IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **KEITH TYSON THOMAS,** Defendant and Appellant.

S067519

CAPITAL CASE

Alameda County Superior Court No. 118686B
The Honorable Alfred Delucchi, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

By information filed on December 22, 1993, the District Attorney of Alameda County charged appellant Keith Tyson Thomas (hereafter Thomas), and codefendant Henry Glover Jr., in count 1 with the murder of Francia Young (Pen. Code,[1/] §187), with the following special circumstance allegations: that Thomas and Glover committed the murder in the course of robbery, kidnapping, rape, and sodomy (§ 190.2, subd. (a)(17)(i), (ii), (iii), & (iv)). The information further charged Thomas and Glover in count 2 with kidnapping of Francia Young for the purpose of robbery (§ 209, subd. (b)), in count 3 with forcible rape of Francia Young (§ 261, subd. (a)(2)), in count 4 with forcible sodomy of Francia Young (§ 286, subd. (d)); in count 5 with robbery of Francia Young (§ 211), in count 7 with attempted kidnapping of Constance Silvey for purposes of robbery (§ 209, subd. (b)), in count 8 with robbery of Constance Silvey (§ 211), in count 9 with robbery of Sebrena Flennaugh (§ 211), and in counts 10 and 11 with assault on a peace officer with an assault weapon (§ 245, subd. (d)(3)). Thomas was separately charged in count 6 with being a felon in

1. All further statutory references are to the Penal Code unless otherwise specified.

possession of a firearm (§ 12021, subd. (a)). Counts 1 through 5 alleged that both defendants personally used a firearm (§§ 1203.06, 12022.3, subd. (a), & 12022.5) and were armed with a firearm (§§ 12022, subd. (a) & 12022.3, subd, (b)), during the commission of the offenses. Counts 3 and 4 included enhancements for acting in concert (§ 264.1) and for kidnapping for the purpose of committing a sex offense (§ 667.8). Counts 9, 10, and 11, alleged personal use of a firearm by Glover (§§ 1203.06 & 12022.5), and arming with a firearm by Thomas (§ 12022, subd. (a)). (6 CT 1807-1821.) On December 28, 1993, Thomas pleaded not guilty to the charges and denied the special allegations. (7 CT 1831.)

On October 10, 1995, the trial court granted Thomas's motion to sever counts 7 and 8, the attempted kidnapping and robbery of victim Constance Silvey, and the information was renumbered. (2 RT 260; 8 CT 2203 [motion]; 9 CT 2698 [ruling].) On October 16, 1995, the trial court granted Glover's motion to recuse the public defender as counsel for Thomas based on a conflict of interests. (9 CT 2712.) On October 23, 1995, the court appointed new defense counsel to represent Thomas. (9 CT 2716.)

On March 21, 1996, the trial court granted Glover's motion to sever the trials on *Aranda-Bruton*[2] grounds. (10 CT 2892 [motion]; 10 CT 2908 [supplemental motion]; 10 CT 2921 [supplemental motion]; 10 CT 2979 [ruling].) Trial against Glover commenced, and he was convicted of murder with special circumstances and of the other substantive offenses. (11 CT 3278-3289.)[3] Penalty phase proceedings against Glover twice resulted in a mistrial

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2. *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.

3. The jury found not true the allegation that Glover had personally used a firearm during the commission of the murder, kidnapping, rape, sodomy, and robbery. (11 CT 3282-3284, 3289.)

after the jury could not reach a verdict. (12 CT 3419; 13 CT 3721.) On April 4, 1997, Glover was sentenced to life imprisonment without the possibility of parole on count 1, a consecutive indeterminate term of life with the possibility of parole on count 2, and a determinate term of 20 years. (13 CT 3748-3750.)

On September 4, 1997, a jury was sworn and the People began their case-in-chief against Thomas. (13 CT 3834.) On September 16, 1997, the People rested. (13 CT 3854.) Thomas rested without presenting evidence in the guilt phase. (13 CT 3854; 57 RT 5975.) On September 29, 1997, after four days of deliberation (13 CT 3869, 3875-3876, 3881, 3899-3900), the jury found Thomas guilty on all counts and returned true findings on the special circumstance allegations and the allegations of actions in concert. The jury found not true the personal use of a firearm enhancements alleged as to the murder, kidnapping, rape, sodomy, and robbery counts, but found true the arming allegations alleged as to those counts. (13 CT 3901-3913.)

On October 6, 1997, the penalty phase began. (14 CT 4033.) On October 22, 1997, after four and one-half days of deliberations (14 CT 4046, 4049, 4050, 4052, 4065-4066, 4143), the jury returned a verdict of death (14 CT 4069, 4143).

On January 16, 1998, the trial court denied Thomas's motion to modify the verdict of death. (14 CT 4155 [motion]; 14 CT 4165 [ruling].) The court sentenced Thomas to death for the murder of Francia Young, and imposed a concurrent term of life with the possibility of parole on the kidnapping conviction. The court stayed sentence on the remaining counts and enhancements pursuant to section 654. (14 CT 4166-4167, 4187-4189.) On motion of the prosecutor, the court dismissed counts 7 and 8 involving victim Constance Silvey. (14 CT 4167.)

On January 26, 1998, the Superior Court Clerk of Alameda County filed with this Court a notice of automatic appeal of the death judgment.

STATEMENT OF FACTS

A. Kidnapping, Robbery, Sexual Assault, and Murder of Francia Young

25-year-old Francia Young lived with her mother in Oakland and worked in San Francisco as a computer analyst. Most days Ms. Young drove her black Ford Mustang to the MacArthur BART Station in Oakland, parked, and took BART into San Francisco. (52 RT 5383-5384.)

