conducted April Holley's autopsy. (16 RT 2352-2353, 2359-2360, 2458-2461.) April was a small girl, around four and one-half feet tall, and she weighed about 100 pounds. (16 RT 2362, 2462.) She was in stage two of sexual development, which meant she had developed a very small amount of breast tissue and a small amount of pubic hair.[23] (16 RT 2361-2362.) Dr. Miller's role in the autopsy was to determine the cause of death. (16 RT 2461.)

Dr. Miller observed a frothy fluid that exuded from April's nose and mouth. (16 RT 2466.) A number of petechiae appeared on April's head, the upper part of her neck, and on her chest. (16 RT 2364, 2462-2463.) Petechiae are small hemorrhages in the skin, which occur when small blood vessels rupture. (16 RT 2363.) The largest number of petechiae were

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[23] The Tanner Staging of Secondary Sexual Characteristics begins with stage I, pre-puberty, stages II, III, and IV being the intermediate stages based upon the amount of pubic hair, breast tissue in females, and the size of the testes in males and stage V is full development at adulthood. (16 RT 2361.)

scattered over April's head, including her eyes and eyelids, her jawline, and her neck. (16 RT 2364-2366, 2462-2464.) There can be a variety of causes for petechiae, but the most common cause is increased pressure within the blood vessels. This could occur as the result of violent vomiting or from asphyxiation. (16 RT 2367-2368.) In Dr. McCann's opinion, the petechiae around April's eyes represented increased pressure resulting from straining, while those near the jawline resulted from a struggle that was evidenced by a line on her neck that was consistent with her neck being held down by a hand. (16 RT 2370-2372.) Dr. Miller concurred that the petechiae on the left side of April's neck along with external and internal bruising on the left side of her neck, resulted from a struggle, in combination with the drowning. (16 RT 2463-2464, 2368-2470.) The number of petechiae and their distribution indicated "there was a great struggle that was going on, that this girl was really attempting to perhaps get away from her perpetrator." (16 RT 2374.) There was no evidence a ligature was used. (16 RT 2375-2376, 2467.) The injuries were consistent with April being on her right side, inside a porcelain bathtub. (16 RT 2469.)

There was some bruising on the body, with the most striking bruise on the right lower leg. (16 RT 2377-2378, 2466.) This bruise was 48 to 72 hours old, maybe older. (16 RT 2381.) There was also a distinct bruise on the inner aspect of April's left thigh, which was a much more recent bruise, within 24 hours. (16 RT 2382-2383, 2466.) In a rape or attempted rape situation, the perpetrator usually attempts to force the victim's legs apart, and the pressure from the thumb may lead to bruising, often on the inner part of the thigh. (16 RT 2383.) It was significant that there were no injuries to April's feet, ankles, toes, elbows, or fingers, since such injuries would have been expected from the likely kicking and thrashing in the small area of the bathtub. (16 RT 2384-2385, 2477.)

Dr. Miller observed hemorrhaging on the right side of April's head underlying the skull, which indicated blunt trauma. (16 RT 2474-2475.) However, there was no external indication of trauma. (16 RT 2475.) This injury was consistent with April's head hitting either side or the bottom of the bathtub. (16 RT 2476.)

Dr. McCann examined the genital region of April's body, finding a "very large laceration" that extended from the outer portion of the genitalia past the hymen to the back wall of the vagina. (16 RT 2387, 2389-2390, 2395.) This was a very serious injury, which is relatively rare and involves a "very violent type of attack." (16 RT 2396.) This type of injury was consistent with penetration by an adult penis. (16 RT 2397-2398.) It was also consistent with penetration by other types of foreign objects, for example, a broom handle. (16 RT 2398.) In Dr. McCann's opinion, the injury occurred while April was lying on her back. (16 RT 2399.)

There was a blood blister just inside April's hymen, which is a type of injury caused by trauma. This indicated the injury occurred while April was alive. (16 RT 2401-2404.)

Dr. McCann examined the anal area and found that the anus was open and dilated. (16 RT 2405-2406.) The dilation "was a somewhat irregular opening of the anus." (16 RT 2406.) Anal dilation is very common, but the irregular opening was not. (16 RT 2408.) The doctor found three lacerations to the anus, all very serious injuries. (16 RT 2409-2411.) There was not only injured muscle, but a tearing around the circumference of the orifice. (16 RT 2411.) Dr. McCann believed that these injuries occurred before April's death. (16 RT 2411.) Dr. McCann opined it was "a very forceful entry, and, in my opinion, undoubtedly against resistance." (16 RT 2412.) The injuries were consistent with penetration by a penis. (16 RT 2413.) Dr. McCann was of the opinion that these injures were consistent with multiple perpetrators. (16 RT 2414, 2449.)

April's skin was wrinkled, indicating she had been in the water for a while, although there was no indication of immersion of her feet in the water. (16 RT 2470-2471.) Dr. Leonard's examination of April's lungs indicated "active inhalation of water," which would not have happened if April had been unconscious or dead. (16 RT 2472-2473.) April's lungs were filled to capacity with water, and it would have taken a few minutes for this to happen for a person of April's size. (16 RT 2473.) In Dr. Miller's opinion, April's death resulted from drowning in "'association with sexual assault'" which "implies and denotes that there was trauma involved in the drowning." (16 RT 2478.)

It was stipulated that during the course of the investigation, a drain cloth, which had hair on it, and a large amount of hair from the bathtub drain, were seized for comparison purposes. (17 RT 2637.) A qualified expert from the California Department of Justice compared a number of the hairs seized with known hair samples from April Holley, Naomi Holley, Tammy Holley, Charles Richardson, Bobby Joe Marshall, Jr., Joe Mills, Rummerfield, John Rand, Michael Brown, Michael Fink, and appellant. (17 RT 2637.) There were four pubic hairs that were consistent with Charles Richardson, meaning this hair could have originated from Richardson. (17 RT 2637.) Hair comparison, however, cannot be absolutely conclusive. (17 RT 2637.) Of the four pubic hairs that were consistent with Richardson, all of the microscopic characteristics were the same as the known hairs of Richardson, and one of the characteristics was unusual, which the criminalist making the comparison had only seen six times in the ten years he had been conducting hair comparisons. (17 RT 2638.)

It was stipulated that the rectal swabs taken from April Holley during the autopsy revealed the presence of sperm, although the vaginal swabs did not.[24] (17 RT 2638.) "Valid and reliable DNA tests were conducted on the sperm using proper laboratory procedures." (17 RT 2638.) "Similar DNA tests were performed on blood samples submitted to the laboratory after having been properly procured from Charles Richardson, Bobby Joe Marshall, Jr., Joe Mills, and James Stubblefield." (17 RT 2638-2639.) The results of the comparison by qualified experts, after proper testing procedures to compare the DNA taken from the blood samples, excluded those four men as possible contributors of the sperm. (17 RT 2639.)

Further Investigation

Schaub's relationship with appellant changed after April's body was discovered. (18 RT 3005.) After April's murder, Schaub repeatedly asked appellant where he had been and if he had anything to do with April's killing. (18 RT 2977.) Sometime in the middle of December, during an argument, appellant told Schaub that he had killed April, but he would never be caught. (18 RT 2977, 2995, 3000-3001.)

Appellant told Schaub that after he dropped off Saldana at the trailer on that Saturday night, he picked up Bobby Joe and Mills, whom he saw out running around. (18 RT 2978.) Appellant, Bobby Joe and Mills saw April walking south on Canal Street with Richardson. (18 RT 2978.) Appellant said he, Mills, Bobby Joe and Richardson were at the Holleys' house and April was mad, so they all left. He did not explain exactly what had happened at the Holleys'. (18 RT 2978-2979.) Appellant threatened Schaub, telling her that she would get hers if she told on him. (18 RT 2979,

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[24] Swabs from April's vagina, anus, and mouth were taken at the autopsy. (17 RT 2415.) A significant percentage of rapists, perhaps more than a third, do not ejaculate. (17 RT 2414, 2441.)

3007.) Appellant also told Schaub what to tell the police about his visit to the cotton gin with Bobby Joe and Mills. (18 RT 3008.)

Schaub did not tell anyone what appellant had told her until October 1991. (18 RT 2982.) Schaub admitted she had not said anything about appellant's confession in any of the several statements she gave to the police and to defense investigator Cliff Webb. (18 RT 2980-2981.)

In June 1989, Bobby Joe told Victoria Lopez that he was present when April was murdered. (17 RT 2823-2825.) Bobby Joe said he, Richardson, and another guy were at the Holleys' house, and they were touching and kissing April. (17 RT 2826-2827.) Bobby Joe said they were all in the bathroom and that was where it all took place. (17 RT 2827.) Bobby Joe said they all fucked her.[25] (17 RT 2827.) Lopez had heard "bits and pieces" about April's murder while she was living in the Matheny Tract.[26] (17 RT 2822.)

On May 30, 1990, fifteen-year-old Lynn Farmer was visiting his sister who lived in Tulare.[27] (18 RT 3029-3031.) Farmer's sister lived with appellant's brother, Donald Brown, and appellant lived in their garage. (18 RT 3030-3032.) Farmer was in the garage with appellant. They had met just recently. (18 RT 3031-3032, 3071.) Appellant was going to give Farmer a tattoo. (18 RT 3032-3033.)

Farmer saw his friends - John Richardson, Carlos Salas, and Chris Allen - in the back alley drinking some beer, and they returned to the

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[25] Bobby Joe denied making the statement to Lopez. (17 RT 2769.)

[26] Lopez did not contact the police, since she did not want to become involved. (17 RT 2829.) In 1991, Lopez told Regina Holdridge what Bobby Joe had said. Lopez was later contacted by Investigator Diaz. (17 RT 2828-2829, 2838.)

[27] Farmer admitted that in 1990 he had a drinking problem. (18 RT 3067.) He might have smoked some marijuana that day, but he was not sure. (18 RT 3068.)

garage with Farmer. They were going to have a beer party. (18 RT 3019-3020, 3029-3030, 3034-3035.) Farmer introduced John Richardson, who is Charlie Richardson's brother, to appellant. (18 RT 3019-3022.) Appellant said he knew Charlie and was friends with him. (18 RT 3023.) Appellant said he wanted to get a tattoo of April Holley on his chest. (18 RT 3039.)

After discussing how they could make some money, appellant said the best way to make money was purse snatching. (18 RT 3040.) John Richardson did not want to be involved, so he left. (18 RT 3026, 3043.)

Appellant, Farmer, Salas, and Allen went to the Best Western Lodge in Tulare to do some purse snatching. (18 RT 3043, 3046.) Appellant and Farmer went upstairs, while Chris and Carlos stayed downstairs. (18 RT 3046.) Farmer heard an "old lady" screaming downstairs. (18 RT 3047.) Farmer, who was in the middle of the hallway, "looked down in the middle of the part where the windows are and stuff, and you can see down to where you can go down the stairs and stuff." (18 RT 3047, 3056.) Farmer saw two "old ladies," one standing up and one on the ground. (18 RT 3047.)

Farmer and appellant, who were nervous, started walking fast. (18 RT 3047-3048.) Appellant said, "'[m]an, if I get busted for this, man, I'll get busted, you know, they'll hook me up with the old lady and April.'" (18 RT 3048.) Appellant said he did the same thing to the "old lady" as he did to April, "'[f]ucked her in her ass.'" (18 RT 3049.)

Farmer started going down the stairs real fast, and appellant, who had a knife, said, "'[c]ome back here or I'll cut your guts out.'" (18 RT 3050-3051.) Appellant told Farmer that he knew where Farmer lived. (18 RT 3051.)

Appellant and Farmer went out the back door of the motel and left. (18 RT 3051-3052.) Appellant threw the knife away. (18 RT 3053.) Appellant and Farmer were stopped by the police two or three minutes later. (18 RT 3053.) When Farmer got out of Juvenile Hall, appellant

called him and said, "'[d]on't be rattin' on me, you little fucker.'" (18 RT 3054.)[28]

It was stipulated that on August 12, 1992,

> Charles Richardson was convicted of the first degree murder of April Holley, burglary, rape by force, lewd or lascivious act upon a child under 14 by force, and sodomy by force.

(19 RT 3125.)

Appellant's Statements

On January 18, 1989, Investigator Raborn obtained a tape-recorded statement from appellant.[29] (17 RT 2833-2845; Peo. Exh. 49.) Appellant told Investigator Raborn that he got together with Bobby Joe and Mills around 11:00 p.m. on Saturday. Appellant told them he had to go out to the cotton gin to talk to Schaub, and then he would take them to get some cocaine. (18 RT 2853-2854.) Appellant drove Bobby Joe and Mills to Linnell Camp, driving his sister's car, and they bought some cocaine. (18 RT 2854-2855.) Bobby Joe and Mills did "a lot" of cocaine, but appellant only "did a hair line." (18 RT 2855.)

Appellant said he drove back to the cotton gin to tell Schaub he was going to take Bobby Joe and Mills home, and then he would return with her lunch. (18 RT 2855.) While driving Mills and Bobby Joe home, he ran out of gas about a half mile from his residence. (18 RT 2856.) They walked down Wade Street. Bobby Joe and Mills went to the Marshalls' trailer, and appellant went to his sister's residence. (18 RT 2856-2857.) Appellant

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[28] The first person that Lynn Farmer told about appellant's statements was Cliff Webb, an investigator for Charlie Richardson. At the time he spoke with Webb, Farmer was in Juvenile Hall for the purse snatching. (18 RT 3064, 3066.) When Farmer was first questioned by police officers about the incident, he did not say anything about what appellant had told him. (18 RT 3066.)

[29] Investigator Raborn testified that the transcription of the tape was accurate. (18 RT 2845-2846.)

woke his sister and told her about the car running out of gas. (18 RT 2857.) She told appellant to go and get some gas and to get the car back to her residence. (18 RT 2857.)

Around 4:10 a.m., appellant left with J.D. Rushing to get some gas. (18 RT 2857-2858.) Appellant drove because Rushing was drunk. (18 RT 2859.) Appellant was driving southbound on Canal Street when he saw Richardson running down the other side of the canal bank, which was about 200 feet from Addie Street, toward the Marshalls' trailer. (18 RT 2859, 2865, 2876.) Richardson was wearing bell bottom blue jeans, a little vest, a hat, and some tennis shoes. (18 RT 2860.) Richardson had something in his hand. It looked like a piece of wood or some kind of pipe fitting, and it was one to one and a half feet long. (18 RT 2860, 2864.) Appellant also saw James Stubblefield, who was trying to hide his face, running on the other side of the canal. (18 RT 2862.) Stubblefield, who had once lived with the Holley family, ran over to the Hernandezes' house. (18 RT 2862, 2872.)

Appellant got some gas and drove the car home. (18 RT 2867.) His girlfriend woke him up at 6:00 a.m., and they had a fight because he did not bring lunch to her at the cotton gin.[30] (18 RT 2867-2868.) Appellant went back to sleep and then woke up between 11:00 a.m. and noon. (18 RT 2868.) Appellant went down the block after hearing cars burning rubber, and he saw a "bunch" of people and police officers, as well as an ambulance. (18 RT 2868.) Deanna and Renee Bailey told him that April was dead. (18 RT 2868-2869.) Appellant talked to some officers around 5:30, and he told them to check out James Stubblefield. (18 RT 2870.)

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[30] CHP Officer Mark Stewart testified that on Sunday he was dispatched to 524 West Wade in the Matheny Tract about a car blocking a driveway. (18 RT 2882-2883.) Officer Stewart arrived at about 8:20 a.m., where he found a dark colored Pontiac blocking a driveway. (18 RT 2844.)

Appellant later called the witness hotline and said they should check out Stubblefield because he tried to molest April a couple times. (18 RT 2871.) Appellant claimed Stubblefield had tried to molest April in August 1988, when appellant was at the Holleys' house with Stubblefield. (18 RT 2872-2873.) Stubblefield told April to sit on his lap, but she refused. (18 RT 2873.) Stubblefield grabbed April and sat her on his groin. (18 RT 2873.) Stubblefield also grabbed April's buttocks "in a pinching manner." (18 RT 2873.) Appellant told Stubblefield that his conduct was not right. (18 RT 2873.) April had told appellant that Stubblefield once felt her "private areas" and was "trying to get down her pants." (18 RT 2874.)

Appellant said that five days before the interview, he had a conversation with Nancy French. She told him she saw "some dude" who had "74" tattooed on his wrist hanging out with Stubblefield. (18 RT 2876.) Appellant immediately thought of Richardson. (18 RT 2876-2877.) French, who was married to Stubblefield's father, told appellant she would back Stubblefield's story and "try to make it seem like he wasn't nowhere near this incident . . . ." (18 RT 2879.)

On September 4, 1990, Tulare County District Attorney Investigator Ralph Diaz interviewed appellant. (14 RT 1975-1976, 19 RT 3127-3128.)[31] Appellant admitted the statement he gave in 1989, claiming he saw Richardson and Stubblefield running down the canal around 4:30 a.m. on Saturday, was false. (19 RT 3133-3134.) However, he claimed that everything he had told the officer during the previous interview up to the time the car ran out of gas was true. (19 RT 3135.)