On December 8, 1992, Ms. Young left for work as usual. The weather was rainy, and she wore a long raincoat. Ms. Young borrowed her mother's umbrella, which was a mixture of green, blue, maroon, and charcoal colors with an ivory handle. She also carried her burgundy shoulder-strap purse. (52 RT 5385-5387.)

Ms. Young typically arrived home from work around 5:30 p.m. (52 RT 5387.) Her mother expected her home the evening of December 8, 1992, to help decorate the Christmas tree. (52 RT 5387.) Ms. Young did not return, however. (52 RT 5389-5392.)

On December 8, 1992, around 6:00 p.m., William Dials exited BART at the MacArthur station and began walking towards the intersection of 40th Street and Martin Luther King Jr. Boulevard. (52 RT 5364.) Dials heard a female scream in a loud, terrified voice from across the street. (52 RT 5364-5365.) Afraid, Dials hid behind a truck and peeked out. (52 RT 5372.)

Approximately 75 feet away, Dials could see two African-American men and an African-American woman standing near a dark colored mustang. (52 RT 5365-5367.) One man stood on the driver's side of the vehicle and the other on the passenger's side. The man on the driver's side got into the car with the woman. The man on the passenger's side stood with his hands on the roof of the car, looking around. (52 RT 5365, 5367-5369, 5378-5380.)

The man on the driver's side and the woman both exited the vehicle, and walked towards the rear of the car. (52 RT 5370-5371.) The woman got inside

of the trunk. (52 RT 5372.) Just then, the man on the passenger's side looked towards Dials, who ducked to avoid being seen. (52 RT 5372.) When Dials looked again, the two men were getting into the vehicle. (52 RT 5373.) They sat in the car for a couple of minutes, and then drove off. Dials did not attempt to intervene because he feared that the men had a weapon. (52 RT 5374, 5379-5380.) He was unable to make out the license plate number of the car. (52 RT 5373-5374.)

Believing that he had witnessed a kidnapping, Dials reported his observations to BART officials, and later to the Oakland Police Department. (52 RT 5374-5375.) According to Dials, the man on the driver's side of the car was approximately 30 pounds heavier than the man on the passenger side, and resembled codefendant Glover in build. The man on the passenger side resembled Thomas in build. (52 RT 5368-5370, 5377.)[4/]

The same evening, at approximately 8:04 p.m., an ATM surveillance camera at the Wells Fargo Bank at 40th Street and Piedmont Avenue in Oakland captured an image of a person attempting to access Francia Young's bank account. The individual made three successful withdrawals for $100 each from the checking account. Another attempted withdrawal from Ms. Young's savings account was denied for insufficient funds. (54 RT 5491-5492, 5512, 5515-5522; People's Exh. 24.)

Approximately 30 minutes later, at 8:30 p.m., Officer Matthew Trzesniewski of the California Highway Patrol located Francia Young's Mustang. The vehicle had been wrecked on eastbound Interstate 580 near Fruitvale Avenue, and abandoned in the roadway. (54 RT 5480-5483.) No identifiable fingerprints were found on the car. (53 RT 5477.)

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4. At the time of their arrests, Glover was heavier than Thomas by 30 to 40 pounds. The weight difference was substantial enough to be immediately noticeable. (54 RT 5508, 5510.)

On December 8, 1992, at approximately 10:50 p.m., two individuals again attempted to access Ms. Young's bank account. ATM photographs revealed a person resembling Thomas holding an umbrella, and another unidentified individual bending over the machine. The subsequent attempts to access Ms. Young's account were denied, as the maximum withdrawal amount had been exceeded. Bank records showed a total of seven transactions on Ms. Young's account the evening of December 8, 1992. (54 RT 5496, 5520-5522; People's Exh. 20.)

On December 9, 1992, at approximately 11:00 a.m., Officer Ronald Anderson of the East Bay Regional Parks District responded to George Miller Park in Point Richmond to investigate a report of a dead body. (53 RT 5407-5408.) Approximately 20 feet up a dirt trail leading from the parking lot, the officer discovered a pile of clothing, including a woman's brown trench coat, a blue and white flowered long-sleeve shirt, a woman's white camisole, a skirt, a bra and panties, a watch, and a black leather shoe. The white camisole top was torn completely down the back. (53 RT 5409, 5433-5434, 5442, 5445.)

Approximately 250 feet further up the hill from the clothing, the officer discovered Francia Young's body. (53 RT 5410.) She was lying face down. (53 RT 5455.) She was naked except for a blue blazer which was opened in front. Her ankles were tied with her stockings, and her arms were bound behind her back with her scarf. The stockings that bound her legs had been secured to a tree branch. (52 RT 5300, 5302, 5321-5322; 53 RT 5449-5452.) The manner in which the victim was bound would have made it extremely difficult for her to crawl or roll away. (53 RT 5457, 5468.)

Dr. Charles Kokes performed an autopsy on the victim. Ms. Young was killed by a gunshot wound to the back of the head. (52 RT 5303, 5305.) Heavy gunpowder discharge into the skin indicated a contact wound. (52 RT 5306-5307.) An evidence technician recovered a copper bullet jacket near the

victim's body, and a lead slug embedded 6 to 10 inches in the dirt directly below the victim's head. (53 RT 5429, 5436.) Oakland Police Criminalist Ronald Nichols, an expert in firearm identification and tool markings, opined that the bullet and casing located at the crime scene could have been fired from an AK-47 rifle. (57 RT 5958-5966.)

Vaginal and anal swabs taken from the victim revealed the presence of spermatozoa. (54 RT 5536, 5538-5539.)[5] Doctor Edward Blake performed DNA testing on the samples using the polymerase chain reaction ("PCR") typing process. PCR typing of the sperm found in the vaginal cavity matched Thomas for all seven markers, and eliminated codefendant Glover. This combination of markers occurs in approximately 1 out of every 100,000 individuals. (55 RT 5593-5594, 5598, 5607, 5616, 5619-5621.) The sperm found in the rectal cavity was compatible with the vaginal swab, but the sample was too small to make a comparison for all seven markers. (55 RT 5628-5629, 5632-5633.)