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[31] The entire interview was recorded and transcribed, and admitted as People's Exhibit 51. (19 RT 3128-3129.) Before questioning, appellant was advised of and waived his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436). (19 RT 3131-3132.)

Investigator Diaz asked appellant about his statements to Lynn Farmer, saying he did "the same thing to the old lady that you did to April Holley." Appellant said he was not stupid enough to tell a kid about a serious crime. (19 RT 3136-3137, 3140-3141, 3225.) He said he was not with Farmer at the motel, and he had never said anything to Lynn Farmer about April Holley. (19 RT 3221, 3225-3227.)

When asked if he was with Richardson on Saturday night, appellant answered no, and indicated that he did not hang out with Richardson. He said he had only met Richardson one time. (19 RT 3138-3140.) Appellant said he "wouldn't fuckin' be caught dead with Charlie Richardson," and that Richardson was "bad news." (19 RT 3149.) Appellant said he took Schaub to work around 6:00 Saturday evening and then went directly to the Marshalls' trailer, where he picked up Bobby Joe and Mills. (19 RT 3142, 3153.) He said he told Schaub that he would be back later, and that he was going to take Bobby Joe and Mills to Linnell Camp to get some cocaine. (19 RT 3143.) According to appellant, he had made plans to take Bobby Joe and Mills to Linnell Camp during an earlier phone conversation with Bobby Joe, which took place about 45 minutes before appellant took Schaub to work. (19 RT 3154-3156, 3169.)

Appellant said he picked up Bobby Joe and Mills between 8:30 and 9:00 p.m., and they went to Linnell Camp. They bought some cocaine, which they used until they ran out. (19 RT 3143, 3157-3158, 3167.) Appellant said the car ran out of gas on Wade Street. (19 RT 3143.) He said he did not stop at Kim Fleeman's house or at Billy Rummerfield's residence. (19 RT 3165.)

The investigator asked appellant what he and Schaub did for two hours if he left to take her to the cotton gin at 6:00 p.m., because she did not clock in until 8:00 p.m. (19 RT 3143-3144.) Appellant said he could not remember "most of the things that went down." (19 RT 3144.) Appellant

suggested that perhaps he and Schaub had sex, or they might have used some cocaine. (19 RT 3144.) Appellant said that when he left Schaub, he told her he would bring her lunch. (19 RT 3144.) Appellant said he was planning to take Bobby Joe and Mills home and then cook some food to take to Schaub, but the car ran out of gas. (19 RT 3145.)

Appellant said that when the car ran out of gas, he went straight to Saldana's trailer. (19 RT 3145-3146.) He said that as he was walking to his sister's trailer when he saw someone running or walking fast down through the canal. (19 RT 3176-3177, 3183, 3206.) He entered the trailer and told Saldana that her car had run out of gas. (19 RT 3146.) Saldana told him to get some gas for the car, but he told her he was going to lie down in the back of the trailer. (19 RT 3147.) Appellant said the next thing he remembered was Schaub yelling at him for not coming back to the cotton gin. (19 RT 3147.)

Appellant fell asleep again, and next remembered going out front to talk to Clifton and the others. (19 RT 3147.) Appellant said he saw a "bunch of cars," and Bradley Hunter was standing on the front porch. Hunter told him April Holley was murdered. (19 RT 3147-3148, 3204, 3229-3230.) According to appellant, this occurred between 6:00 and 11:00 a.m. (19 RT 3204-3205.) Appellant said he ran around and talked about the cops being out front only after he talked with Hunter. (19 RT 3148, 3172-3173.) Appellant denied going to the Marshalls' trailer on Sunday. (19 RT 3237-3238.) He also denied seeing April or being at the Holleys' house on Saturday night, and he denied killing April. (19 RT 3184-3187.) Appellant had last been at the Holleys' house about a week prior to the murder of April. (19 RT 3189.) Appellant said he had a casual, friendly relationship with April. (19 RT 3195.)

Defense

Jessie Bradley lived in the Matheny Tract at 3825 South Canal Street in December 1988. (19 RT 3285.) Bradley spent part of Saturday evening riding around with Charlie Richardson, beginning around 7:00 or 7:30. (19 RT 3286-3287, 3291.) Bradley dropped off Richardson at the Hernandezes' house after about two hours. (19 RT 3287-3288, 3292-3293, 3296.) Richardson and Robert Hernandez brought some automobile tires into the Hernandezes' house. (19 RT 3297, 3301.)

At approximately 11:00 Saturday night, Tammy Petrea[32] was watching television with Jimmy Rounsaval inside a bus, which was located on a lot in the Matheny Tract. (20 RT 3435-3436, 3441-3442.) Richardson knocked on the door of the bus, and Petrea answered the door, letting him come inside. (20 RT 3440, 3442-3444.) Petrea and Richardson used some cocaine. (20 RT 3445-3446.) Rounsaval left the bus to use the restroom at the nearby house. (20 RT 3447.) Richardson placed his hand on Petrea's leg. (RT 3448.) Petrea left the bus and Richardson followed her. (20 RT 3449.) Richardson asked Petrea if she had heard about April getting killed. (20 RT 3449.) Richardson said, "[t]hey did it." (20 RT 3450.) Richardson said she had something on him and he did not want her to testify against him. (20 RT 3450.) Richardson said he "fucked her and he drowned her" in the bathtub. (20 RT 3451.) Richardson said he plugged up the bathtub with a rag. (20 RT 3451.) He walked off after telling Petrea that if she said anything he would take care of her. (20 RT 3452.)

According to Bobby Joe, Sr., a person in the bathroom off the master bedroom in his trailer could not hear a conversation taking place in the second bedroom, unless the speakers were "pretty close to yelling." (19 RT

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[32] Petrea was deceased at the time of appellant's trial. Her testimony from Charles Richardson's trial was read into the record by stipulation of the parties. (20 RT 3435.)

3268-3269.) Kim Fleeman had once accused Bobby Joe, Sr., of molesting her, but no charges were ever filed. (19 RT 3267-3268.)

Mike Marshall got out of bed around 10:00 or 11:00 a.m. on Sunday. He never saw Fleeman or appellant at the trailer that day. (19 RT 3271, 3274, 3276.) Mike did not consider Vickie Lopez, with whom he had slept, an honest person.[33] (19 RT 3272-3273.)

Bobby Joe, Sr.'s son, Kenneth Marshall, returned to the Marshalls' trailer on Sunday, after April's body had been found, between 11:00 a.m. to noon. (19 RT 3277, 3279.) He did not remember seeing Fleeman at the trailer. (19 RT 3280.) Kenneth's sister, Nancy Lee, arrived at the trailer around 3:00 p.m. (19 RT 3259-3260.) Nancy Lee never saw Kim Fleeman that day. (19 RT 3260.)

Steven Gould dated Vickie Lopez in 1989. (19 RT 3251.) He did not recall Vickie being at his house and making a telephone call to Regina Holdridge to discuss Bobby Joe. (19 RT 3251-3252.) Vickie Lopez was one of the last persons Gould would trust; she had told lies about him. (19 RT 3252.) Gould believed Regina Holdridge was an honest person. (19 RT 3255-3256.)

Tulare Senior Police Investigator Gale Watson interviewed Lynn Farmer after his arrest following the purse snatching. (19 RT 3319-3320.) Farmer gave various accounts of what happened at the Best Western Motel, first stating that he was not there, but then stating that he had been there that day. (19 RT 3320, 3324.) Farmer said he was afraid of appellant. (19 RT 3325-3326.) He said he had been smoking marijuana, but he did not appear to be under the influence. (19 RT 3320-3321, 3323.) At the time of

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[33] Lopez testified that she did not sleep with Mike Marshall. (17 RT 2840.)

the interview, the police also had appellant in custody as a suspect. (19 RT 3322.)

On June 15, 1990, Investigator Diaz interviewed Schaub, who told him that appellant asked her to cover up for him. (19 RT 3338-3339.) On July 5, 1990, Investigator Diaz interviewed Lynn Farmer. Farmer said that appellant had threatened to cut his "nuts off." (20 RT 3433-3434.) When Investigator Diaz and Sergeant Salazar said they wanted the truth, Farmer said appellant did not threaten to cut his "nuts" off, but threatened to cut "his guts out." (20 RT 3434.)

On July 19, 1990, Tulare County District Attorney Investigator John Johnson interviewed Kim Fleeman. Fleeman said her Aunt Nancy called her around 8:30 or 9:00 a.m. on Sunday. (20 RT 3432.) Fleeman told Johnson she did not actually see Richardson, but that she saw appellant and Bobby Joe sitting on the bed in the trailer. (20 RT 3432-3433.)

On July 20, 1990, Cliff Webb, a private investigator, interviewed Schaub. Schaub said there was "no way" Kim Fleeman was at the Marshalls' trailer on Sunday morning. (19 RT 3346-3348.) Schaub said that appellant was in Saldana's trailer all morning. (19 RT 3349.)

Investigator Diaz was present when a statement was taken from Kim Fleeman on July 26, 1990. Fleeman said she went over to the Marshalls' trailer on Sunday in her mother's red Volkswagen. Investigator Diaz also interviewed Fleeman on March 4, 1991. (19 RT 3332-3333.) During the two interviews, Fleeman made contradictory statements. She said she saw Bobby Joe sitting on the bed in the Marshalls' trailer on Sunday. (19 RT 3333.) When asked if she saw Richardson, she responded, "'I don't remember actually seeing them in there.'" (19 RT 3333.) Fleeman said "she heard the voices of all three." (19 RT 3333.) Fleeman said appellant stated, "'[w]ell, the bitch deserved everything she got.'" Fleeman did not say that appellant used the term "'[l]ittle bitch.'" She also said she had not

actually heard the conversation herself, and that she learned about April's death when she called "out there." (19 RT 3334.)

On March 6, 1991, Investigator Diaz interviewed Vickie Lopez. She said Bobby Joe came over to her house between 11:00 p.m. and 12:00 a.m. the night he told her about being at April Holley's residence.[34] (19 RT 3329.) Investigator Diaz interviewed Lopez again on March 12, 1991, and Lopez told him that Bobby Joe said he had sex with April Holley. (19 RT 3330.)

On March 15, 1991, Investigator Diaz interviewed Joe Mills, who said he did not recall seeing Fleeman at the Marshalls' trailer on Sunday. (19 RT 3327-3328.)

On October 1, 1991, Investigator Diaz interviewed Schaub. After he asked her if she was sure that appellant admitted he killed April, she responded, "'I don't think I am, no.'" (19 RT 3337.)[35] Schaub said she was in a car when appellant made the admission.[36] (19 RT 3337-3338.)

Scott Dinkins, a private investigator, inspected the Best Western Motel in Tulare. (19 RT 3355.) According to Dinkins, who had made no effort to see if any remodeling had been done since 1988, there was no place at the third stairwell at the far west end of the building where a person can look down from the second floor and see the first floor. (19 RT 3360-3361, 3365.)

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[34] Lopez testified that she was pretty sure that Bobbie Joe came over between 10:30 and 11 p.m. (17 RT 2831.)

[35] Schaub denied making this statement. (18 RT 2990.)

[36] Schaub denied telling Diaz that she was in a car when appellant made the admission. (18 RT 2998.) Schaub testified that appellant made the admission at appellant's mother's house. (18 RT 2986.)

Rebuttal Evidence

In March 1991, Steve Gould was talking to Regina Holdridge by telephone, when he put Vickie Lopez on the phone. (20 RT 3508-3509.) Lopez told Holdridge some information about the murder of April Holley. (20 RT 3510.) Holdridge later told her mother-in-law, Sherry Holdridge, who was a detective with the Tulare Police Department, what Lopez had said to her. (20 RT 3510-3511.)

Penalty Phase Trial

Prosecution Evidence

On November 5, 1986, appellant "busted" into Bruce William Rummerfield's house and struck Bruce on the side of the head with a baseball bat. (21 RT 3796, 3799-3800.) Donald Brown, appellant's brother, thought Bruce was "messing around" with Donald's girlfriend. (21 RT 3801.) Bruce went to the hospital, where they stitched up his head. (21 RT 3801.)

On September 25, 1988, Debbie N. was introduced to appellant. (21 RT 3740, 3748.) Later that night, after they used some cocaine, Debbie was in a pickup truck with appellant when he asked her to get out of the truck and check the tires by kicking them. (21 RT 3743-3744.). Debbie got out of the car, which was located in an isolated area. (21 RT 3744-3745.) Appellant locked the doors of the truck and started to drive off. (21 RT 3744.) Debbie began to cry, because she was not familiar with the area. (21 RT 3744.) Appellant got out of the truck and told Debbie that he was going to have sex with her. (21 RT 3745.) Debbie told appellant no and started crying. (21 RT 3745.) Appellant said if she did not have sex with him, he was going to tie her up, kill her, and throw her body in a ditch. (21 RT 3745.) Appellant made Debbie orally copulate him and then he had intercourse with her. (21 RT 3746.) Appellant told Debbie that she better

not tell anyone or he would kill her. (21 RT 3746.) Debbie reported the incident to the police. (21 RT 3747.)

On December 13, 1988, Eunice Atherton was staying at the Holiday Inn in Fresno. (21 RT 3754-3755.) Appellant approached Eunice and asked her for the time. When she raised her arm to look at her watch, appellant pushed her down and jerked her purse off of her arm. (21 RT 3756,-3757, 3759.) Eunice reported the incident to the police. (21 RT 3759.)

Margaret A. lived alone in her home on 259 North N Street in Tulare. Around 10:00 or 11:00 p.m. on May 28, 1990, 74-year-old Margaret went to bed after locking up the house. (21 RT 3760-3761.) Later that night, she heard a click and, after a "rush," a man held her shoulders down. (21 RT 3762.) Margaret hit and scratched the man. (21 RT 3764.) The man hit her on the left side of the head with some kind of stick at least three times. (21 RT 3764.) He choked Margaret, and she began to lose consciousness. (21 RT 3765.) Something very hard was inserted into Margaret's rectum a couple times and into her vagina three times, which was very painful. (21 RT 3766.)

The man dragged Margaret to the bathroom, where he threw her into the bathtub. (21 RT 3766.) He closed the drain to the tub and turned on the water. (21 RT 3766.) Margaret turned the water off, and he told her not to do that. (21 RT 3767.) The man left the bathroom and then came back with a knife from the kitchen in one hand and a stick in the other hand. (21 RT 3767.) The man gestured with the knife, stating, "'[i]f you recognize me, know me, I'll use this . . . .'" (21 RT 3768.) The man left the bathroom, and Margaret saw him collecting things in the house. (21 RT 3768.) Margaret locked the bathroom door and started yelling "[f]ire, fire" out the bathroom window. (21 RT 3769.) The fire personnel eventually showed up at the house. (21 RT 3770.)

Tulare County Police Detective Gale Watson was involved in the investigation into the crimes committed at Margaret A's home. (21 RT 3780-3781.) Detective Watson observed blood in the bedroom of Margaret's house. (21 RT 3781.) A portion of a broken pool cue was seized. (21 RT 3782.)

Margaret spent six days in the hospital and five days in a convalescent hospital. (21 RT 3771.) Margaret's left hand bone was broken and one finger on her right hand was cracked. (21 RT 3771.) Margaret's rectum and vagina were "very torn up, . . ." (21 RT 3771.) Margaret had been a virgin at the time of this assault. (21 RT 3771.)

On May 29, 1990, appellant called his state parole agent, Joseph Brown, and said he could not report in to the parole office because he had stayed up too late. (21 RT 3783-3784.) Agent Brown met with appellant the next day, May 30, 1990, for appellant's initial parole visit. (21 RT 3784.) Appellant had a scratch above his left eyebrow and another scratch alongside his nose. (21 RT 3785.) Brown informed appellant of the standard parole conditions, including that parolees could not have weapons. (21 RT 3785.) Appellant asked Brown if a pool cue was considered a weapon. (21 RT 3785.) Appellant said that where he was staying there was a pool table and various pool sticks, including possibly some broken ones. (21 RT 3785-3786.) Appellant said he was living in a detached garage at 303 North N Street in Tulare. (21 RT 3786.)

After learning about the rape and beating of Margaret A., Agent Brown conducted a parole search of the garage where appellant lived. (21 RT 3787.) Agent Brown and detectives seized a broken pool cue and a checkbook with Margaret A.'s name printed on the checks. They also found a camera with Margaret A.'s name in the case, along with a blood-stained pillowcase. (21 RT 3788-3790.)

On May 30, 1990, Dorothy Tarbet was staying at the Best Western Motel in Tulare. Tarbet was using a walker because she had broken her ankle. (21 RT 3749-3750.) Dorothy's husband and 84-year-old mother were with her at the motel. (21 RT 3749.) As Tarbet and her family walked to their room, they passed two young men. As the Tarbets neared the room door, the young men came running at them and pushed Dorothy's mother to the floor. (21 RT 3751.) The men took Dorothy's purse and her mother's purse. (21 RT 3752.)

Defense Evidence

Appellant testified on his own behalf. (21 RT 3803.) He admitted attacking Bruce Rummerfield. Appellant said his brother asked him to attack Rummerfield, who was "messing" with appellant's brother's girlfriend. (21 RT 3809.)

Appellant used cocaine with Debbie N. and had consensual sex with her on September 25, 1988. (21 RT 3804.) Appellant did not force Debbie to have sex with him, he did not threaten her, and he did not injure her. (21 RT 3804.)

He denied snatching Eunice Atherton's purse on December 13, 1988. (21 RT 3806-3807.) According to appellant, he was not at the Best Western Motel in Tulare on May 30, 1990. (21 RT 3806.)

He testified that he did not attack Margaret A. (21 RT 3808.)

Appellant also said he did not rape, sodomize, molest or kill April Holley, nor did he help anyone else kill her. (21 RT 3810.) He was not present at the Holleys' residence on Saturday, December 3, or on Sunday, December 4. (21 RT 3810-3811.)

Appellant told the jury that he would rather have a death sentence than be sentenced to life without the possibility of parole. (21 RT 3812.) He told the jury that they had convicted an innocent man, and "If you guys

got a clear conscience, then I'm asking you to give me death." (21 RT 3813.)

GUILT PHASE ARGUMENTS

I. ADMISSION OF EXPERT TESTIMONY CONCERNING THE MANNER OF APRIL HOLLEY'S DEATH WAS PROPER

Appellant argues his state and federal constitutional rights were violated because the court admitted expert testimony to help establish that April Holley's murder occurred during the commission of a sexual assault. (AOB 143.) The evidence was properly admitted.

A. Relevant Trial Record

During motions in limine, defense counsel argued that Dr. Miller's autopsy report statement, that April's death was caused by "drowning in association with sexual assault," was "superfluous." (8 RT 109.) Counsel argued "[s]exual assault didn't kill her." He asserted,

> the doctor doesn't know. He wasn't there. He doesn't know whether the sexual assault was in association with it or not. That's beyond his expertise. He's supposed to be testifying about the cause of death. It's unnecessary to add on "in association with sexual assault."

(8 RT 109.)

The court responded, "experts can speculate if it's based upon assumed facts." (8 RT 109.) Defense counsel maintained the trial court was wrong. He argued, "this is the ultimate opinion. This is an ultimate finding that sustains a special circumstance." (8 RT 109.) The prosecutor responded that the report by Dr. Miller was based on his examination of April's body. (8 RT 110.)

The parties and the court reviewed Dr. Miller's preliminary hearing testimony. The doctor had then testified that death was caused by "'drowning in association with sexual assault.'" (8 RT 110 [read from prior testimony].) At that time, the doctor's testimony was challenged by

counsel, who asked: "'Sexual assault didn't cause death, right?'" (8 RT 111). Dr. Miller responded,

> It's considered to be an attributary cause. This is a very traumatic experience and it is considered contributory to the death, in association with.

(8 RT 111.)

The doctor explained that because a sexual assault has a physiological component, the autopsy's conclusion that death was caused by "drowning in association with sexual assault" was not analogous to stating death was caused by a "'gunshot wound associated with a robbery.'" (8 RT 111.) It was, in fact, more akin to describing a death where the victim was sexually assaulted and stabbed to death as "'multiple stab wounds in association with sexual assault.'" (8 RT 112.)

During the in limine motions discussion, defense counsel maintained that the jury would view the doctor's statement that the drowning occurred "in association with" a sexual assault to be the same as saying death occurred "during the course of" the sexual assault. He contended this would violate due process by lessening the prosecutor's burden of proof as to the sexual assault special circumstance. (8 RT 112-113.)

The trial court ruled that the doctor could testify regarding the cause of death, as he had done at the preliminary hearing. The court explained that "this is nomenclature that's used in the medical profession . . . ." The court cited *People v. Gamez* (1991) 235 Cal.App.3d 957 (*Gamez*)[37] (disapproved on other grounds by *People v. Gardeley* (1996) 14 Cal.4th 605) in support of its ruling. (8 RT 114.) In addition, the court noted the doctor's testimony would assist the trier of fact in determining the cause of

[37] Respondent will discuss *Gamez* in the analysis that follows.

death, and the jury had the choice to either accept or reject the doctor's opinion. (8 RT 114-115.)

At trial, Dr. Miller and Dr. McCann testified about the results of April's autopsy. Dr. McCann described the injuries to April resulting from the sexual assault. First, he described the injury to her vagina as "very serious" and "relatively rare and involv[ing] a very violent type of attack." (16 RT 2396.) He said her injury was consistent with penetration by an adult penis or penetration by a foreign object such as a broom handle. (16 RT 2397-2398.) Next, Dr. McCann described the injuries to April's anus. He observed three serious lacerations. (16 RT 2409-2411.) In addition to injured muscle, there was a tearing around the circumference of the orifice. (16 RT 2411.) Dr. McCann believed these injuries occurred before April's death. (16 RT 2411.) He opined it was "a very forceful entry, and, in my opinion, undoubtedly against resistance." (16 RT 2412.) The injuries were consistent with penetration by a penis. (16 RT 2413.) Dr. McCann was of the opinion that these injures were consistent with multiple perpetrators. (16 RT 2414, 2449.)

Dr. Miller testified regarding the cause of death. He testified that April's death resulted from drowning in "'association with sexual assault.'" He explained this "implies and denotes that there was trauma involved in producing the drowning." (16 RT 2478.) On cross-examination, defense counsel asked Dr. Miller:

> Q. When you were asked what the cause of death was, you said drowning.
>
> A. Yes.
>
> Q. Drowning is why she died, right?
>
> A. That's correct.
>
> Q. And then you looked at your report, and then you read off your report what you wrote seven years ago?

A. That's correct.

Q. She didn't die from the sexual assault, did she? That's not what you meant when you added that?

A. No.

Q. Actually, as far as your observations go and your abilities as a pathologist, just from your observations and nothing more, you can't tell that the two were really associated, can you, except that you noticed -- you saw the symptoms at the same time on the same table?

A. It's not an extrapolation of going beyond the facts, that what I observed occurred in a fairly concurrent fashion.

Q. When you give that response, you're adding to the calculus what you were told, that observations of other people that were at the scene, aren't you?

A. This is the way we always do autopsies.

Q. Well, I'm asking maybe another question. In a hypothetical, you come upon an eleven-year-old victim, the same objective symptoms, on a table. And this is all you know. And you make your observations. From what you could see at this point you understand we're eliminating what you've been told. Could you say as a physician that the sexual assault happened even at the same time as the drowning?

A. I think the – that's not the way I perform my autopsies. And this is not the way I conduct myself professionally. Whenever an autopsy is performed, I need all the help I can get. And I want all the information.

This is why we gather information prior to even going near the body. That's the way it is and that's the way it's going to be.

In answer to your question, the objective signs would be reasonable for a pathologist to look and determine that this all occurred within a reasonable length of time, or as I stated, concurrently.

(16 RT 2479-2480.)

B. Analysis

Appellant maintains that Dr. Miller's testimony withdrew the determination of the sexual assault-related special circumstances from the jury's consideration, and denied him the right to reliable jury fact findings. He also contends the testimony was highly prejudicial. (AOB 157-158.) Respondent disagrees. The trial court's ruling was not erroneous. The cause of April's death was the proper subject of expert testimony, and appellant is not entitled to any remedy.

The trial court's ruling to admit expert testimony is reviewed under the abuse of discretion standard. (*People v. Mendoza* (2000) 24 Cal.4th 130, 177.) Expert opinion testimony is admissible if it will assist the jury. (*People v. Prince* (2007) 40 Cal.4th 1179, 1222, citing Evid. Code, § 801, subd. (a).) Testimony in the form of expert opinion is not made inadmissible merely because it embraces an ultimate issue to be decided by jury. (Evid. Code, § 805; see *Ecco-Phoenix Electric Corp. v. Howard J. White, Inc.* (1969) 1 Cal.3d 266, 271.)

> An expert may generally base his opinion on any "matter" known to him, including hearsay not otherwise admissible, which may "reasonably ... be relied upon" for that purpose.

(*People v. Montiel* (1993) 5 Cal.4th 877, 918.)

Appellant cites five bases for his argument that the expert's testimony did not satisfy statutory requirements, and should have been excluded by the trial court. (AOB 156.) Respondent will address each of these grounds and show that appellant's contentions are meritless; however before doing so, respondent wishes to point out that several of appellant's contentions should be deemed forfeited, because he did not raise them in the trial court. Appellant challenged the doctor's expertise to conclude that the death occurred by drowning in association with a sexual assault (8 RT 109), and he asserted the doctor's conclusion infringed on the trier of fact's role in

determining the ultimate conclusion regarding the sexual assault special circumstance (8 RT 112). Appellant did not, however, argue any of the following: that the doctor did not rely on competent evidence; that the doctor's opinion was not a suitable subject for expert opinion; or that the prejudicial effect of his testimony outweighed its probative value. Accordingly, the latter three assertions were forfeited. (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)

Appellant addresses two of his five challenges to the expert testimony in section F of the argument. (AOB 156, 163-168.) He claims that Dr. Miller lacked expertise "to opine on the temporal connection between the drowning and sexual assault," and that the prosecution did not establish that the doctor's opinion was supported by reliable evidence. (AOB 156.) Not so.

The trial court considered defense counsel's argument against admitting the doctor's opinion regarding the cause of death. The court found the doctor's expertise would be helpful to the jury. (8 RT 114-115.) Thus, clearly the court exercised its discretion before ruling on appellant's objection to Dr. Miller's proposed testimony. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1222.) Further, the court's decision is supported by the record.

Dr. Miller, who is a pathologist, conducted the autopsy along with Dr. McCann, a pediatrician who specializes in childhood sexual abuse. (16 RT 2354-2355, 2359-2360, 2460-2461.) Dr. Miller's specific role in the autopsy was to determine the cause of death. (16 RT 2461.)

April's body was found in the bathtub, half submerged in several inches of water. (15 RT 2233, 2331-2332.) Her lungs were filled with water. (16 RT 2473.) Dr. McCann found a recent bruise on April's inner thigh, along with evidence of sexual assault, consisting of evidence of forceful penetration of April's vagina and anus. (16 RT 2382-2383, 2389-

2390, 2395-2398, 2409-2411.) Dr. McCann testified that the injuries occurred while April was alive. (16 RT 2411.)

Dr. Miller testified that April died as a result of drowning "in association with sexual assault." (16 RT 2478.) He acknowledged during cross-examination that April died as the result of drowning and that she did not die from the sexual assault. But he reported, "It's not an extrapolation of going beyond the facts, that what I observed occurred in a fairly concurrent fashion." (16 RT 2479.)

Dr. Miller had performed approximately 4,000 autopsies. (16 RT 2459-2460.) The doctor was well qualified to render an opinion on the cause of April Holley's death. He was present and participated in the autopsy. His opinion regarding the sexual assault on April and other circumstances of her death were "made known to him" through his joint conduct of the autopsy with Dr. McCann. The doctor observed the injuries to April, and he relied on this information, along with Dr. McCann's observation that April was alive when the assault occurred, to conclude that the drowning occurred in association with the sexual assault.

In addition, as Dr. Miller explained when he was cross-examined, he also relied on information he learned from others involved in the investigation. Dr. Miller testified that whenever he performs an autopsy, he wants to receive as much information as possible, and he gathers information about the case before he begins the autopsy. (16 RT 2480.) The information Dr. Miller relied on, both from others involved in the investigation and from his own observations during the autopsy, is exactly the sort of reliable evidence a pathologist considers to form his opinion.

Next, appellant contends Dr. Miller's testimony about the manner of April's death was not a proper subject for expert opinion. (AOB 169-173.)

Evidence Code section 801[38] sets forth the limitations on expert witness testimony. The testimony of an expert is admitted when it addresses an area "beyond common experience." (Evid. Code, § 801, subd. (a).) In addition, the opinion must be based on matters perceived or made known to the expert and of the sort an expert would reasonably rely on to form the opinion. (Evid. Code, §801, subd. (b).) Appellant contends Dr. Miller's testimony was not helpful to the jury because jurors did not need an expert opinion to assist them in determining whether there was a connection between the sexual assaults and the murder. He reiterates that Dr. Miller had no special expertise, and claims the jurors had all the relevant evidence necessary to determine for themselves whether the sexual assault and murder were connected. (AOB 173.) He is mistaken.

Dr. Miller's opinion was properly admitted because the jurors would have no ability to determine the cause and manner of April's death without his testimony. Dr. Miller's testimony, in conjunction with Dr. McCann's testimony, assisted the jury by describing the nature and extent of April's injuries and explaining how they could have occurred. While Dr. Miller determined April died as a result of drowning, his testimony also established, with Dr. McCann's testimony, when the injuries and death likely occurred. Without the expert testimony, the jury would have no way

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[38] If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

to determine whether the sexual assault occurred near the time of April's drowning. The fact that Dr. Miller described the death as resulting from drowning associated with sexual assault helped the jury to determine that the sexual assault and drowning occurred in close temporal proximity.

Appellant next argues that Dr. Miller should not have been permitted to testify that the cause of death was drowning in association with a sexual assault, because that opinion addressed an ultimate issue before the jury. He contends this testimony was not made admissible by Evidence Code section 805. (AOB 174-181.) Respondent disagrees.

The trial court cited *Gamez, supra*, 235 Cal.App.3d at page 965 when it ruled that Dr. Miller could testify in accord with the autopsy report and that April's death resulted from drowning in association with sexual assault. (8 RT 114.) The *Gamez* court quoted Evidence Code section 805 when it held that the expert could testify about a matter that, in effect, proved one of the elements of the offense:

> Testimony in the form of opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact. So long as expert testimony assists the trier of fact, it is proper even though it provides evidence of the elements of the allegations charged.

(*Gamez, supra*, 235 Cal.App.3d at p. 965.)

In *People v. Wilson* (1944) 25 Cal.2d 341, the court considered whether an expert should be permitted to testify about an ultimate issue in the case. The court held that the propriety of testimony on an ultimate issue depends on "'the nature of the issue and the circumstances of the case.'" (*Id.* at p. 349.) In an area where the ultimate issue can be determined only with the assistance of an expert - for example the value of an item, or whether a person is sane - it is proper for the expert to state an opinion on the ultimate issue. (*Ibid.*)

Similarly here, the jury would not be capable of determining the cause or the time of either April's drowning or the sexual assault without the expert's testimony. The doctor's testimony was necessary to establish these facts. Further, while Dr. Miller testified that the drowning and sexual assault were associated, he did not conclusively state that the killing occurred during the commission of the sexual assault, but only that they occurred in close temporal proximity. The doctor's testimony did not exceed the bounds of proper expert testimony and did not withdraw the issue of the sexual assault special circumstances from the jury's consideration.

Finally, appellant argues the court abused its discretion when it allowed Dr. Miller's testimony because its prejudicial effect outweighed the probative value. He also contends the testimony misled the jury, in violation of section 352. (AOB 182-188.) Not so.

Evidence Code Section 352[39] allows the court to exclude evidence if it is likely it will confuse or mislead the jury or if its prejudicial effect substantially outweighs its probative value.

> A trial court's determination to admit expert evidence will not be disturbed on appeal absent a showing that the court abused its discretion in a manner that resulted in a miscarriage of justice. [Citations.]

(*People v. Robinson* (2005) 37 Cal.4th 592, 630.)

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[39] Evidence Code section 352 states:

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

The trial court properly allowed Dr. Miller to state April's death resulted from drowning in association with sexual assault. The doctor's testimony did not direct the jury to make a particular finding nor was it conclusive on the jury's sexual assault special circumstances findings. Dr. Miller merely provided the jurors with information about the autopsy findings and cause of death. His testimony did not connect appellant to the sexual assault or to the drowning.

Other evidence supported the conclusion that the sexual assaults were associated with April's drowning. Dr. McCann testified that April was alive when the sexual assaults took place. (16 RT 2411.) April was last seen alive by her neighbor, Lorraine Hughes, around 8:00 Saturday evening. (15 RT 2215.) Neighbors testified that they heard screams that sounded like April, coming from the vicinity of her home, somewhere between 9:00 and 10:00 Saturday night. (15 RT 2117-2118, 2120, 2132, 2166, 2169-2172.) The doctor who reported to the crime scene shortly after April's body was discovered estimated her time of death at about 9:00 p.m. Saturday. (15 RT 2344, 2347-2348.)

Appellant has not shown error. His contention should be rejected.

II. EVIDENCE REGARDING APPELLANT'S OTHER CRIME WAS PROPERLY ADMITTED AS A PARTY ADMISSION

Appellant contends the court erred in admitting "other acts" evidence. (AOB 189.) The evidence in dispute was a statement by appellant, in which he acknowledged committing sexual assaults on April Holley and on an elderly woman. The trial court's ruling, which prohibited the evidence under the law "other acts" evidence, but allowed the statement as an admission, was proper, and this claim should be rejected.