Drs. Blake and Kokes testified that a man may have intercourse with a woman but leave no evidence of sperm if, for example, the man failed to ejaculate, had a vasectomy, or wore a condom. (52 RT 5351; 55 RT 5627.) While at the crime scene on December 9, 1992, an evidence technician had located a relatively new-looking condom package on the trail, several yards downhill from victim Young's body. (53 RT 5447-5448.)

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5. Defense counsel explored in detail on cross-examination the possibility that semen from the vaginal canal had seeped into the anal canal while the body lay supine awaiting the autopsy. Dr. Charles Kokes, who performed the autopsy, explained that he took care to avoid cross-contamination between the vaginal and anal canals when collecting the samples. He cleaned the outside of the anal canal to remove any seepage from the vaginal area, and then collected a specimen from inside of the anal canal. While cross-contamination can occur on the outside surface of the anus, it does not occur inside the rectum itself. (52 RT 5320-5321, 5336, 5340, 5342, 5350, 5354, 5356-5357; see also 54 RT 5545-5546.)

B. Robbery of Sebrena Flennaugh and Assault on Hayward Peace Officers Ducker and Davis With an Assault Rifle

On December 20, 1992, Sebrena Flennaugh was living in an apartment in Hayward. She was nine months pregnant at the time. That evening, Ms. Flennaugh drove to the grocery store. On her way home, she noticed an orange Pinto driving along side her car. (55 RT 5640-5643.)

Ms. Flennaugh entered her apartment and began cooking dinner. She was partially clothed in a t-shirt and underwear. While talking on the telephone, Ms. Flennaugh heard a knock on the door. The person outside inquired through the door if someone unknown to Flennaugh lived there, and Flennaugh replied "no." (55 RT 5641-5644.)

Ms. Flennaugh ended her telephone conversation. Suddenly, the person outside began kicking at her apartment door. Ms. Flennaugh quickly dialed 911. The hinges on the door gave way, and the door flew open. Glover and Thomas entered the apartment. (55 RT 5643-5647.) Glover carried a rifle, similar in appearance to an AK-47, which he pointed at Ms. Flennaugh. (55 RT 5647-5648.)

Thomas approached Ms. Flennaugh and demanded to know who she had been speaking to. (55 RT 5648-5649.) Ms. Flennaugh dropped the phone and replied "no one." Thomas grabbed the phone and hung it up. (55 RT 5648-5649, 5681, 5697.)

Glover walked through Ms. Flennaugh's apartment while Thomas stood near the door, preventing Flennaugh's escape. (55 RT 5650, 5652.) Glover and Thomas placed several of Ms. Flennaugh's possessions in a duffle bag that they had brought with them. (55 RT 5651, 5685.) At one point, Glover entered Ms. Flennaugh's bedroom. She could hear him rummaging through her drawers. (55 RT 5651.)

Glover returned to the living room and asked Ms. Flennaugh "where's the money at, bitch?" (55 RT 5652-5653, 5676-5677.) Thomas struck Ms. Flennaugh in the back of the head. She disclosed to the men that she had money (approximately $600) in her coat pocket. Glover took the money and demanded more. He punched Ms. Flennaugh in the face, bloodying her nose and knocking her to the floor. (55 RT 5653-5656, 5679-5680, 5686.)

As Ms. Flennaugh lay on the floor, crying, Glover reached over and rubbed his hand on her upper thigh. (55 RT 5657-5658.) Fearful that Glover would rape her, Ms. Flennaugh told him that she was pregnant and pleaded with him not to hurt her. (55 RT 5658.)

Just then, Officers Mark Ducker and Chris Davis from the Hayward Police Department knocked on Ms. Flennaugh's door in response to the 911 call. (55 RT 5659; 56 RT 5735-5740, 5765-5767.) Glover and Thomas instructed Ms. Flennaugh to ask who was there. (55 RT 5659.) The officers announced "Hayward Police Department." (55 RT 5659; 56 RT 5740.)

Glover ran to the balcony while Thomas remained with Ms. Flennaugh. (55 RT 5660-5661.) From where they stood outside, the officers heard the balcony door open. They ran around the building and down the stairs to the back of the apartment. (56 RT 5740, 5767-5768.) At the bottom of the stairs, they saw Glover peek over the edge of the balcony and point a rifle at them. (56 RT 5741, 5769.) Glover fired a shot at the officers, which struck the wall at about chest level, within a foot of where the officers were standing. (56 RT 5742-5744, 5771.) The officers retreated and exchanged gunfire with Glover. (56 RT 5744, 5746-5747.)

Glover jumped from the balcony to the ground and landed, still holding his gun, approximately 20 feet from Officer Ducker. Glover continued to fire on the officer. Glover retreated and ultimately evaded arrest. (56 RT 5744, 5746-5747, 5756, 5758.)

In all, Officer Ducker estimated that Glover fired at least 8 or 9 rounds at him. (56 RT 5749.) Both officers opined that Glover was using an AK-47 rifle. (56 RT 5754, 5772.)[6]

During the firefight, Thomas remained in the apartment with Ms. Flennaugh. (55 RT 5660-5661, 5663; 56 RT 5773-5774.) He commented that "I'm not going to get shot and killed like all the other black people. I'm not jumping off that balcony to his friend." (55 RT 5725.) He also told Ms. Flennaugh that "you better not snitch, you better not snitch, 'cause I'll see you on the streets today." (55 RT 5670, 5726-5727.)

Officers Ducker and Davis returned to the apartment. It was ransacked. Ms. Flennaugh's property had been removed from the closets and drawers and was strewn about the floor. (57 RT 5889, 5903.) Ms. Flennaugh was visibly shaken and had trouble speaking. (56 RT 5792.) In her statement to officers, she did not identify Thomas as one of the robbers. (55 RT 5664-5667; 56 RT 5825.)

Thomas pretended to be a victim, telling officers that he had accompanied Ms. Flennaugh home that evening, and was with her when the robber burst into the apartment. Thomas denied knowing the robber's identity. (56 RT 5774-5775, 5782-5785, 5793-5794.) After completing an interview with Thomas, the police allowed him to leave. (56 RT 5797.) An officer walked Thomas to his car, an orange Pinto. The keys were in the ignition, and the car was parked some distance from the apartment. (56 RT 5794-5795.)

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6. Officer Laura Martin recovered a casing and a live round on the balcony of apartment 9, and two more expended shell casings on the ground outside the apartment. (57 RT 5891-5892, 5898.) Criminalist Ronald Nichols of the Oakland Police Department compared the bullet casings recovered from the scene of Francia Young's murder with those recovered from the scene of the Hayward robbery and concluded that they were not fired from the same weapon. (57 RT 5966, 5968, 5971.)

The next day, officers contacted Ms. Flennaugh. At that time, she informed them that Thomas had participated in the assault and robbery. She said that she lied about Thomas's involvement out of fear for her life. (55 RT 5668-5669; 56 RT 5798-5800.) She told officers that the other robber had a gold tooth and went by the nickname "Hooter" or "Rooter." (56 RT 5800.)

C. The Investigation Following the Crimes

Camille Green lived with codefendant Glover at the Regency Motel in Oakland during December 1992. (56 RT 5845-5846.) The motel was approximately one block from the MacArthur BART station. (54 RT 5509.) Sometime before Christmas 1992, Thomas came by the hotel room. He gave Ms. Young's umbrella to Green, telling her "Merry Christmas." (56 RT 5847-5848.)[7] Also around that time, Glover gave Green a Liz Claiborne purse similar in appearance to the one owned by Ms. Young. (56 RT 5846-5847.) Glover later instructed Green to dispose of the purse because it was evidence and the police would be looking for it. Green threw the purse in a dumpster. (56 RT 5848, 5855.)

On December 23, 1992, Detective Frank Daley of the Hayward Police Department learned that a man named Glover who matched the description of the suspect in the Flennaugh robbery was staying at the Regency Motel in Oakland. (56 RT 5810-5811.) He went to the motel and spoke with Glover. (56 RT 5811-5812.) After the interview, Detective Daley placed Glover under arrest. (56 RT 5813.) Later that day, Ms. Flennaugh identified Glover from a photographic line-up as the person who had assaulted and robbed her. (55 RT 5670-5672; 56 RT 5814-5815.)

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7. In a statement to Sergeant David Kozicki prior to trial, Green initially maintained that she received the umbrella from Thomas, but later changed her story and stated that it came from Glover. (57 RT 5951-5953.)

Officers from the Oakland Police Department returned to Glover's motel room to search for evidence. The room, however, had been cleaned and the property removed. Officers then went to Glover's family's residence in Oakland. There officers seized the victim's umbrella and a pair of Glover's boots. (54 RT 5499-5505, 5510.)

D. Thomas's Arrest and Confession

Around the time of Glover's arrest, officers from the Oakland Police Department released to the media photographs of Thomas from the Wells Fargo ATM machine, whose identity was at that point unknown. (54 RT 5492-5496.) On December 24, 1992, at approximately 1:20 a.m., Thomas surrendered himself to Oakland Police after seeing his picture in the paper. (54 RT 5497, 5505; 55 RT 5580-5581, 5583.) Thomas told the officer on duty that he was wanted for a murder at a BART station, and that he "wanted to get this out of the way." (55 RT 5582-5583, 5586.)

On December 26, 1992, Sergeant David Kozicki of the Oakland Police Department and Sergeant Larry Kiefer of the East Bay Regional Parks Department interviewed Thomas about Francia Young's murder. (57 RT 5914-5915.) After receiving *Miranda*[8] warnings, Thomas waived his constitutional rights and agreed to speak with the officers. (57 RT 5915-5916.)

Thomas gave the officers three different versions of the incident. (57 RT 5917.) In an untaped portion of the interview, Thomas maintained that he was at a friend's house when Glover came by and asked Thomas if he knew how to use an ATM machine. Thomas agreed to go to the bank with Glover. Glover was driving a black Mustang. (57 RT 5917-5918.) At the bank, Glover gave Thomas an ATM card with the name "Francia" on it. He said that it was his sister's card and that he needed to access the account to collect bail money for

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8. *Miranda v. Arizona* (1966) 384 U.S. 436

his sister. The two men made three withdrawals of $100 each. (57 RT 5918.) Glover and Thomas parted. A few hours later, Glover again sought out Thomas and asked for assistance with the card. Glover was still driving the Mustang. The two men went to an ATM but were unable to withdraw money. Thomas then went with Glover to Glover's room at the Regency Motel. Glover had an assault rifle and ammunition in the room. (57 RT 5918-5919.)

Thomas also admitted participating in the robbery of Sebrena Flennaugh on December 20, 1992. He stated that a man named Dennis had defrauded Glover and that Glover asked Thomas to "watch his back" while he got even with Dennis. (57 RT 5920, 5939.)