A. Relevant Proceedings

Prior to the start of appellant's trial, the prosecution filed a motion in limine seeking to admit evidence concerning a violent sexual assault

appellant committed against 74-year-old Margaret A., whom he repeatedly struck on the head, then raped and sodomized with a broken pool cue. After assaulting Margaret A., appellant placed her in a plugged bathtub, and repeatedly turned on the water, before she yelled for help and he fled.

The prosecutor filed a motion to admit the evidence surrounding the assault on Margaret A. under Evidence Code section 1101, subdivision (b).[40] In the motion, the prosecutor described evidence presented at the trial of Charles Richardson[41] concerning the sexual assault and murder of April Holley (I CT 249-250), noting the similarity of the acts committed against April Holley and the acts described during appellant's trial for the assault against Margaret A. (I CT 250-251; see Probation Report at CT 693, referring to appellant's trial in Tulare County Superior Court case no. 29128.) (I CT 249-256.)

The prosecutor argued the evidence showed the existence of a common design or plan. (I CT 252.) The motion included this chart detailing the similarities between appellant's conduct in the two cases:

APRIL HOLLEY (MURDER)	MARGARET ALLEN (ASSAULT)
1. The murder occurred at night.	1. The assault occurred at night.
2. April was home alone.	2. Margaret was home alone.
3. April was a vulnerable victim (age 11)	3. Margaret was a vulnerable victim (age 74)
4. There was no evidence of forced entry.	4. There was no evidence of forced entry.

[40] In this argument, respondent will refer to Evidence Code sections 1101, subdivision (b) and 352 simply as section 1101(b) and section 352.

[41] Richardson was convicted as a co-perpetrator of the murder of April Holley. See this Court's opinion in case number S029588.

5. The defendant lived near April.	5. The defendant lived near Margaret.
6. April was raped.	6. Margaret was raped (pool cue).
7. April was sodomized.	7. Margaret was sodomized (pool cue).
8. April had extensive injuries to her vagina and rectum.	8. Margaret had extensive injuries to her vagina and rectum.
9. April had head injuries.	9. Margaret had head injuries.
10. April was drowned in her bathtub.	10. Margaret was thrown in her bathtub, and the defendant closed the drain and turned on the faucets after he threatened her with a knife.
11. The defendant said that he "did the same thing to April Holley as he did to the old lady."	11. The defendant said that he "did the same thing to April Holley as he did to the old lady."

(I CT 253.)

The prosecutor argued the evidence also was admissible under section 352. The prosecutor argued the likelihood of prejudice was lessened because appellant was already convicted in the Margaret A. case, and therefore the jury would not seek to punish him for that conduct by convicting him in the present case. The evidence would not consume an undue amount of time, as it required only Margaret A.'s testimony. And the probative value was great, because while Margaret A's assault occurred 18 months after April's murder, appellant had been in custody all but 14 days of those 18 months. (I CT 255-256.)

The motion was the subject of a lengthy hearing before appellant's trial began. (8 RT 145-196.) Defense counsel argued there were more dissimilarities than similarities between the April Holley and Margaret A. cases, pointing to, among other things, the difference in the victims' ages,

the use of the pool cue in Margaret A.'s case, the nature of the resulting injuries, and the fact appellant did not kill Margaret A. (8 RT 150-156.) He also noted that the April Holley murder involved a second perpetrator. (8 RT 159.) The court agreed with defense counsel that appellant's statement that he "did the same thing to April Holley as he did to the old lady" was not something he would consider in deciding whether the evidence showed a common plan or scheme. (8 RT 158.)

Defense counsel then argued that the prejudice inherent in the evidence exceeded the probative value of the evidence, and therefore it should be excluded under section 352. He argued the evidence was particularly prejudicial and thus should be excluded because the assault on Margaret A. was so heinous. (8 RT 160-163-165.)

The prosecutor argued that the assault on Margaret A. was no more heinous than the assault and murder of April Holley. (8 RT 173.) He also argued that the probative value was high, because that within 14 days that appellant was free from incarceration after the assault and murder of April Holley, he assaulted Margaret A. (8 RT 174.)

The court expressed concern about whether there was sufficient similarity between the two assaults to show a common plan, primarily because the evidence did not clearly show that appellant indicated his intent to drown Margaret A. after he placed her in the tub. (8 RT 177-179.) The court also noted the different ages of the victims, and that the attack on Margaret A. was committed by appellant alone, while April Holley's assault involved another participant. (8 RT 178-179.) Based on the evidence before the court at that time, it ruled it would not allow the evidence regarding Margaret A.'s assault to be admitted under the common plan exception in section 1101, subdivision (b). The court made the ruling without prejudice to reopening the question if other evidence came to light during trial that would alter the court's analysis. (8 RT 190-191.)

After the court ruled on the proposed 1101(b) evidence, the prosecutor asked the court to rule on the admissibility of proposed testimony by Lynn Farmer regarding appellant's statement about "April Holley and the old lady." (8 RT 192-195.) The court expressed its intention to allow the statement "in its entirety." (8 RT 195.)

During trial, the issue of appellant's statement came up when the parties discussed whether the court should admit evidence regarding appellant's involvement in planning to commit purse snatchings with a group of minors. (17 RT 2567-2588.) The prosecution intended to introduce testimony about the purse snatching, because it provided the context for appellant's statement to Lynn Farmer concerning April Holley and Margaret A. (17 RT 2571.) The court reminded defense counsel that it had already ruled the statement would be admitted, and it explained the difference between an admission and section 1101, subdivision (b) evidence. The court noted that the statement came from the defendant, and therefore qualified as an admission. It was up to the jurors to decide whether they believed the statement was made. (17 RT 2572-2573.)

When appellant objected that the statement was merely another means of admitting the other acts evidence, the court explained that the statement was not about the purse snatching or the assault on Margaret A.:

> The crucial difference is he says, "If I get caught for this snatch, I could get caught for April Holley and the old lady, 'cause I screwed the old lady in the ass just like I did to April Holley." That's the difference.
>
> He himself connects the two together, if they believe the statement. If they don't believe the statement, then it's not -- has no relevance. But if they believe the statement, I think it's highly relevant. Certainly it's prejudicial to the defendant. But any admission is prejudicial to the defendant.

(17 RT 2578.)

Defense counsel maintained that even if the admission were allowed, the jury should not learn about the purse snatch that occurred just before appellant made the statement, due to the prejudice that would result from the other crimes evidence. (17 RT 2580.) The prosecutor argued that the circumstances under which the statement was made – that appellant and Farmer were evading police after the purse snatching - gave the statement credibility. (17 RT 2580-2581.) The court ruled the statement and its surrounding circumstances were relevant and probative, and these factors outweighed the prejudicial effect of allowing the jury to learn about the purse snatching that occurred just prior to the admission. (17 RT 2581-2582.)

Lynn Farmer testified that in May 1990, he visited his sister Cindy. Appellant was living in the garage of Cindy's home. (18 RT 3031-3032.) Appellant was going to give Farmer a tattoo. (18 RT 3033.) Appellant mentioned he wanted to get a tattoo of April Holley. (18 RT 3039.) Farmer and appellant were eventually joined by a number of Farmer's friends. They decided they were going to have a little beer party. (18 RT 3033-3035.)

Appellant suggested that the best way to get money to purchase beer would be "to go do some purse snatching." (18 RT 3040.) Farmer, appellant, and two of Farmer's friends went to Kmart, and then to a motel in Tulare to do the purse snatching. Appellant instructed the others to "[j]ust hit an old lady in the arm and get her purse somewhere." (18 RT 3043-3044.)

They did not snatch any purses at Kmart, so they moved to a motel. (18 RT 3045-3046.) Appellant and Farmer were on the second story and the others stayed on the first floor. (18 RT 3046-3047.) The next thing Farmer recalled, he heard "an old lady screaming downstairs and me and [appellant] turned around and started going back." (18 RT 3047.)

According to Farmer, appellant was nervous. "He said, 'Man, if I get busted for this, man, I'll get busted, you know, they'll hook me up with the old lady and April." (18 RT 3048.) Appellant said, "He did the same thing to the old lady as he did to April," that he "'[f]ucked her in the ass.'" (18 RT 3049.)

As they were hurrying to leave the motel, appellant told Farmer that "he knew where I lived." (18 RT 3051.) They looked for a place to get over the fence. (18 RT 3052.) Within a few minutes, the police arrested Farmer and Brown. (18 RT 3053.)

Later, at the jury instruction conference, the parties and the court discussed the appropriate instruction to be given regarding appellant's admissions. Defense stated that he and the prosecutor agreed that CALJIC No. 2.71 would not be given, and he requested the court modify CALJIC No. 2.70.[42] (19 RT 3374-3375. 3387-3389.) Counsel submitted

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[42] The standard CALJIC No. 2.70 instruction is:

> A confession is a statement made by a defendant in which [he] [she] has acknowledged [his] [her] guilt of the crime[s] for which [he] [she] is on trial. In order to constitute a confession, the statement must acknowledge participation in the crime[s] as well as the required [criminal intent] [state of mind].
>
> An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence.
>
> You are the exclusive judges as to whether the defendant made a confession [or an admission], and if so, whether that statement is true in whole or in part.

the following language to be used in lieu of the standard third paragraph of CALJIC No. 2.70:

> You are the exclusive judges as to whether the defendant made a confession, and if so, whether such a statement is true in whole or in part.
>
> The prosecutor has the burden of proving, beyond a reasonable doubt, that such a statement was made and that it was true in whole or in part. If you should find that there is any reasonable doubt that the statement was made or that it is true, you must reject it. If you find that the prosecutor has proved, beyond a reasonable doubt, that it was made and that it was true in whole or in part, you may consider that part which you find to be true.

(II CT 315.)

The court declined to give the instruction as offered, but agreed to let defense counsel propose another modified instruction. (19 RT 3389-3391.)

The court actually gave the following instruction:

> A confession is a statement made by a defendant other than at his trial in which he has acknowledged his guilt of the crime for which such defendant is on trial. In order to constitute a confession, such statement must acknowledge participation in the crime as well as the required [criminal intent] [state of mind].
>
> An admission is a statement made by a defendant other than at his trial which does not by itself acknowledge his guilt of the crime for which such defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence.
>
> You are the exclusive judges as to whether the defendant made a confession or an admission, and if so, whether such statement is true in whole or in part. If you have a reasonable

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[Evidence of [an oral confession] [or] [an oral admission] of the defendant not contained in an audio or video recording and not made in court should be viewed with caution.]

doubt that the defendant made the statement, you must reject it. If you find that it is true in whole or in part, you may consider that part which you find to be true.

Evidence of an oral confession or oral admission of the defendant should be viewed with caution.

(20 RT 3526-3527; II CT 346.)

B. Analysis

Appellant argues the court erred by admitting "other acts" evidence, and asserts the ruling deprived him of numerous rights under the California and federal Constitutions. (AOB 191.) The record clearly shows the court did not allow the "other acts" evidence under section 1101, subdivision (b). The court admitted only appellant's statement to Farmer, as a party admission. Appellant's attempt to characterize the admission as other acts evidence does not make it any such thing. He has not shown error.

Evidence Code section 1230 creates an exception to the hearsay rule, allowing admission of a statement that is against the penal interest of the declarant:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

It is the fact that the statement subjects the declarant to criminal liability that makes the statement trustworthy. (*People v. Spriggs* (1964) 60 Cal.2d 868, 874.) A reviewing court may not overturn the trial court's finding regarding trustworthiness unless there was an abuse of discretion. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.)

Appellant relies on *People v. Allen* (1976) 65 Cal.App.3d 426, 433 (*Allen*) to support his contention that the statement in question was admitted in error. He contends that although appellant's statement was a party admission, it was not admissible because the statement was not "*legally relevant.*" (AOB 208, italics in original.) He is wrong.

In *Allen*, the defendant, who was charged with theft, made a statement in the presence of the victim and a police officer that he knew many "fences," and if he put the word out, he would be able to learn if anyone attempted to sell the victim's stolen jewelry. The statement appeared to be exculpatory. However, the prosecutor asked to have the statement admitted on the theory it "constituted an implied statement that [the defendant] had stolen the victim's jewelry" and wanted to try to get it back from his confederate. The trial court agreed and admitted the statement as an implied admission of guilt.

The *Allen* court found error. It stated,

> Evidence Code section 1220 does not define when a declarant-party's extrajudicial hearsay statement becomes relevant to be admissible against such party under the personal admission exception to the hearsay rule. It is obvious, however, that, for such a statement to be admissible against a party as an admission, the statement must assert facts which would have a tendency in reason either (1) to prove some portion of the proponent's cause of action, or (2) to rebut some portion of the party declarant's defense.

(*Allen, supra*, 65 Cal.App.3d at p. 433.)

The court found that the prosecutor's "implied admission" theory was "clearly speculative and lacks trustworthiness or reliability based upon either logic or reason." The court pointed out that the most logical and direct inference the jury would draw from the statement was that the defendant knew and associated with people who receive stolen property, not that he committed the theft. The court concluded the "implied

admission" was in the category of improper character evidence, rather than a party admission. (*Allen, supra*, 65 Cal.App.3d at pp. 434-436.)

Based on *Allen*, appellant argues this Court should find his statement was not relevant and was admitted in error. (AOB 208.) To support his contention, he urges this Court to consider certain "facts." First, he suggests that in light of appellant's prior acquaintance with April Holley, it is possible that the act of sodomy he referred to in his statement might have been unrelated to the act that occurred on the occasion of April's murder, and that it may have been a reference to "not necessarily nonconsensual" activity with the 11-year-old child. (AOB 208-209.) He also claims the admitted statement raised improper inferences concerning the "other acts" evidence involving Margaret A. (AOB 210.) Appellant contends the jury might have concluded that appellant had forcible anal intercourse with the "old lady," when "appellant admitted to nothing of the sort and the circumstances did not dictate this conclusion" because the forcible act with Margaret A. involved sodomy with a foreign object, unlike the sodomy committed against April. (AOB 210-211.)

Respondent submits appellant's comparison of his case to the *Allen* case is inapt. Evidence is relevant if it has any "tendency in reason to prove or disprove any disputed fact." (Evid. Code, § 210.) In this case, while Respondent does not concede that the statements admitted in *Allen* were irrelevant, the statement admitted in appellant's case was most certainly relevant. The trial court admitted appellant's statement because it was an admission that "he did the same thing to the old lady as he did to April." (17 RT 2578, 18 RT 3049.) Thus, the statement was relevant to his prosecution for sodomizing and murdering April Holley.

Further, it stretches credulity to imagine that any juror believed the acts referred to in appellant's statement concerned consensual or non-criminal sexual activity, particularly since April was an 11-year-old child.

(See also *People v. Prince*, *supra*, 40 Cal.4th at p. 1237 [court did not abuse it's discretion in admitting evidence of that tended to show defendant raped victim in the weeks prior to conversation describing the sexual assault].)

Lynn Farmer's testimony regarding the purse snatching was relevant, because it was admitted to provide the context for appellant's statement. In this regard, appellant's claim is comparable to that of the defendant in *People v. Turner* (1994) 8 Cal.4th 137 (*Turner*).

In *Turner*, the dispute concerned the admission in the defendant's trial of statements by his co-perpetrator in a shooting. Vincent, an informant, was permitted to testify about statements he heard both the defendant and co-perpetrator Scott make as the three were transported on a jail bus. Scott's statements described the circumstances of the shooting, and included questions he asked of the defendant, such as, "We had them tied up. ... Why did you do it?" and "you should have got rid of it [the gun]." (*Turner*, *supra*, 8 Cal.4th at p. 188.) The court instructed the jury that they should not consider Scott's statements for the truth of the matter stated, but "'only to the extent that they give meaning to the statements of [defendant].'" (*Id.* at p. 189.) The defendant objected to the admission of Scott's statements as inadmissible hearsay. The *Turner* court found Scott's statements were properly admitted because they "gave context to the defendant's statements and tethered them to the crimes in this case." (*Id.* at p. 190.)

Like the statements in *Turner*, Farmer's testimony about appellant's participation in the purse snatching activity gave context to appellant's statement. Appellant made the admission to Farmer as they fled from the hotel, after their confederates tried to grab the purse of a hotel guest. The fact appellant and Farmer were fleeing from the police gave context to appellant's statement that "if he got busted" the police would connect him to "the old lady and April." The statement referring to "the old lady and

April," gave context and meaning to his admission that he did the "same thing" to each of them, referring to the sexual assaults on April Holley and Margaret A.

Even assuming Farmer's testimony was admitted in error, appellant cannot show a miscarriage of justice. Farmer's testimony did not go unchallenged. Defense counsel called Senior Investigator Gale Watson who questioned Farmer immediately after his arrest for the purse snatching incident. The detective said Farmer changed his story frequently, and as a result, the detective questioned Farmer's truthfulness. (19 RT 3320.) Detective Watson testified that when she questioned him, Farmer admitted he had recently smoked marijuana. (19 RT 3321.)

Appellant's jury was properly instructed regarding how to evaluate the admission. They were instructed that before considering the admission, they must decide whether they believed appellant, in fact, made the statement, and that they should view any admission with caution. (20 RT 3526-3527.)