After a short break, Thomas gave a second untaped statement in which he admitted participating in the abduction of Francia Young, the theft of her car, and the use of her ATM card. (57 RT 5920.) According to Thomas, Glover suggested that they steal a car so that they could rob a Safeway grocery store. The two men went to the MacArthur BART station, where Glover had targeted a black Mustang parked at the station. At Glover's direction, Thomas retrieved a gun that Glover had hidden nearby. When Thomas returned with the gun, Glover was forcing a person into the trunk of the Mustang. (57 RT 5920-5921.) Glover and Thomas drove to Richmond, where Glover removed a woman from the trunk of the car. Thomas told Glover not to hurt the woman, and to just tie her up and leave her. Thomas stayed in the car for several minutes listening to the radio while Glover marched the woman 20 or 30 yards up the hill. (57 RT 5921-5922.) After approximately 10 minutes, Thomas followed and found that Glover had bound the woman and removed her clothing. Shocked by what he had seen, Thomas went back down the hill. Glover followed a few minutes later. Thomas maintained that he did not have sex with the victim, and that he was unsure whether Glover had done so. (57 RT 5922-5925.)

Glover and Thomas drove back to Oakland. Glover repeated the woman's ATM code out loud along the way. Once there, the men withdrew money from an ATM machine using the woman's card. They then reentered Interstate 580, where the Mustang struck a wall and spun out. Both men fled the car, and met later at the Regency Motel. A subsequent attempt to get money from the ATM card and the victim's credit cards was unsuccessful. (57 RT 5923-5924.) According to Thomas, Glover kept all of the money stolen from Francia Young's account. (57 RT 5925.)

After Sergeant Kozicki asked Thomas some pointed questions, Thomas again changed his story and admitted that he had raped Francia Young. (57 RT 5927.) In this version of events, Thomas admitted that he walked up the hill in Richmond and came upon Glover raping the victim. Thomas raped her also. He ejaculated, and did not wear a condom. (57 RT 5926-5927.) Afterwards, Glover forced Ms. Young up the hill. Thomas told Glover to tie up the victim and leave her. Thomas then retreated down the hill. He was not aware that Ms. Young was dead until he heard a report on the news two days later. (57 RT 5927, 5929-5930, 5943, 5945.)

After making these admissions, Thomas gave a tape-recorded statement in which he repeated again the salient points of his confession. The tape was played for the jury. (57 RT 5930-5932; People's Exhibits 50 [tape] & 50A [transcript].) In that statement, Thomas maintained that he did not see Glover force a person into the trunk at the BART station, and that he only realized later that Francia Young was concealed there. (People's Exh. 50A 6-7, 9, 19-20.) He also maintained that after raping Ms. Young, he returned to the car where he listened to the radio. The wind was blustering outside and Thomas did not hear a gunshot. (People's Exh. 50A 12, 17, 22.)

E. Penalty Phase Evidence—Prosecution's Case in Aggravation

1. Uncharged Attempted Kidnapping and Robbery of Constance Silvey-White

On December 11, 1992, three days after Francia Young's murder, Richard Warren's silver 1985 Dodge Colt was stolen from the MacArthur BART station sometime prior to 6:00 p.m. (61 RT 6402-6404.) Around 8:00 p.m., Constance Silvey-White (Silvey) pulled into her driveway at 1411 Gilman Street in Berkeley. As she walked towards the street to retrieve her garbage cans, two men, who Silvey later identified as Glover and Thomas, emerged from behind a bush and approached her. She stopped, but the men continued to advance. Silvey backed away, terrified that she would be sexually assaulted or carjacked. (61 RT 6433-6441, 6446.)

Glover approached Silvey and told her, "Shh, be quiet. Don't say a word. Don't do anything." (61 RT 6443.) Silvey retreated, saying, "no, no." Glover pursued her while Thomas went to Silvey's car. (61 RT 6443.) Glover punched Silvey in the face, causing her to bleed profusely from her nose. The two began fighting and wrestling with each other. (61 RT 6442-6446, 6448-6449.)

Thomas released the trunk latch of Silvey's car. (61 RT 6447, 6487.) Glover yelled at Silvey to get into the trunk of the car and attempted to shove her inside. Terrified, Silvey continued to struggle against Glover. (61 RT 6449-6450.) Just then, Silvey's neighbor, Irene Cole, heard her panicked screams and came outside to investigate. (61 RT 6410-6413.) She called out to Silvey, asking if she was alright. Glover released Silvey and he and Thomas hastened down the driveway. (61 RT 6451-6452.) Cole saw the men get into a silver Dodge Colt hatchback and drive away. (61 RT 6416-6417.)

Silvey was bleeding and in shock. She was treated at a local hospital for a broken nose, cuts and bruises. (61 RT 6452-6453.) Silvey's purse was still in

her car but her wallet, containing credit cards and approximately $150 in cash, was missing. (61 RT 6456.)

After the assault, the police released a composite sketch of the first suspect who had attacked Silvey based upon her description. (62 RT 6538, 6546.) On January 7, 1993, Silvey participated in a physical lineup with eight suspects. She identified Glover as the man who assaulted her. She put a question mark next to Thomas as the second suspect. (61 RT 6462-6467; 62 RT 6540-6544.) She explained that she used a question mark because, although she recognized Thomas as the suspect, she was not as sure of that identification as she was of her identification of Glover. (61 RT 6502, 6504; see also 62 RT 6549, 6557-6558.) At trial, Silvey unequivocally identified Thoms as the second suspect. (61 RT 6471, 6505.) She saw Thomas from a distance of approximately two feet and the street lighting was sufficient to make out his face. (61 RT 6470-6473, 6479, 6483, 6488-6489, 6519.)

2. Uncharged Unlawful Possession of a Firearm

On June 20, 1988, Officer Sherman Bennett of the Oakland Police Department was patrolling near the area of MacArthur Boulevard and Martin Luther King Jr. Way in Oakland. He saw three young men standing on a corner known for narcotics dealing. As the officer approached, he recognized one of the young men as the 14-year-old Thomas. The officer asked for and received permission from Thomas to conduct a pat search. During the pat search, he discovered a loaded, .25 caliber pistol on Thomas. (61 RT 6521-6528.)