Appellant has not shown the trial court abused its discretion in admitting appellant's admission. His contention should be rejected.

III. RHONDA SCHAUB'S TESTIMONY WAS PROPERLY ADMITTED INTO EVIDENCE

Appellant argues the admission of Rhonda Schaub's testimony relating to his confession to the murder of April Holley violated his right to due process and to be free from cruel and unusual punishment. (AOB 218.) There was no error.

A. Relevant Proceedings

1. Pre-trial ruling

Defense counsel filed a motion requesting a ruling under Evidence Code sections 402 and 405 regarding the admissibility of Rhonda Schaub's

anticipated testimony that appellant confessed to participating in April Holley's murder. Counsel argued Schaub's testimony was unreliable and untrustworthy, and its admission would violate his right to due process, citing *Chambers v. Mississippi* (1973) 410 U.S. 284. (I CT 271.)

At the hearing on pretrial motions, appellant's counsel informed the court that in order to challenge Schaub's testimony and show her bias against his client, he would have to ask questions that would reveal information that would further damage appellant in the jury's eyes. Counsel explained that when he questioned Schaub about why she delayed so long to report appellant's confession, he expected her to testify that she was frightened of him due to his violent nature. (8 RT 135-137.) Counsel argued that any effort to attack Schaub's testimony through cross examination, rather than helping appellant's case, would only prejudice his client further. (8 RT 139.)

The court responded that appellant could show that Schaub had many opportunities to report appellant's confession, yet she failed to do so. But the court advised counsel it would not allow him to ask Schaub whether she was biased against appellant, and then prevent any follow- up questions concerning the reason for Schaub's bias. The court noted the jury was entitled to hear the evidence so that it could evaluate Schaub's credibility. (8 RT 138-140.)

2. Schaub's testimony

Schaub testified that she had been in a relationship with appellant for a few months as of December 1988, and she was living with him at that time. (18 RT 2965-2966.) After Schaub learned about April's death, she "kept asking [appellant] where he'd been, if he had anything to do with her death." (18 RT 2977.) The first couple of times she asked him about it, he didn't say anything. But then one morning when appellant was angry with

Schaub, he told her "that he had killed April, but he would never be caught." (18 RT 2977.)

Appellant told Schaub he had been to the Holleys' home with Bobby Joe and Joe Mills. Richardson was there too. He said April was mad and they all left. Later that month (December), appellant told Schaub that Richardson had April's ring. (18 RT 2979.)

After appellant told her about his involvement with April's murder, he sent her a few threatening letters. He told her if she told anyone, "I'd get mine." (18 RT 2979.) Their relationship ended soon after April's death. (18 RT 2980.)

Schaub did not tell the police about appellant's confession when she spoke with them in January 1989. (18 RT 2980.) She also did not mention appellant's statements to Investigator Diaz when she gave a statement in June 1990, nor did she mention it to Richardson's defense investigator, Cliff Webb, when he interviewed her in July 1990. (18 RT 2980-2981.) During the 1990 interview with Investigator Diaz, Schaub said appellant did not "'cop out'" to killing April. (18 RT 2982.) Schaub again failed to mention the statement during interviews with Webb and Diaz in March and in August 1991, respectively. (18 RT 2981.) The first time she mentioned the confession to anyone was in October 1991. (18 RT 2982.) Schaub received the threatening letters from appellant after she had a child with another man. (18 RT 2993.)

The first time she told Investigator Diaz about appellant's confession, she did not mention appellant's threat, nor did she report that he went to the Holleys' with Mills and Marshall. (18 RT 2992.) She told Investigator Diaz that she pushed and nagged appellant to tell the truth. She said to the investigator, "'I was – I guess I wanted him to say he did it.'" (18 RT 2997, 3008)

After April Holley was murdered, appellant became distant. He was meaner and more violent. (19 RT 3005.)

Analysis

Appellant argues the court erred in allowing Schaub to testify that appellant confessed his involvement in April Holley's murder, because it was inherently unreliable and untrustworthy, violating his right to due process. (AOB 218.) Respondent disagrees.

Appellant attacks the admission of his confession to Schaub on the basis that the evidence was untrustworthy and not sufficiently reliable to be admitted at trial, particularly because he was facing the death penalty. (AOB 219-220.) He relies on Schaub's statements during cross-examination, that at the time she questioned appellant about his participation in April's murder she was angry with him and wanted to "get even." (AOB 221.)

The United States Supreme Court has noted that even if voluntary, a defendant's confession is "not conclusive of guilt." (*Crane v. Kentucky* (1986) 476 U.S. 683, 689 (*Crane*).) In *Crane*, the defendant did not challenge the voluntariness of his confession to police, but he wanted to present evidence surrounding the circumstances that led to the confession. The trial court refused to admit the evidence. The high court explained how the ruling to exclude evidence of the circumstances of the confession deprived the defendant of his right to due process:

> Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the

> manner in which the confession was obtained casts doubt on its credibility.

(*Crane v. Kentucky* (1986) 476 U.S. 683, 689 (*Crane*) [judgment reversed because trial court, after finding confession was voluntary, would not allow questions regarding the duration of interrogation or circumstances of confession].)

Appellant's discussion of *People v. Neal* (2003) 31 Cal.4th 63 (*Neal*) does not assist his argument. In *Neal*, this Court recognized that the erroneous admission of an involuntary confession is error, and that the error "is 'likely to be prejudicial in many cases.'" (*Neal, supra*, 31 Cal.4th at pp. 85-86, citing *People v. Cahill* (1993) 5 Cal.4th 478, 503.) The *Neal* court relied on the *Chapman*[43] standard, requiring the proponent of evidence to show the erroneous admission of a confession was harmless beyond a reasonable doubt. While admission of the defendant's confession in *Neal* was held to be erroneous, the case does not support appellant's argument. The confession in *Neal* resulted from police interrogation that included *Miranda* violations (*Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*)) and other circumstances that affected the voluntariness of the defendant's confession.[44]

> This Court has held that, in general,
>
> confessions stand upon the same footing as other evidence and are to be weighed by the jury in the same manner. All parts are not necessarily entitled to the same credit, and the jury may believe a part and reject the remainder of a confession. [Citations.]

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[43] *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).

[44] In *Neal*, the court noted the officers' deliberate violation of the defendant's rights under *Miranda*. The court also pointed to the intentional isolation of the immature and unsophisticated defendant and deprivation of food, drink and toilet facilities. These factors all militated against admitting the confession. (*Neal, supra*, at pp. 72-76.)

(*People v. Garcia* (1935) 2 Cal.2d 673, 679 (*Garcia*).)

The rule from *Garcia* applies here, as there are significant differences between the circumstances presented by appellant's confession to Schaub and the confessions at issue in *Crane* and *Neal*. Appellant's confession occurred during a conversation between appellant and Schaub, who was then appellant's girlfriend. The confession was not the result of police interrogation, and it did not occur under coercive circumstances.

The trial court's decision to allow Schaub's testimony is not subject to *Chapman* harmless error analysis, because the court did not err as a matter of law, and admit an involuntary confession as occurred in *Neal*. Nor did the court deprive the defense from presenting critical evidence that would have explained the circumstances of the confession, in violation of appellant's right to due process, as in *Crane*. The admission of Schaub's testimony regarding appellant's confession is reviewed under the *Watson* prejudice test. (*People v. Cahill, supra,* 5 Cal.4th at pp. 509-510, citing *People v. Watson* (1956) 46 Cal.2d at 818, 836.) Appellant must show it is reasonably probable he would have received a better result in the absence of error.

Given the evidence presented to the jury, appellant cannot show error. The jury knew the circumstances of appellant's confession to Schaub. The jurors learned that she waited almost three years to report the confession. Defense counsel placed Schaub's motives and her credibility in question, pointing out her estrangement from appellant and her drug use.

Other testimony supported Schaub's account and implicated appellant as April's killer. Schaub told Investigator Diaz that appellant asked her to cover up for him. (19 RT 3338-3339.) Kim Fleeman testified that she overheard a conversation the morning after April was killed, where Bobby Joe said, "'[w]e've got to get our stories straight,'" and appellant said, "'[t]he little bitch deserved everything she got.'" (18 RT 2893-2894.) The

jury also knew that Charles Richardson, Bobby Joe Marshall, Jr., Joe Mills, and James Stubblefield, who appellant implicated as the likely guilty parties in his interviews with police, were excluded as possible donors of the sperm found in April's rectum, while appellant was not excluded as the donor. (17 RT 2638-2639.)

The court did not err in admitting Schaub's testimony. Appellant's claim must be rejected.

IV. APPELLANT'S CONVICTION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

In his final guilt phase argument, appellant contends his conviction is not supported by substantial evidence. (AOB 224.) Respondent disagrees.

The test the reviewing court applies in evaluating an insufficient evidence claim is well established:

> Substantial evidence is evidence which is "'reasonable in nature, credible, and of solid value.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576, [].) "In reviewing the sufficiency of the evidence, we must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Davis* (1995) 10 Cal.4th 463, 509 [].) The reviewing court must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, [].) "The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on "isolated bits of evidence." [Citation.] (*People v. Cuevas* (1995) 12 Cal.4th 252, 261 [].)

(*People v. Medina* (2009) 46 Cal.4th 913, 919, italics in original.) In cases where the prosecution relies mainly on circumstantial evidence, the same standard of review applies. The reviewing court "must accept logical inferences which the jury might have drawn." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Appellant argues the evidence showed he was not near April Holley's home near the estimated time of her death, therefore his conviction for her murder is not supported by the evidence. (AOB 227.) Appellant's argument is based on a selective, narrow view of the evidence. In fact, the jury's verdict is supported by substantial evidence.

A. Summary of Evidence Tying Appellant to April Holley's Murder

Appellant knew the Holleys and was familiar with their home

April's older sister Tammy testified that she had known appellant for about three years before April's death. He was a friend with whom she used to party. (14 RT 2022-2023.) April's mother also testified that she knew appellant, that he visited their home and had even spent the night there. (14 RT 2003-2004, 2006.)

April was murdered at approximately 9:00 Saturday night, and appellant visited the Holley home near 9:00

April was dropped off at her home between 7:15 and 8:30 Saturday evening. (14 RT 2047-2048, 2059.) April's neighbor, Lorraine Hughes, testified that April knocked on her door between 7:45 p.m. and 8:00 p.m. (15 RT 2215.)

Several of April's neighbors testified that they heard screams coming from the direction of April's home. Jeremy Johnson recognized April's scream between 9:00 p.m. and 10:00 p.m. (15 RT 2117-2120.) Irene Garcia also heard the scream of a young girl around 9:00 that night. Garcia's brother heard cursing that sounded like it was coming from the street a little after 9:30 p.m. (15 RT 2152-2157.) Garcia's son reported he heard screams coming from April's house around 9:00 p.m. (15 RT 2166.)

Appellant's sister, Lisa Saldana, owned a 1974 brown Pontiac Firebird that she described as a loud vehicle. On Saturday, she loaned her car to appellant so that he could drive his girlfriend to work. (18 RT 2928,

3086-3088.) Kim Fleeman reported that between 6:30 and 7:00 Saturday evening, Bobby Joe arrived at her home in Lisa Saldana's car. Fleeman could not see the other occupants of the vehicle well enough to identify them, but she told Bobby Joe that if appellant was in the car, "I wanted him out of here now." (18 RT 2896-2899.) The Holleys' neighbor, Margaret Thomas, saw a car pull up to the Holleys' house around 8:30 p.m. Thomas said the car was a little loud and sounded old. The car remained there for a while. (15 RT 2300, 2305-2307, 17 RT 2636.)

Bobby Joe and Mills testimony regarding appellant's whereabouts on Saturday night

Bobby Joe and Joe Mills went to the Holleys' home around 8:15 p.m., but finding no one at home, they returned to the Marshalls' trailer. (17 RT 2654-2655, 2738-2740, 2748.) They arrived there about 8:45 p.m., and soon after, appellant pulled up in the brown Firebird. (17 RT 2664-2665, 2749.) Appellant stayed a few minutes, then left again, driving toward the street where the Holleys lived. (17 RT 2665-2667.) According to Mills, appellant returned to the Marshalls' place after about 30 minutes, and then Mills, Bobby Joe, and appellant left for Linnell Camp. (17 RT 2668-2669.) Bobby Joe's account of the evening differed somewhat from Mills. Bobby Joe said he and Mills left with appellant immediately after appellant's brief visit inside the Marshalls' trailer. (17 RT 2750.)

Both Bobby Joe and Mills testified that before they went to Linnell Camp, appellant drove them to the cotton gin where they visited Rhonda Schaub. According to Bobby Joe, it took them about 15 to 20 minutes to get to the cotton gin. (17 RT 2753.) Bobby Joe said they arrived at the gin about 9:20 p.m., but Mills said it was closer to 10:00. Schaub testified that they arrived at the gin after 9:00 p.m. (17 RT 26669-2671, 2754, 18 RT 2971, 3000.) They left the cotton gin about 9:50 p.m. and went to a mall in

Visalia before heading to Linnell Camp to purchase drugs. (17 RT 2672-2673, 2755.)

Admissions

On Sunday morning, Kimberly Fleeman went to the Marshall's trailer. While she was there, between 10:30 and 11:00, she overheard a conversation during which Bobby Joe said, "'[w]e've got to get our stories straight.'" (18 RT 2893-2894.)[45] Appellant said, "'[t]he little bitch deserved everything she got.'" (18 RT 2894.)

Schaub testified that appellant told her he killed April. (18 RT 2977, 2995, 300-3001.) He told Schaub that he, Bobby Joe and Mills had seen April Saturday evening, and they had gone to her home. Charlie Richardson was also there. (18 RT 2978.)

Physical evidence

The jury was informed that April had been drowned after an apparent struggle. (16 RT 2472-2473, 2478.) She had also been violently raped and sodomized. (16 RT 2387, 2389-2390, 2395-2398, 2405-2414.) Semen was recovered from rectal swabs taken during April's autopsy. (17 RT 2638.) Charles Richardson, Bobby Joe Marshall, Jr., Joe Mills and James Stubblefield were excluded as possible contributors of the semen. (17 RT 2638-2639.)

B. Analysis

Contrary to appellant's assertion, Mills did not provide an alibi that made it "improbable if not impossible" for appellant to have committed the murder of April Holley; and the evidence does not conclusively establish that appellant, Bobby Joe and Mills together were at Linnell Camp between 9:00 p.m. and 2:00 a.m. Sunday, as he claims. (AOB 227.) The evidence

[45] Bobby Joe denied having any conversation with Richardson and appellant on Sunday morning. (17 RT 2768.)

supports appellant's conviction for the murder and other crimes committed on Saturday, December 3. There was ample evidence from which the jury could find the elements of the crimes beyond a reasonable doubt.

Mills' testimony established a window of time at approximately 9:00 p.m., when appellant left the Marshalls' trailer without Bobby Joe and Mills. According to Mills, when appellant left the Marshalls' trailer, he was driving toward the Holleys' home. Margaret Thomas saw a car pull up at the Holley's shortly after 8:30 p.m., and the car stayed a while. Neighbors' accounts of the screams coming from the Holleys' residence placed them variously between 9:00 and 10:00 that night.

As the prosecutor pointed out in response to appellant's motion for a new trial, there were many inconsistencies in the witnesses' testimony concerning the whereabouts of appellant, Bobby Joe, and Mills, during the period around 9:00 Saturday evening. (2 CT 504-505.) Further, though Bobby Joe initially contradicted Mills account, he also admitted during cross-examination that he was not certain about any of the times and that he was "guessing as I go along." (17 RT 2777.) Bobby Joe said that he was not "real sure about the times." (17 RT 2788.) He also admitted on redirect examination that appellant "could have left and come back" during Saturday evening. (17 RT 2793.)

In evaluating a claim of insufficient evidence, this Court reviews the record in the light most favorable to the judgment to determine whether it discloses substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Snow* (2003) 30 Cal.4th 43, 66.) All conflicts in the evidence are resolved in favor of the judgment and all reasonable inferences are drawn in its favor. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Appellant has not shown his conviction is not supported by sufficient evidence. His claim should be rejected.

PENALTY PHASE ARGUMENTS

V. COUNSEL UPHELD HIS DUTY OF LOYALTY BY ACCEDING TO APPELLANT'S KNOWING AND VOLUNTARY CHOICE TO NOT PRESENT EVIDENCE IN MITIGATION, OTHER THAN HIS TESTIMONY WHICH CHALLENGED BOTH GUILT PHASE AND PENALTY PHASE EVIDENCE

Appellant contends he experienced constitutional error based on his counsel's failure to present mitigation evidence during the penalty phase trial. He also contends this error resulted in a violation of his rights to due process, to be free from cruel and unusual punishment, and to a reliable penalty phase verdict. (AOB 236 et seq.) Respondent disagrees.

A. RELEVANT PENALTY PHASE PROCEEDINGS

In preparation for the penalty phase trial, defense counsel informed the court that appellant did not wish to be present during the penalty trial, nor did he wish to present any witnesses or evidence in mitigation. The only testimony appellant intended to present was his own, during which he would inform the jury that he was innocent; however, he also informed the court that he wished to receive the death penalty rather than serve a life sentence without the possibility of parole.