3. Prior Felony Conviction for Transportation/Sale of Narcotics

In 1991, Thomas was convicted of violating Health and Safety Code section 11352, subdivision (a) (transportation/sale of a controlled substance). He was ordered to serve two years probation. (61 RT 6529-6530.)

4. Uncharged Attempted Robbery of Timothy McNulty

On July 28, 1992, Timothy McNulty and two friends were walking on Durant Street in Berkeley when they encountered a group of six or seven young men and women. As the group passed by, one of the women tried to pick McNulty's pocket. McNulty pushed her arm away and said "what are you doing?" The women in the group yelled at McNulty, and a man punched him in the face. McNulty fell down, and when he attempted to stand up, Thomas, who accompanied the group, pushed him back down on the ground. The two groups squared off, and then the group of young people walked away. Shortly thereafter, the police arrived and pursued the suspects. They detained Thomas, and McNulty identified him at the scene. (62 RT 6580-6589.)

5. Uncharged Battery of Cathy Brown

Cathy Brown dated Thomas on and off between 1989 and 1992. She was 24 years old and Thomas was 16 years old when they first met. On October 19, 1989, Brown was standing outside talking to an acquaintance when Thomas walked up and slapped her in the face two or three times. Brown threatened to call the police and Thomas left. (62 RT 6590-6593.) In February 1992, Brown and Thomas were dating and had a two-year-old son in common. On February 11, 1992, Thomas was at Brown's home. He began yelling at their son. When Brown attempted to intervene, Thomas grabbed her by the hair and struck her in the face. A family member summoned the police. Brown did not seek medical treatment for either incident. (62 RT 6593-6597.)

6. Victim Impact Testimony

The prosecution introduced victim impact evidence from Francia Young's mother, Mary Young, and a close family friend, Ely Gassoway. Mary recalled that Francia was a kind person who believed in helping others. She was a member of the First AME church in Oakland, where she sang in the junior

choir and served as a financial secretary, a Sunday school teacher, and an usher. (62 RT 6603-6604.) Francia and her mother were very close. (62 RT 6605.) When Mary learned of Francia's death, she was in disbelief. It was only after the funeral that she began to come to terms with her loss. (62 RT 6605-6606.) Mary was unable to sleep for approximately three months after Francia's death, and was eventually hospitalized for a week. (62 RT 6607.) After she was released from the hospital, she sought counseling, at a personal expense to her of around $9,000. (62 RT 6608.) Mary's personal business also failed after Francia died, due in part to Mary's need to care for her own ailing mother. (62 RT 6607-6608.)

Ely Gassoway met Mary Young in 1973. He was a good family friend and a de facto stepfather to Francia when she was growing up. (62 RT 6610.) Francia was his daughter "in every sense of the word." (62 RT 6610.) She was a "light-hearted" girl who always tried to help others. (62 RT 6610.) Gassoway was "destroyed" by Francia's murder. He could not function, both because he missed Francia and because of his good friend Mary's pain and sadness. (62 RT 6611-6612.) Gassoway could not comprehend how someone could take a life in order to facilitate a theft of property. (62 RT 6612.)

F. Defense Case In Mitigation

Officer Pete Gomez of the Berkeley Police Department testified regarding his investigation of the Constance Silvey robbery. He interviewed Silvey at the crime scene. She was injured, scared, confused, and incoherent. She reported that she had been attacked by two black men. The first man who struck her was in his twenties, 5'10" tall, with a round face, and wore a dark leather coat and dark knit hat. The second suspect was in his early twenties, tall, and wore dark clothing and a dark knit hat. She could not describe the second suspect's face or what he was wearing. She stated that she had not seen the second suspect very well. (63 RT 6659-6664, 6671, 6673, 6675-6676.) Silvey initially told the

officer that she did not believe the suspects were trying to place her in the trunk of her car. Later, however, she spoke to the officer again and opined, based upon the context of the encounter and the suspects' comments, that they were attempting to force her into the trunk. (63 RT 6663-6664, 6666.)

John Kurzenhauser worked as a child welfare investigator for Alameda County. (63 RT 6676-6677.) In 1980 he was assigned to investigate a report of alleged abuse committed by Thomas's mother, Veronica Johnson. Thomas was seven years old at the time. (63 RT 6678-6683, 6688, 6704.)

Johnson told Kurzenhauser that she wanted Thomas removed from the home. She was a religious woman, attended church regularly, and believed in the use of corporal punishment to discipline her child. (63 RT 6696.) Johnson reported that she had been beating Thomas using a belt since he was two years old. Thomas had rebelled against her discipline and would strike back at her physically. (63 RT 6684-6685.) Johnson, who was two months pregnant at the time of Kurzenhauser's investigation, said that two weeks earlier, Thomas had thrown a television on the floor and kicked her. She feared that Thomas might injure her unborn child. She blamed Thomas for a miscarriage she suffered two years earlier after she and Thomas had been wrestling. (63 RT 6685.) The day prior to the report, Johnson had attempted to beat Thomas with a belt while her nieces held him down. Thomas freed himself from their grasp and ran away from home. (63 RT 6687.) Kurzenhauser examined Thomas for injuries. He did not observe any fresh marks, but could see old scars on Thomas's back consistent with having been beaten with belts and electrical cords. (63 RT 6699-6700.)

Johnson reported to Kurzenhauser that Thomas had been sexually active since the age of two, when a 12-year-old neighbor girl had sex with him under the house. When Thomas was six years old, his mother's 30-year-old roommate awoke to find Thomas attempting to have sexual intercourse with

her. (63 RT 6687-6688.) Kurzenhauser interviewed Thomas, who did not recall either event. He reported, however, that the year prior he had had sex with a three-year-old girl and a 12-year-old girl. When asked, Thomas, then age seven, was able to recount sexual details that were not age appropriate. (63 RT 6688.)