> [T]he defendant has made a personal choice to proceed this way because he intends to testify, and because he will inform the jury that he wants to receive the death penalty. He does not want to receive a penalty of life without the possibility of parole. That is an intolerable penalty as far as he is concerned.
>
> I want to make it perfectly clear that in my opinion this is an informed choice. I have spoken to the defendant on three occasions, on at least three other occasions, and other times my paralegal, Scott Dinkins, has also spoken to the defendant about this subject. And the time span for these discussions has been over a week.
>
> The last time I spoke to Mr. Brown was yesterday, yesterday morning. So we've spoken to him enough times that I am convinced that this clearly is his choice. He's not depressed

because of the verdict, whether he agrees with it or not. That's not what is causing him to make this decision. It's an informed choice because in detail I informed Mr. Brown about the potential mitigation that could be put on on his behalf. And in essence, he's giving up the right to present this mitigation.

This is not a case where no investigation was done or really just making a tactical choice not to put on mitigation. An extensive background investigation has been undertaken and completed in Mr. Brown's case. It started in 1992, if I remember correctly. I have in my office 1600 pages of documents. . . . [T]here's ... 800 pages of documents that have been compiled which form the basis for presenting mitigating circumstances.

They involve a background investigation. His family members have been interviewed. We have selected medical records, school records, records from the Youth Authority prison, schools, and the probation department, his juvenile file we have. And so his background and history have been documented.

However, in this regard Mr. Brown does not want to put his family through the ordeal of having to testify here. That's part of the basis for the decision. He's also been tested and interviewed by two psychologists, one several years ago, and another one actually during the course of the trial.

There are mitigating facts that could have been presented that come from his background in the form of abuse and neglect. The psychologist has mitigating facts that she could present, Dr. Martha Kiersch, K-I-E-R-S-C-H, a Fresno neuropsychologist. Another theme that could have been pursued is institutional failure. I think there were signs in his background that gave hints of certain things that were essentially ignored.

I've gone over all of these things and a few others with [appellant]. I've gone over everything that would have comprised the mitigating facts. These are the mitigating factors that could have been presented. And I think [appellant] understands them thoroughly. But because he prefers to receive the death penalty, it's his choice to forego putting these mitigating factors on at his trial.

One of the other options he has, and he understands this, is for me to cross-examine the prosecution's witnesses at this trial.

But that would be counterproductive to the end, that is, the penalty that he wants to receive in this case. So there's no point in doing that. We discussed that. He's made an informed choice about whether or not to have me cross-examine those witnesses.

He also wishes to be absent from these proceedings, knowing full well that he has a right to be present throughout the proceeding. The only time he wants to be here is when he testifies.

(21 RT 3720-3723.)

The court questioned appellant to confirm that these were his wishes:

THE COURT: [Addressing appellant], you've heard your attorney; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And you've met with him and his investigator regarding the penalty phase of this trial?

THE DEFENDANT: Yes, sir.

THE COURT: And is it your desire not to put on any evidence in mitigation, as Mr. Cross has represented to the Court?

THE DEFENDANT: Yes, sir.

THE COURT: Is it also your desire for him not to cross-examine any witnesses that might be put on by the prosecution in aggravation?

THE DEFENDANT: Yes, sir.

THE COURT: Is it also your desire not to be present during the penalty phase, except for when you testify?

THE DEFENDANT: Yes, sir.

THE COURT: Now, by doing those things, obviously that's going to be or could be an advantage to the prosecution. You're aware of that?

THE DEFENDANT: Yes, sir.

THE COURT: When I say "advantage to the prosecution," by not putting on any evidence in mitigation and by not challenging the evidence in aggravation, there's a good likelihood that the jury's going to come back with a recommendation of the death penalty; do you understand this?

THE DEFENDANT: Yes, sir.

THE COURT: I assume you've given this a lot of thought. Have you?

THE DEFENDANT: Yes, sir.

THE COURT: Do you want to tell the Court, you don't have to, but do you want to tell the Court why you wish to proceed in this fashion?

THE DEFENDANT: I'd rather do a death sentence than do life without.

THE COURT: Okay. Whether or not you plan to appeal – let's say the sentence – the recommendation that comes down from the jury, based upon the representations made here as to how this case has progressed, let's say they come back with a recommendation and that is the sentence of the Court, the death sentence. And then later you wish to appeal that, and appeal not only the sentence of guilt, but the penalty phase.

It's going to be difficult, if not impossible, for you to raise those issues on appeal that – those issues being that no evidence was offered in mitigation, that the evidence that was offered in aggravation was never challenged by you or your attorney, that fact that you were not present in court.

If you knowingly give up your right to proceed as normal, I say "normal," where you present evidence in mitigation and challenge that evidence in aggravation, it would be difficult, if not impossible, for you to raise those issues on appeal, because you're giving up those issues now; do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Do you feel in any way that your mental capacity to think clearly, rationally, is impaired in any way right now? Would you like to put this over to give yourself more of

an opportunity to think about it and converse more with your attorney before you make such a decision?

THE DEFENDANT: If I may say something. I've been thinking about this since 1992, either bad or good deciding what I was going to do if I was convicted of this crime. I made that decision with my attorney that I would accept that. I would much rather have a death sentence than a life sentence.

THE COURT: Are you presently taking any type of medication that you feel impairs your ability to think clearly or rationally?

THE DEFENDANT: No

THE COURT: Are you suffering now from any type of cold, flu, that you think's impairing your ability to think clearly or rationally?

THE DEFENDANT: No.

THE COURT: Discussing what we discussed, is it still your desire, first of all, to not present any evidence in mitigation?

THE DEFENDANT: Yes, sir.

THE COURT: Is it still your desire for your attorney not to cross-examine any witnesses that may be presented by the prosecution in aggravation?

THE DEFENDANT: Yes, sir.

THE COURT: And is it still you desire not to be present during the penalty phase, except for your testimony?

THE DEFENDANT: Yes, sir.

THE COURT: The Court does find that the defendant's wishes regarding the penalty phase are informed, they're voluntary, and they're given intelligently.

(21 RT 3724-3728.)

The court and attorneys then addressed some evidentiary matters and jury instruction questions before proceeding with the penalty phase. (21 RT 3728-3732.) Defense counsel reminded the court that appellant was

going to testify in mitigation as the sole witness. (21 RT 3732.) The court again questioned appellant about his desire to be absent from the proceedings:

> THE COURT: Okay, Now, Mr. Brown, do you want to be present when we start the penalty phase?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: You have a right to be here; do you understand that?
>
> THE DEFENDANT: I understand that.
>
> THE COURT: By not being here, I'm going to inform the jury that obviously you're not present and you've made an informed decision not to be present. They're not to consider that factor in any way in making their decision. But by you not being here, that could very likely result in them subjectively considering that, even though they're not supposed to under the law. And that may make them return a verdict of death.
>
> THE DEFENDANT: That's fine.
>
> THE COURT: Do you understand that?
>
> THE DEFENDANT: Yes, your honor.
>
> THE COURT: Knowing that, you still wish to not be present?
>
> THE DEFENDANT: Yes, sir.
>
> [DEFENSE COUNSEL]: Your Honor, the defendant understands that I have an opportunity to make opening remarks to the jury at the beginning of the trial and also to make a closing statement. I may not. I will make a short opening statement. I may not make a closing statement. He understands that, and it's with his approval, if that's the choice that comes out. It's going to be with his approval.
>
> So in a sense he's waiving the right for me to make a closing statement in his behalf. This is going to be a tactical decision that I make. But whatever I do, it's with his approval. He's actually not waiving the right to have me make a closing statement.

THE COURT: Is that true?

THE DEFENDANT: Yes, sir.

THE COURT: You understand that you have a right to have your attorney make a closing argument in your behalf? That closing argument would obviously be urging the jury to find that the most appropriate sentence should be life imprisonment without possibility of parole rather than the death sentence; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And by having your attorney not make such a closing argument, that, once again, could benefit the prosecution. As I say "benefit the prosecution," it could make the jury more likely to render a verdict of the death sentence; do you understand that?

THE DEFENDANT: That's fine.

THE COURT: Understanding that, you still wish to have your attorney not make a closing argument?

THE DEFENDANT: Yes, your Honor.

[DEFENSE COUNSEL]: Let's make this perfectly clear. We're not waiving it at this point. If that is what ultimately is done, I want to make record of that now that we've discussed that. I'm not necessarily waiving it right now. But it might be waived. He knows before we even start the trial that that's a possibility, and he agrees with it.

THE DEFENDANT: Yes, sir.

THE COURT: Okay, That is true?

THE DEFENDANT: Yes, sir.

. . .

THE COURT: Also, I should tell [appellant] and [defense counsel] that the holding cell that you're being held in does have the capability of having the audio of this proceeding. In other

words, you can hear what's going on while you're in the holding cell. Do you want that?

THE DEFENDANT: No, sir.

THE COURT: Also, if at any time you wish to reconsider you positions on any issue, let the Court know immediately and we'll take that up, whether it's you wish to now introduce evidence in mitigation or you wish to have [defense counsel] cross-examine any witness, or if you want to be present at any of the times, just inform [defense counsel] and my bailiff will bring you out immediately and we'll discuss that issue or issues; do you understand that?

THE DEFENDANT: Yes, sir.

(21 RT 3732-3736.)

After a brief recess, the jury entered the courtroom for the penalty phase trial. Before the first witness was called, the court addressed the jury regarding appellant's absence.

THE COURT: Good morning, ladies and gentlemen. We're ready to commence the penalty phase of the trial. As you're well aware, [appellant] is not present. He has chosen not to be present. That's his right. You're not to use that factor in any way in deciding the penalty in this portion of the trial.

(21 RT 3736.)

After the prosecution presented its evidence in aggravation, appellant testified as the sole witness in the mitigation portion of the trial. He denied assaulting Debbie N. or forcing her to have sex with him (21 RT 3804); he denied involvement in any thefts or purse snatchings (21 RT 3805-3807); and he denied attacking and sexually assaulting Margaret A. (21 RT 3803). He did, however, admit that he assaulted (Bruce) Rummerfield. (21 RT 3809-3810.) When asked what penalty he wished to receive, appellant told the jury, "I'd much rather have the death sentence than do life without." (21 RT 3812.) He said, "I have my own reasons why, but I'd just rather accept the death penalty than do life without, period." (*Ibid.*) At the

conclusion of his direct examination, defense counsel asked appellant if he had any other comments he wished to make to the jury. Appellant said:

> I just hope that they all have a clear conscience, and I hope they know that they convicted an innocent man. I maintain my innocence in this case and also the Margaret A[.]. I had nothing to do with either.
>
> I think the people you should be looking at is the Richardsons and Mr. Lynn Farmer himself. I had nothing to do with this. If you guys got a clear conscience, then I'm asking you to give me death.

(21 RT 3813.)

B. ANALYSIS

The gravamen of appellant's argument is that counsel "blindly acquiesced" to his demand that no mitigation evidence be presented to the jury, and, by acting in accord with appellant's wishes, counsel rendered ineffective representation. Appellant contends that counsel's conduct resulted in an unreliable penalty determination, along with other constitutional violations. (AOB 286.) Appellant's assertions of error are not supported either by the record or by California law.

Appellant's ineffective assistance of counsel claim is governed by *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*). In order to be entitled to relief, appellant must show that counsel's representation was below the standard for reasonably competent counsel under prevailing professional norms, and that as a result of counsel's substandard representation, he suffered prejudice. (*Id.* at pp. 687, 690, 693; *People v. Ochoa* (1998) 19 Cal.4th 353, 414.) Under *Strickland*, reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland, supra*, 446 U.S. at p. 689.) To establish prejudice under *Strickland*, appellant must show "a reasonable probability that, but for counsel's unprofessional errors,

the result of the proceeding would have been different." (*Id.* at p. 694.) Appellant has not satisfied either prong of *Strickland.*

1. Counsel's Representation Was Not Below Prevailing Professional Norms

There appear to be several bases for appellant's ineffective assistance of counsel claim. Respondent will address each of his contentions below.

a. Duty of loyalty

First, appellant argues that counsel's duty of loyalty to his client required that he not "simply acquiesce to [his client's] wishes," and he asserts counsel was "not bound, ethically or otherwise, by [his] client's stated desire that mitigating evidence not be presented at his penalty trial." (AOB 249, 250.) To support this claim, appellant cites the American Bar Association's guidelines for defense counsel in capital cases, which state "it is ineffective assistance of counsel to simply acquiesce to such wishes [to receive a death sentence rather than sentence of life without parole]." (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.5, comment., p. 71 (rev. ed. 2003))

In *Bobby v. Van Hook* (2009) __ U.S. __, 130 S.Ct. 13 (*Bobby*), the United States Supreme Court expressly disapproved the notion that professional guidelines, such as the ABA Guidelines cited by appellant, establish the standard against which counsel's effectiveness should be measured. In *Bobby*, the high court rejected the Court of Appeals' finding that trial counsel's investigation and presentation of mitigating evidence was deficient, because it did not comport with the ABA's 2003 Guidelines for capital defense counsel. First, the court criticized the lower appellate court for "[j]udging counsel's conduct in the 1980's on the basis of . . . 2003 Guidelines" without determining if the more recent guidelines were comparable to the prevailing practice of capital defense counsel in the 1980's. (*Id.* a p. 17.) But even worse, in the court's eyes, was the appellate

court's treatment of the ABA Guidelines as if they were "inexorable commands," rather than treating them as one form of evidence for evaluating whether counsel's performance was within the range of reasonable competence. (*Ibid.*)

As in *Bobby*, defense counsel's performance should not be measured against standards that are "'only guides'" to determining what is reasonable. (*Bobby, supra*, 130 S.Ct. at p. 17.) Instead, counsel's conduct should be measured against local or state rules, so long as counsel makes "'objectively reasonable choices.'" (*Id.* at p. 17.)

The United States Supreme Court addressed a virtually identical ineffective assistance of counsel claim in *Schriro v. Landrigan* (2007) 550 U.S. 465 (*Landrigan*). In *Landrigan*, the defendant/petitioner sought an evidentiary hearing to address whether his counsel had been ineffective for failing to present mitigation evidence at his death penalty trial. In appealing from the lower court's rejection of his request for an evidentiary hearing, *Landrigan* argued that the state court had improperly rejected his claim that counsel was ineffective for failing to present mitigation evidence. He made this claim despite the fact that the record showed he expressly instructed counsel to present no mitigation evidence. (*Id.* at pp. 469-470.)

The high court rejected the ineffective assistance of counsel claim. It held that *Landrigan* could not show prejudice under *Strickland* when the failure to present mitigation evidence was based on his interference with all efforts to present mitigation evidence. (*Landrigan, supra*, 550 U.S. at p. 477.)

Appellant relies on *People v. Deere* (1985) 41 Cal.3d 353 (*Deere I*) for the proposition that counsel is incompetent if he acquiesces to his client's demand that he not present mitigation evidence, "without making an independent tactical judgment about the presentation of mitigating

evidence." (AOB 250.) Appellant's reliance on *Deere I* is, quite simply, wrong.

Deere I has been repeatedly and expressly disapproved on the very issue for which appellant cites the opinion: that is, whether counsel has a duty to present mitigation evidence in the face of a defendant's express demand that no mitigation evidence be presented. In *People v. Lang* (1989) 49 Cal.3d 991 (*Lang*), this Court began its analysis by first noting the *Strickland* standard for establishing a denial of the Sixth Amendment right to effective assistance of counsel. (*Id.* at p. 1031.) The court then continued,

> [w]hile selection of defense witnesses is generally a matter of trial tactics over which the attorney, rather than the client, has ultimate control [citation], it does not necessarily follow that an attorney acts incompetently in honoring a client's request not to present certain evidence for nontactical reasons.

(*Id.* at p. 1031.) After discussing the attorney's "ethical duty of loyalty," the court noted that the doctrine of invited error estops a defendant from asserting error when his own conduct caused the claimed error to occur. (*Id.* at pp. 1031-1032.) Finally, *Lang* concluded by rejecting the claim that counsel's performance was deficient:

> [D]efendant predicates the claim of ineffective assistance solely on his trial counsel's action in yielding to his demand, and not on any antecedent act or omission of counsel. Defendant does not contend, for example, that counsel failed to adequately investigate the availability of [mitigation] evidence or to advise him regarding its significance. There is nothing in the appellate record to suggest that counsel's performance was deficient in either of these respects and it is the defendant's burden to establish ineffectiveness. [Citation.]

(*Id.* at pp. 1032-1033.)

Appellant's complaint that counsel is obligated to present mitigating evidence in the face of his client's adamant insistence that he not do so has

been soundly rejected by *Lang*. Further, *Lang's* holding has been followed by a number of other cases.