Kurzenhauser spoke with psychologist Judith Libow, who had been treating Johnson and Thomas. Libow reported that Johnson had missed several of their appointments. In Libow's opinion, there was little bonding between mother and child, and it would be premature to remove Thomas from the home. Based on her observations of Thomas, she did not believe that he was a threat to the new baby. Libow had suggested to Johnson that if she stopped using corporal punishment against Thomas, he would stop retaliating against her. (63 RT 6693-6694.)

Based upon his observations, Kurzenhauser opined that (1) Johnson's living quarters were extremely cramped, leaving Thomas to sleep on a couch in the living room; (2) her house was unkept and littered with clothing; (3) Johnson and Thomas's relationship was more akin to peers than to mother and son; (4) Johnson was hostile to Thomas and blamed him for many of the things that were wrong in her household; (5) Johnson did not take sufficient responsibility for her own conduct in the household; and (6) Thomas was the victim of ongoing physical abuse, and had struck out against his mother in self-defense. (63 RT 6696.)

Kurzenhauser gave Johnson three options for future placement: Thomas could either remain in the home, move in with relatives or friends, or be placed in Snedigar Cottage. Johnson was adamant that Thomas be removed from the home. Kurzenhauser ultimately arranged for a placement at Snedigar Cottage, with continued counseling for Thomas and his mother. When Johnson left Thomas at his placement, he ran to her, threw his arms around her neck, and

kissed her. Johnson was nonresponsive to her son. (63 RT 6690-6692, 6698.)

In September 1980, Catherine Sykora, a child dependency investigator, was assigned to supervise Veronica Johnson and Keith Thomas. (63 RT 6706-6708.) Sykora interviewed the family's psychologist, Dr. Libow, who reported that Johnson had requested immediate help because she was unable to maintain her son in the home. (63 RT 6709.) Dr. Libow opined that Thomas was not an emotionally disturbed child. In her opinion, Johnson's corporal punishment was severe and abusive, causing Thomas to run away from home. (63 RT 6710.) On September 29, 1980, Sykora checked on Thomas at Snedigar Cottage. The staff members reported that he was responsive to them and did not exhibit any behavioral problems. (63 RT 6710-6711.)

Sykora interviewed Veronica Johnson. Johnson reported that she had taken Thomas to therapy in an attempt to maintain custody of him in her home. She had been advised by Dr. Libow not to used corporal punishment, but found the recommendation difficult to follow because Thomas continued to misbehave. She recounted that she recently had found him picking apart the couch. She had two people hold him down while she beat him. Thomas kicked and screamed, and later ran away from home. (63 RT 6716-6717.)

Johnson provided Sykora with several details about her own family history. Johnson's stepmother and her oldest stepbrother had abused her physically and emotionally. When she was 14 years old, she went to live with an aunt, who also physically abused her. Johnson ran away from home when she was 16 years old after her aunt beat her with an umbrella. (63 RT 6718-6719.) Johnson's family traditionally used corporal punishment as a method of discipline, and this was the only form of child rearing that Johnson had been exposed to growing up. (63 RT 6719.)

Johnson became pregnant with Thomas by Keith Thomas Sr. when she was 17 years old. The two did not live together, and she had not seen Thomas Sr.

for four or five years. Thomas Sr. was heavily involved in drugs. Johnson's source of support for her child came from aid to families with dependent children. (63 RT 6719, 6721.)

Sykora also investigated Keith Thomas Sr.'s background. (63 RT 6718.) He had an extensive juvenile and adult criminal record. His lifestyle was unstable, with a marginal employment history, varying living arrangements, and ongoing difficulties with law enforcement. Sykora concluded that Thomas Sr. would be an inappropriate custodian for his son. (63 RT 6718, 6720.)

As a result of her investigation, Sykora filed a petition to remove Thomas from his mother's custody, and arranged to have him transferred into foster care. (63 RT 6711-6717.) In her report, Sykora noted that Thomas and Johnson's relationship was characterized by episodes of increasingly violent behavior. Johnson herself had been abused as a child, and was unable to moderate the intensity of her corporal punishment towards her son. She lacked insight into her problems with her son. She was under stress from the death of her mother and her current pregnancy. Sykora opined that these factors put Thomas at a risk of abuse, and that reunification was not in his or his mother's best interests. (63 RT 6721-6722.)

Sykora subsequently learned from Paulette Tyson, Thomas's paternal aunt, that Thomas's paternal grandparents were willing to assume custody of him. Veronica Johnson was against the placement, however, because she believed that the grandparents were incapable of providing adequate supervision, appropriate meals, or basic housekeeping. (63 RT 6725.)

In October 1982, Alameda County Child welfare worker Lucille Serwa was assigned to provide ongoing supervision of the reunification process between Veronica Johnson and Thomas. (63 RT 6742-6745.) Thomas was nine years old. (63 RT 6746, 6762.) His little sister Ronesha was two years old. (63 RT 6759-6760.)

On November 2, 1982, Serwa met with Johnson for a child welfare visit. Johnson and Thomas lived in public housing in a high-crime area in Oakland. Johnson presented herself as a strong person and a strict disciplinarian. She boasted of having the neatest and best-kept apartment in the housing complex. (63 RT 6748-6749, 6761.) She previously had worked in construction but had been injured on the job. She was then unemployed. (63 RT 6752.)

Johnson reported to Serwa that she had been sexually molested by either her father or her stepbrother between the ages of nine and twelve. Johnson's mother had physically abused her as a child. Her stepmother beat her with a two-by-four board. (63 RT 6751-6752.)

Johnson attended church, and sometimes brought Thomas with her. She rewarded Thomas for being good by allowing him to eat at restaurants and watch television; she revoked those privileges when he misbehaved. (63 RT 6750.) Johnson reported buying things for Thomas with the intention of taking them away when he misbehaved. (63 RT 6751.) As an example of Thomas's poor behavior, Johnson cited an incident where she came home and found that he had spilled flour on the floor. (63 RT 6756.)