In *People v. Howard* (1992) 1 Cal.4th 1132 (*Howard*), counsel initially informed the court that his client would not allow him to present any mitigating evidence. By the time the penalty phase began, counsel persuaded the defendant to allow him to present some mitigating evidence in the form of testimony from a clinical psychiatrist. Although the court had previously ruled that evidence of the defendant's prior uncharged criminal conduct was excluded, the court ruled it would permit the prosecutor to cross-examine the doctor about the reports he reviewed, which included information about the uncharged criminal conduct. Based on this ruling, counsel elected to not call the witness, and the defense rested without presenting any evidence in mitigation. In addition, on the defendant's insistence, counsel presented no closing argument. (*Id.* at pp. 1181-1184.)

On appeal, the defendant argued counsel was ineffective because he failed to present other mitigating evidence, after the trial court refused to limit cross-examination of the psychiatrist. (*Howard, supra*, 1 Cal.4th at p. 1186.) The court rejected the contention, because the defendant "resumed his opposition to any case in mitigation" and repeated his desire to be sentenced to death. (*Ibid.*) Counsel could not be criticized for acquiescing to his client's wishes. (*Ibid.*)

Appellant argues that in the face of a defendant's informed insistence that he wishes to receive the death penalty and that no mitigation evidence be put on, counsel must exercise his discretion, and decide whether to disregard those wishes. (AOB 249-269.) He claims his argument is not contrary to the holding of *Lang* (AOB 262), and insists *Deere I* controls this issue. (AOB 250.) Respondent disagrees. *Lang* does not support the appellant's contention.

Appellant would have this Court hold that where counsel has performed an investigation, has discovered and is prepared to present mitigating evidence, but his client insists that he not do so, counsel must disregard his client's instructions. Instead, and against the client's clear statement that he wants a death sentence and not a life sentence, counsel must nonetheless advocate for a life-without-parole sentence. This position is not supported by this Court's holdings. This Court has said, a

> defendant cannot be permitted to claim that his counsel was deficient for acceding, against counsel's own judgment, to defendant's insistent request that certain evidence not be presented.

(*Lang*, *supra*, 49 Cal.3d at p. 1032.)

Further, the fact that counsel would not be ineffective for presenting mitigating evidence over the defendant's objection or desire that no mitigation evidence be offered (see *People v. Memro* (1995) 11 Cal.4th 786, 875-877 (*Memro*)) does not make the obverse true.[46] That is, while counsel who presents mitigation evidence over the defendant's objection is not ineffective, it is not true that counsel who does not present mitigating evidence, in compliance with the defendant's wishes, is constitutionally ineffective.

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[46] *Memro's* holding, which appellant cites, relied at least in part, on *Deere I*, which is no longer controlling on this issue:

> At the time of the retrial, counsel was obligated to present evidence in mitigation even over defendant's objection. (*People v. Deere* (1991) 53 Cal.3d 705, 712, 716-717 [].) Neither the right to counsel nor any right to a reliable penalty determination was violated by the court's refusal to accede, in effect, to defendant's desire to prevent his counsel from presenting evidence in mitigation. Nor do we discern any other federal constitutional violation.

(*Memro*, *supra*, 11 Cal.4th at pp. 876-877.)

Finally, appellant refers to "[c]ounsel's stated reasons for not conducting a thorough background investigation . . ." (AOB 266), inferring that had counsel performed an investigation, he might have decided to disregard his client's wishes to present no mitigating evidence. This inference is contradicted by the record. Counsel investigated appellant's background and contacted at least one expert to testify for the defense. He investigated appellant's family history, medical and school records and his juvenile records.

> There are mitigating facts that could have been presented that come from his background in the form of abuse and neglect. The psychologist has mitigating facts that she could present . . . . Another theme that could have been pursued is institutional failure. I think there were signs in his background that gave hints of certain things that were essentially ignored.
>
> I've gone over all of these things and a few others with [appellant]. I've gone over everything that would have comprised the mitigating facts. These are the mitigating factors that could have been presented. And I think [appellant] understands them thoroughly. But because he prefers to receive the death penalty, it's his choice to forego putting these mitigating factors on at his trial.

(21 RT 3722-3723.)

Appellant's claim that his counsel violated his duty of loyalty and provided ineffective assistance is unfounded.

b. Counsel's response to Margaret A. evidence.

Appellant contends counsel's failure to object to evidence in aggravation concerning the Margaret A. "incident" demonstrates counsel was ineffective. (AOB 253.) Again, respondent disagrees with appellant's analysis and with his conclusion that counsel was ineffective.

Prior to the start of the penalty phase trial, defense counsel stated he would not object to evidence concerning conduct related to Margaret A., because appellant wished to receive the death penalty. He explained to the

court that normally, he would challenge admission of the testimony, because the conviction for the attack and sexual assault on Margaret A. occurred after the murder of April Holley. Thus, it was not proper evidence under section 190.3, subdivision (c). The prosecutor pointed out, however, that the circumstances surrounding the offenses committed by appellant was admissible under section 190.3, subdivision (b), as evidence of criminal activity involving the use of force. (21 RT 3729-3731.)

The court agreed the evidence of the conviction could not come before the jury. It advised the parties that even with appellant's consent, the court would not allow admission of evidence that appellant was convicted in the Margaret A. case. The facts of the offense, however, would be allowed under section 190.3, subdivision (b). (21 RT 3721.)

The trial court correctly concluded that evidence concerning appellant's assault on Margaret A. was admissible as a circumstance in aggravation under section 190.3, subdivision (b). That subdivision allows the jury to "take into account" . . "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence." Regardless of whether appellant wished to have the evidence admitted to enhance the likelihood he would receive a death sentence, the court correctly ruled it was admissible under the Penal Code section governing admission of aggravating and mitigating evidence. Appellant has not shown the ruling was erroneous. His claim fails.

c. Appellant's request to not present mitigating evidence was unequivocal

In the prejudice portion of appellant's argument, he claims his desire to not present mitigating evidence was not truly a voluntary, unequivocal waiver of his right or his desire to present mitigating evidence. He argues counsel should have recognized that the "waiver" was equivocal. He focuses on the fact he took the stand and denied his guilt as evidence of the

equivocal nature of his waiver, which he compares to the waiver of the right to counsel. Appellant concludes that his testimony insisting on his innocence contradicted his goal of receiving the death penalty. (AOB 272-285.) Once again, the record does not support appellant's contention.

The record shows appellant objected to a sentence of life in prison without the possibility of parole. The court asked appellant whether he wished to receive a death sentence, and he responded affirmatively. (21 RT 3724.) The court explained in detail that appellant's decision to not allow his attorney to cross-examine the prosecution's witnesses and to not put on mitigation evidence eased the prosecutor's job. This decision increased the likelihood he would receive a death sentence. (21 RT 3725.) The court asked whether appellant had thoroughly considered his decision, and if any impairment or illness might have affected his decision. Appellant affirmed that he had no impairment. He reiterated his desire to not be present and to decline to challenge the prosecution's witnesses or to present witnesses of his own. (21 RT 3725-3728.) The court concluded appellant's decision was voluntary and intelligent. (21 RT 3728.)

As noted earlier, appellant told the jury he wished to receive a death sentence. (21 RT 3812.) He also proclaimed his innocence and denied he was involved in the assault on Margaret A. He concluded by telling the jurors he hoped their consciences were clear after finding him guilty, and that if they were, they should give him a death sentence. (21 RT 3813.)

There is nothing equivocal about his statements or his position regarding the conduct of the penalty phase trial. Appellant consistently both proclaimed his innocence and asked for a death sentence. He now claims his assertion of innocence was incompatible with a wish to receive the death penalty, and counsel was ineffective for failing to recognize this and follow up on the apparent contradiction. (AOB 279-282.)

Appellant has not shown counsel was objectively unreasonable in complying with his instructions. Further, appellant's statements that a sentence of life in prison without the possibility of parole is intolerable was not incompatible with his claim of innocence. The jury had already determined appellant was guilty of April Holley's murder, and the jury found special circumstances to be true. His protests of innocence notwithstanding, the only sentence alternatives were life without parole or death. Appellant was informed of the options, and steadfastly affirmed that he wished to receive a death sentence rather than a life without parole sentence.

2. Appellant Has Not Shown Prejudice

To succeed in an ineffective assistance of counsel claim, appellant must show that in the absence of the asserted error, it was reasonably probable he would have received a different outcome in the sentencing proceedings. (*Strickland, supra*, 466 U.S. at p. 694.) Appellant has not shown prejudice.

Appellant testified, and denied participation in April Holley's murder and in the other criminal conduct presented by the prosecutor as evidence in aggravation (with the exception of the assault on Bruce Rummerfield). As discussed earlier, the evidence concerning his assault on Margaret A. was admissible under section 190.3, subdivision (b). The jury clearly was not persuaded that he did not commit the aggravating acts.

In a similar circumstance in *People v. Williams* (1988) 44 Cal.3d 1127, the defendant complained that counsel was ineffective for failing to present mitigation evidence. The court found no prejudice, because the record did not show what the defendant's mitigation evidence would have disclosed. (*Id.* at p. 1153.) The court refused to "predicate reversal of a judgment on mere speculation that some undisclosed testimony may have altered the result." (*Id.* at p. 1154.)

Here, appellant asks the court to reverse the judgment, but he has not described the mitigating nature of evidence that he asserts should have been offered, and, of course, the evidence is not part of the record. It is not clear that any of the information obtained in preparation for the penalty trial was truly mitigating, other than reference to "mitigating facts" that could be presented by a psychologist. (21 RT 3722; AOB 271.) Appellant has not satisfied his burden of showing prejudicial error based on his undisclosed evidence. Counsel was prepared to present a mitigation case, but appellant insisted that he present no evidence and that he not cross-examine the prosecution witnesses. He cannot claim prejudice when he refused to allow counsel to present mitigation evidence, other than appellant's own testimony. His claim of prejudice should be rejected.

3. Appellant Has Not Shown The Judgment Was Unreliable

Appellant claims the failure to present mitigation evidence has resulted in an unreliable penalty judgment. (AOB 286.) He has not shown the judgment was unreliable.

In *People v. Bloom* (1989) 48 Cal.3d 1194 (*Bloom*), this Court discussed the requirement for reliability of a death judgment. The *Bloom* court pointed out that the United States Supreme Court's Eighth Amendment jurisprudence concerning for reliability of a death judgment has never required that an unwilling defendant be forced to present mitigation evidence in a capital case penalty trial. (*Id.* at p. 1228.) The court held,

> the required reliability is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present.

(*Ibid.*)

Respondent is at a loss to understand how, under *Bloom's* reliability factors, appellant can claim that he has been the victim of unreliable penalty proceedings. Though he claims the penalty phase suffered from procedural defects, his argument presumes what it seeks to prove: that is, counsel did not present mitigating evidence, ergo the penalty was imposed without "proper instructions and procedures, . ." because the trier of penalty did not consider relevant mitigating evidence. (AOB 287.)

Appellant's penalty phase proceedings satisfied all the requirements of a reliable penalty phase. He was advised of and afforded the opportunity to be personally present, to confront and cross-examine witnesses, and to present evidence during the penalty phase. He repeatedly asserted his wish that he not be present, that counsel present no mitigating evidence, and he informed the jury he wished to receive a death penalty rather than a sentence of life in prison without parole. The court insured that this was his wish.

In fact, mitigation evidence was presented when appellant testified, denied any participation in the murder of April Holley, and denied participating in the other violent conduct presented in the penalty phase, other than the assault on Bruce Rummerfield. He has not shown error entitling him to relief.

VI. THE TRIAL COURT DID NOT ERR IN GRANTING APPELLANT'S REQUEST TO BE ABSENT DURING THE PROSECUTION'S PENALTY PHASE CASE

Appellant argues he was denied his constitutional rights to due process and confrontation, as well as his Eighth Amendment right to a reliable penalty determination and to be free from cruel and unusual punishment, because the court permitted him to be absent when the prosecutor presented aggravating evidence at the penalty phase trial. (AOB 298.) Respondent disagrees.

As set forth at length in the previous argument, appellant unwaveringly maintained both his desire to receive the death penalty rather than a life-without-parole sentence, and his wish to not be present during the prosecution's penalty phase case. When counsel first advised the court about appellant's wishes regarding conduct of the penalty phase, the court confirmed that this was his wish. (21 RT 3725.) Appellant told the court:

> I've been thinking about this since 1992, either bad or good deciding what I was going to do if I was convicted of this crime. I made that decision with my attorney that I would accept that. I would much rather have a death sentence than a life sentence.

(21 RT 3727.)

After the court fully explained the potential dangers of appellant's decision to him, it again questioned him to verify that he desired to be absent from the proceedings:

> THE COURT: Okay, Now, Mr. Brown, do you want to be present when we start the penalty phase?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: You have a right to be here; do you understand that?
>
> THE DEFENDANT: I understand that.

> THE COURT: By not being here, I'm going to inform the jury that obviously you're not present and you've made an informed decision not to be present. They're not to consider that factor in any way in making their decision. But by you not being here, that could very likely result in them subjectively considering that, even though they're not supposed to under the law. And that may make them return a verdict of death.
>
> THE DEFENDANT: That's fine.

(21 RT 3732-3733.)

Also, consonant with his desire to be absent from the proceedings, appellant informed the court that he did not wish to receive audio of the penalty phase proceedings in the holding cell he occupied during the prosecution's case. (21 RT 3735.) At the start of the penalty trial, the court admonished the jurors that they were not to consider appellant's absence in reaching their decision in the penalty phase. (21 RT 3736.)

A defendant may voluntarily waive his constitutional right to be present at trial, which includes his right to be present during critical stages of the proceedings. While he has the right under the Sixth Amendment to be present at trial while evidence is received, he may waive this right. (*People v. Young* (2005) 34 Cal.4th 1149, 1213 (*Young*), citing *United States v. Gagnon* (1985) 470 U.S. 522, 526.)

As fully set forth in the preceding argument, and as summarized here, the court insured appellant was aware of his right to be present. The court secured an informed waiver from appellant after cautioning him of the dangers of being absent. In addition, the court offered him the option of listening to the proceedings via an audio feed into the holding cell where appellant would wait during the penalty phase trial. The record shows appellant knowingly and voluntarily waived his right to be present during presentation of the prosecution's presentation of aggravating evidence.

Notably, appellant does not assert in this appeal that his absence from the proceedings was a violation of state law. Appellant only claims federal constitutional error. Accordingly, any state law claim should be considered forfeited. Should this Court find that appellant's reference to *People v. Majors* (1985) 18 Cal.4th 385, 415-416 (AOB 298) adequately preserves the issue for the court, then, as respondent will show, any state law error was harmless.

California law provides that a defendant in a capital case cannot waive his right to be present during portions of the trial where evidence is received. Section 977, subdivision (b)(1), provides that where a defendant is charged with a felony,

> the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence.

In addition, section 1043, subdivision (b) describes the circumstances when a felony trial may proceed in the defendant's absence. While a defendant may voluntarily absent himself from trial, subdivision (b)(2) limits when a defendant may be absent to "[a]ny prosecution for an offense which is not punishable by death . . . ."

Thus, while the trial court may have erred under California's statutory law in permitting appellant to be absent, the state law error is subject to harmless error analysis. (*Young*, *supra*, 34 Cal.4th at pp. 1213-1214, citing *People v. Jackson* (1996) 13 Cal.4th 1164, 1210.) The reviewing court must determine "whether there is a '"reasonable *possibility*"' the jury would have reached a different result had the error not occurred. (*People v. Dickey* (2005 35 Cal.4th 884, 923, italics in original, citing *People v. Hernandez* (2003) 30 Cal.4th 835, 877.)

The error here was harmless. The court instructed the jury it should not consider appellant's absence. In addition, appellant testified in the

mitigation phase of the penalty trial. He denied any involvement with April Holley's death, and he denied wrongdoing in the other matters testified about during the penalty phase – the assaults on Margaret A. and Debbie N., and the purse snatchings. He admitted only the assault on Bruce Rummerfield. Finally, appellant informed the jury that he did not want to receive a life sentence, and would rather have a death sentence.

Given the evidence tying appellant to April Holley's murder, the aggravating evidence presented by the prosecution, and his statement that to the jurors that he wanted to receive a death sentence, he cannot show he would have received a more favorable result if he had been present during the presentation of the prosecution's penalty phase evidence.

VII. COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BY PERMITTING APPELLANT TO WAIVE HIS RIGHT TO PRESENT MITIGATION EVIDENCE

In another variation of appellant's claims of purported error arising from his decisions regarding the conduct of the penalty phase trial, appellant contends counsel was ineffective for permitting him to waive his right to present mitigation evidence. (AOB 301-303.) His claim is meritless.

Counsel explained that he had discussed appellant's options with him on several occasions, as had his assistant. Counsel prepared for the penalty phase by doing an investigation, and had considered various strategies, including outlining abuse and neglect appellant experienced. In addition, counsel had enlisted the services of a psychologist who could testify regarding some mitigating factors.

> I've gone over all of these things and a few others with [appellant]. I've gone over everything that would have comprised the mitigating facts. These are the mitigating factors that could have been presented. And I think [appellant] understands them thoroughly. But because he prefers to receive

the death penalty, it's his choice to forego putting these mitigating factors on at his trial.

(21 RT 3722-3723.)

Contrary to appellant's assertion on appeal (AOB 302), the record shows appellant unequivocally expressed his wish that no mitigation evidence be presented, aside from his own testimony which was offered to dispute most of the aggravating evidence presented by the prosecution. Appellant did testify, and used the opportunity to deny his guilt and to deny much of the conduct testified to by the witnesses in aggravation. (21 RT 3803-3813.)

Appellant informed the court that he did not want his attorney to present any other witnesses in mitigation and that he did not want his attorney to cross-examine the prosecution's witnesses. (21 RT 3727-3728.) The record shows appellant was advised of his rights and the risks inherent in his decision to not present mitigation evidence.

Appellant had not shown counsel provided constitutionally ineffective representation. Counsel followed his client's wishes, and performed according to his duty of loyalty to his client. (See Argument V, *supra*.) His claim should be rejected.

VIII. TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BY FOLLOWING APPELLANT'S WISHES REGARDING CONDUCT OF THE PENALTY PHASE

Appellant claims that counsel was ineffective for failing to present mitigation evidence at the penalty phase. (AOB 304.) He contends this argument is distinct and raises a separate legal issue from his previous penalty phase argument. Respondent submits this claim has been addressed in the response to Argument V, but will summarize the response again below.

Appellant contends that counsel was required to present mitigation evidence at the penalty phase, despite his repeated insistence that counsel not do so. *Deere I, supra*, 41 Cal.3d 353 on which appellant relies for this proposition has been repeatedly disapproved. (*In re Avena* (1996) 12 Cal.4th 731-732 ["we reject petitioner's reliance on *People v. Deere* (1985) 41 Cal.3d 353, [] for the proposition that failure to present mitigating evidence alone necessarily constitutes ineffective assistance of counsel"]; *Lang, supra*, 49 Cal.3d at pp. 1031-1033.)

A "defendant cannot be permitted to claim that his counsel was deficient for acceding, against counsel's own judgment, to defendant's insistent request that certain evidence not be presented." (*Lang, supra*, 49 Cal.3d at p. 1032.) Appellant's argument should be rejected.

IX. APPELLANT WAS NOT DEPRIVED OF THE RIGHT TO COUNSEL

Appellant now claims that as a result of his waiver of the right to be present and to present mitigation evidence at the penalty phase trial, he was denied the right to counsel and the right to due process, in violation of the Fifth, Sixth and Fourteenth Amendments. (AOB 307.) Respondent disagrees.

The premise of appellant's argument is that he did not execute a valid waiver of his right to counsel, and counsel was ineffective because he argued in favor of the prosecution's position. (AOB 308-309.) The record does not support his claim of an invalid waiver. Respondent again provides the portion of the record that shows appellant waived the right to put on mitigation evidence and that he informed the court he wished to receive the death sentence and did not want counsel to argue for a life-without-parole sentence:

> THE COURT: And is it your desire not to put on any evidence in mitigation, as Mr. Cross has represented to the Court?
>
> THE DEFENDANT: Yes, sir.

THE COURT: Is it also your desire for him not to cross-examine any witnesses that might be put on by the prosecution in aggravation?

THE DEFENDANT: Yes, sir.

THE COURT: Is it also your desire not to be present during the penalty phase, except for when you testify?

THE DEFENDANT: Yes, sir.

THE COURT: Now, by doing those things, obviously that's going to be or could be an advantage to the prosecution. You're aware of that?

THE DEFENDANT: Yes, sir.

THE COURT: When I say "advantage to the prosecution," by not putting on any evidence in mitigation and by not challenging the evidence in aggravation, there's a good likelihood that the jury's going to come back with a recommendation of the death penalty; do you understand this?

THE DEFENDANT: Yes, sir.

THE COURT: I assume you've given this a lot of thought. Have you?

THE DEFENDANT: Yes, sir.

THE COURT: Do you want to tell the Court, you don't have to, but do you want to tell the Court why you wish to proceed in this fashion?

THE DEFENDANT: I'd rather do a death sentence than do life without.

THE COURT: Okay. Whether or not you plan to appeal – let's say the sentence – the recommendation that comes down from the jury, based upon the representations made here as to how this case has progressed, let's say they come back with a recommendation and that is the sentence of the Court, the death sentence. And then later you wish to appeal that, and appeal not only the sentence of guilt, but the penalty phase.

It's going to be difficult, if not impossible, for you to raise those issues on appeal that – those issues being that no evidence was offered in mitigation, that the evidence that was offered in aggravation was never challenged by you or your attorney, that fact that you were not present in court.

If you knowingly give up your right to proceed as normal, I say "normal," where you present evidence in mitigation and challenge that evidence in aggravation, it would be difficult, if not impossible, for you to raise those issues on appeal, because you're giving up those issues now; do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Do you feel in any way that your mental capacity to think clearly, rationally, is impaired in any way right now? Would you like to put this over to give yourself more of an opportunity to think about it and converse more with your attorney before you make such a decision?

THE DEFENDANT: If I may say something. I've been thinking about this since 1992, either bad or good deciding what I was going to do if I was convicted of this crime. I made that decision with my attorney that I would accept that. I would much rather have a death sentence than a life sentence.

THE COURT: Are you presently taking any type of medication that you feel impairs your ability to think clearly or rationally?

THE DEFENDANT: No

THE COURT: Are you suffering now from any type of cold, flu, that you think's impairing your ability to think clearly or rationally?

THE DEFENDANT: No.

THE COURT: Discussing what we discussed, is it still your desire, first of all, to not present any evidence in mitigation?

THE DEFENDANT: Yes, sir.

THE COURT: Is it still you desire for your attorney not to cross-examine any witnesses that may be presented by the prosecution in aggravation?

THE DEFENDANT: Yes, sir.

THE COURT: And is it still you desire not to be present during the penalty phase, except for your testimony?

THE DEFENDANT: Yes, sir.

THE COURT: The Court does find that the defendant's wishes regarding the penalty phase are informed, they're voluntary, and they're given intelligently.

(21 RT 3724-3728.)

Counsel complied with appellant's express wishes. Appellant was not deprived of his right to counsel. His claim should be rejected.

X. THE TRIAL COURT COMMITTED NO ERROR IN ACCEPTING APPELLANT'S WAIVER OF THE RIGHT TO PRESENT MITIGATION EVIDENCE

Appellant argues the court erred when it accepted his waiver of the right to present mitigation evidence and the right to cross-examine the prosecution's aggravation witnesses. He contends this error denied him his constitutional rights to a fair trial, his right to confront and cross-examine witnesses, and his right to a reliable penalty determination. (AOB 312.) He has not shown error.

Appellant bases his argument on his theory that appellant's waiver of the right to cross-examine the prosecution's penalty phase witnesses and to present mitigation witnesses was effectively a waiver of the right to counsel. He contends the trial court had a sua sponte duty to ensure appellant's waiver of the right to counsel was valid. (AOB 313.) Respondent disagrees with the premise of appellant's argument.

The record plainly shows the court secured a valid waiver of appellant's rights to present evidence:

THE COURT: And is it your desire not to put on any evidence in mitigation, as Mr. Cross has represented to the Court?

THE DEFENDANT: Yes, sir.

THE COURT: Is it also your desire for him not to cross-examine any witnesses that might be put on by the prosecution in aggravation?

THE DEFENDANT: Yes, sir.

THE COURT: Is it also your desire not to be present during the penalty phase, except for when you testify?

THE DEFENDANT: Yes, sir.

. . . .

THE COURT: Discussing what we discussed, is it still your desire, first of all, to not present any evidence in mitigation?

THE DEFENDANT: Yes, sir.

THE COURT: Is it still you desire for your attorney not to cross-examine any witnesses that may be presented by the prosecution in aggravation?

(21 RT 3724-3728.)

In *People v. Dickey* (2005) 35 Cal.4th 884, the defendant in a capital case advised the court he did not want to be present during the penalty phase of his trial. The court advised the defendant "'it would probably be wiser to be in the courtroom during the taking of the testimony,'" but the defendant made clear he did not want to be present. The court advised the defendant of his confrontation and cross-examination rights, he waived the rights and elected to remain in a cell which had audio and video feeds. (*Id.* at pp. 922-923.) This Court concluded the defendant suffered no error under either the federal or California Constitutions, and the state law error was harmless. (*Id.* at pp. 922-924.)

Appellant's reliance on *People v. Stanley* (2006) 39 Cal.4th 913 (*Stanley*) is misplaced. In *Stanley*, the defendant sought to represent himself at trial. The trial court denied his request. First, the court was not convinced the defendant understood the rights he was waiving in making

his request. In addition, the defendant's request for self-representation was equivocal, as he told the court he believed he would retain the option of obtaining counsel if, at some point, he felt he needed assistance. (*Id.* at p. 929-931.) This Court agreed that in view of the record, the defendant's request was not a knowing and voluntary waiver of the right to counsel. (*Id.* at pp. 932-933.)

In appellant's case, he did not seek to represent himself and did not waive his right to counsel. Like the defendant in *Dickey*, appellant waived only his right to be present, not his right to counsel. His argument lacks merit and his claim should be rejected.

XI. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE EITHER THE UNITED STATES CONSTITUTION OR INTERNATIONAL LAW

In his final argument, appellant raises numerous challenges to California's death penalty statute. Appellant recognizes that this Court has previously rejected most of his claims, but he asks this Court to reconsider its previous holdings. (AOB 316.) He claims the overall impact of the scheme is "constitutionally defective." (AOB 317.) Respondent submits the various contentions should be rejected, and as none of his claims has merit, there is no cumulative error.

A. Section 190.2 Is Not Impermissibly Broad

Appellant claims the categories provided in section 190.2 do not sufficiently narrow the class of those persons eligible for the death penalty. (AOB 318-319.) This Court has repeatedly held otherwise. (*People v. Doolin* (2009) 45 Cal.4th 390, 455, citing *People v. Chatman* (2006) 38 Cal.4th 344, 410.) His contention is meritless.

B. Application of Section 190.3, Factor (a) Did Not Affect Appellant's Constitutional Rights

Next, appellant argues that allowing the jury to consider "circumstances of the crime" as an aggravating factor does not sufficiently narrow or guide the jury regarding evidence it may consider in arriving at a death sentence under section 190.3, subdivision (a). (AOB 309-321.) Both the United States Supreme Court and this Court have found factor (a) is not unconstitutionally vague. (*Tuilaepa v. California* (1994) 512 U.S. 967, 976; *People v. Bramit* (2009) 46 Cal.4th 1221, 1248 [circumstances of the crime" factor (a) does not foster arbitrary and capricious penalty determinations].)

C. CALJIC No. 8.88 was not impermissibly vague and ambiguous

Appellant argues that CALJIC No. 8.88 is vague and impermissibly broad, thus it fails to limit the sentencer's discretion. As a result, he asserts the instruction fails to minimize the risk of an arbitrary decision, violating the Eighth and Fourteenth Amendments. (AOB 321.) This claim lacks merit.

The jury was instructed with CALJIC No. 8.88, and the portion referred to by appellant follows:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are substantial in comparison with mitigating circumstances, that it warrants death instead of life without the possibility of parole.

(21 RT 3851.)

This Court has repeatedly found CALJIC No. 8.88 is not impermissibly vague or broad, and that it does not violate the federal Constitution. (*People v. Chatman, supra*, 38 Cal.4th at p. 409; *People v. Moon* (2005) 37 Cal.4th 1, 42.) Appellant has provided no reason to change this Court's previous holding.

D. The description of mitigating factors in section 190.2, subdivision (d) is proper

Appellant argues use of the terms "extreme" and "substantial" to describe factors the jury could consider in mitigation bars the jury from being able to fully consider potential mitigating factors. (AOB 322.) This Court has rejected his contention. (*People v. Avila* (2006) 38 Cal.4th 491, 614-615.)

E. The instructions on mitigating factors did not violate appellant's rights under the state law or the federal Constitution

Next, appellant argues the trial court erroneously failed to instruct the jury that factors identified as mitigating factors were to be considered only as mitigating factors and that they were not relevant for another purpose. He contends the "whether or not" qualification in the instructions lead the jury to believe that if they do not find the factor to exist, they could find the circumstance to be aggravating, rather than mitigating. (AOB 322-325.) He has not shown error.

This Court has addressed this claim in the past and rejected it. In *People v. Boyer* (2006) 38 Cal.4th 412, 486 (*Boyer*), for example, this Court considered the defendant's claim that the jury was not properly instructed because the instructions "failed (1) to clarify the phrase 'whether or not' in various of the factors set forth in section 190.3 . . . ." The *Boyer* court rejected the claim, finding that CALJIC No. 8.88 adequately explained to jurors how to consider the mitigating factors listed in section 190.3 (*Ibid.*) The trial court is not required to explain that the factors described in section 190.3, subdivisions (d) through (h) and (j) can only mitigate, and not aggravate, the crime. (*People v. Elliot* (2005) 37 Cal.4th 453, 488.) Appellant's claim is meritless.

F. California's death penalty statute is not unconstitutional for failing to require fact-finding beyond a reasonable doubt as to aggravating and mitigating factors

Appellant contends that the death penalty sentence was imposed in violation of the United States Supreme Court's decision in *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), because the jury was not required to find the facts supporting the death penalty beyond a reasonable doubt. (AOB 325-329.) Respondent disagrees.

Under California law, the jury must find at least one aggravating factor true, and must find that the aggravating circumstances substantially outweigh mitigating circumstances before it may impose a death sentence. (§ 190.3[47].) This Court has found California's death penalty statute does not violate *Cunningham* or any other United States Supreme Court precedent, nor does it violate the federal Constitution:

> The death penalty statute does not violate the Eighth and Fourteenth Amendments by failing to require the state to prove beyond a reasonable doubt that aggravating factors are true (except for other unadjudicated crimes), that aggravating factors outweigh mitigating factors, or that death is the appropriate sentence. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1059, [].)

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[47] The relevant portion of section 190.3 follows:

> After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

> Nor does the lack of a unanimity requirement as to which aggravating evidence is true violate the Sixth, Eighth, or Fourteenth Amendment. (*People v. Stevens*, *supra*, 41 Cal.4th at p. 212, [].) The failure to require written or other specific findings by the jury does not violate federal due process or Eighth Amendment rights to meaningful review. (*Ibid.*) Nothing in *Cunningham v. California* (2007) 549 U.S. 270, [], *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, [], or *Ring v. Arizona*, *supra*, 536 U.S. 584, [], affects our conclusions in these regards.

(*People v. Loker* (2008) 44 Cal.4th 691, 755.)

Appellant's contention should be rejected.

G. The Constitution does not require written findings as to how the jury reached its determination to recommend a death sentence

Appellant's argument (AOB 329-332) that California's death penalty statute violates the federal Constitution because it does not require specific and/or written findings as to aggravating factors found by the jury is meritless. This Court has repeatedly rejected this contention. (*People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Stanley* (2006) 39 Cal.4th 913, 965.)

H. Unanimity is not required as to aggravating factors

Appellant urges this Court to reconsider its position, and to find that the jury must unanimously agree on the aggravating factor or factors that resulted in the death sentence. (AOB 332-334.) Again, this Court has repeatedly rejected appellant's argument. Recently, this Court reiterated that the no United States Supreme Court authority requires the jury "reach unanimous decisions regarding aggravating factors . . . ." (*People v. Letner* (2010) 50 Cal.4th 99, 208.)

I. The jury was properly instructed and capital sentencing does not require instruction on burden of proof

Next, appellant argues that if the prosecution is not required to satisfy a particular burden of persuasion or burden of proof regarding aggravating factors, the jury should have been instructed that there was no burden of proof. (AOB 334-335.) This argument has also been rejected repeatedly by this Court. (*People v. Letner, supra*, 50 Cal.4th at p. 208.)

J. Imposition of the death penalty does not violate international law or the United States Constitution

Finally, appellant argues the death penalty violates international norms, as well as the Eighth and Fourteenth Amendments of the United States Constitution. (AOB 335-336.) As he recognizes, this Court has ruled against this argument. "The death penalty law is not contrary to international norms of human decency in violation of the Eighth and Fourteenth Amendments." (*People v. Solomon* (2010) 49 Cal.4th 742, 844.)

CONCLUSION

Respondent respectfully requests this Court affirm the judgment.

Dated: October 25, 2010

Respectfully submitted,

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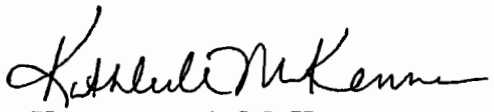

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CERTIFICATE OF COMPLIANCE

I certify that the attached **Respondent's Brief** uses a 13 point Times New Roman font and contains 32,704 words.

Dated: November 1, 2010

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name:

No.: **S052374**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 2550 Mariposa Mall, Room 5090, Fresno, CA 93721.

On November 2, 2010, 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 United States Mail at Fresno, California, 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 November 2, 2010, at Fresno, California.

W. Garber
Declarant

W Garber
Signature

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