Johnson reported an incident where she and her sister had held Thomas down to discipline him. He resisted, and threatened to strike her with a towel rack. She "knock[ed] him cold." When he came to, he was uncontrollable and tried to run away. Johnson reported that Thomas frequently became uncontrollable when she tried to "whip" him. She had struck Thomas with her fists in the past. (63 RT 6750-6751.) She found the act of beating Thomas to be physically "exhausting." (63 RT 6752.) She had been counseled against using corporal punishment on Thomas, but she was not convinced on the subject. (63 RT 6751.) Based on these reports, Serwa could see that there was a "battle" going on between mother and son. (63 RT 6751.)

Johnson believed that her son would benefit from therapy, but she was not interested in attending therapy herself. Johnson felt that her past efforts at therapy with Thomas had been unsuccessful. She hoped that in therapy Thomas would learn how not to anger her, and how to accept punishment. Johnson allowed Thomas to spank and slap his two-year-old sister. (63 RT 6753-6755.)

On November 30, 1982, Johnson called Serwa and reported that Thomas was uncontrollable and had run away from home. She stated that she could not control Thomas except through the use of corporal punishment, and she asked that he be removed from the home. (63 RT 6745-6746.) Serwa interviewed Thomas, who reported that he had spent the night outdoors under a stairwell in the rain. Thomas was tired and crying. He was afraid of his mother and he asked to be removed from the home. (63 RT 6747.) He explained that the day before his mother had left her boyfriend in charge of Thomas and his sister. The two children had messed up Johnson's bed. Thomas feared he would be punished for the act and fled through a bedroom window. (63 RT 6747-6748.)

Johnson informed Serwa of her plan to beat Thomas with a belt for his disobedience. Serwa counseled her against it for two hours, but Johnson did not waiver in her view that Thomas was manipulating her and deserved to be punished. (63 RT 6756-6757.) Serwa called the police to the home. (63 RT 6756.)

Based upon her investigation, Serwa concluded that Thomas was not safe in the home and had him removed. She advised Johnson that she would need to make significant changes to her attitude about parenting before Thomas would be allowed to return. Johnson was steadfast in her belief that the problem was with Thomas, not her. (63 RT 6758.)

Pauline Thomas, Keith Thomas's paternal grandmother, first met Thomas when he was two years old. She saw him infrequently after that because she

was not acquainted with his mother. (63 RT 6764, 6766, 6772.) When Thomas was approximately seven years old, Pauline heard that he had been put up for adoption. She went to court and expressed her willingness to take the child. (63 RT 6767-6768.) Thereafter, Thomas stayed with Pauline on weekends, and at a foster home during the week. Later, he came to live with Pauline full time. (63 RT 6768, 6770-6771.)

At first, Thomas was quiet and afraid at Pauline's house. He looked like a child that had been "thrown away." Thomas eventually began to relax around Pauline. He saw a psychologist, attended school, and made a friend in the neighborhood. (63 RT 6768-6773.) Thomas Sr. did not come by often to visit his son. Thomas would speak to his mother on the telephone. He did not say much about her except that she would "whoop" him while he slept. He professed to love his mother, but believed that she loved his little sister more than him. (63 RT 6773-6775.)

Once, Pauline threw a birthday party for Thomas. He commented that it was the first party he had ever had. (63 RT 6771.) On another occasion, Thomas commented that he wished he were dead. (63 RT 6775-6776.) In the four or five months that Thomas stayed with Pauline, he was well behaved and followed her directions. Thereafter, Thomas's mother took him back into her custody. (63 RT 6773, 6776-6777, 6784-6785.)

After Thomas moved back in with his mother, Pauline saw him only occasionally. When Thomas was 11 or 12 years old, he went to live with his father in Sacramento. Pauline frequently went to Sacramento to care for her mother, and she would see Thomas at her mother's house. Thomas brought along a handicapped, two-year-old child that he lived with. Thomas was kind to the child, fed and cleaned him, and walked him around in a stroller. (63 RT 6777-6780, 6786, 6794.)

Thomas moved back to Oakland with his mother when he was 13 or 14 years old. Pauline would seek him standing on the street corners with his friends. She suspected that he might be dealing drugs. Whenever she saw Thomas, she encouraged him to stay in school. He was always polite to her. (63 RT 6781-6782, 6787-6789, 6791.)

Keith Thomas Sr. testified regarding is relationship with Thomas Jr. Thomas Sr. had several felony convictions and had been to prison twice. (63 RT 6802.) He met Veronica Johnson when he was 17 or 18 years old. They never married or lived together and he continued to date other women. (63 RT 6799-6800.) Thomas Sr. did not know when his son was born and he did not see the child much growing up. At one point, Thomas Sr. heard that Thomas Jr. was going to be removed from his mother's custody. Thomas Sr. could not become involved, however. He was a drug user and a pimp, and was wanted by the police at the time. (63 RT 6801.)

When Thomas Jr. was living with his grandmother, Thomas Sr. would stop by to see him periodically. Thomas Sr. was using heroin, cocaine, LSD, and marijuana at the time. (63 RT 6803.) Thomas Jr. later returned to live with his mother. Once, Thomas Sr. encountered his son on the street in Oakland late at night. He asked Thomas Jr. what he was doing out, and Thomas Jr. replied that he was buying cigarettes for his mother. Thomas Sr. took Thomas Jr. home and argued with Johnson about her supervision of the boy. (63 RT 6804-6805.)

In 1985, Thomas Sr. completed a prison sentence for assault with a deadly weapon. He moved to Sacramento and lived with a woman named Joyce Smith and her five children. Joyce's mother, her brother, and her sister also lived in the home. (63 RT 6803, 6805-6806.) Around that time, Veronica Johnson called Thomas Sr. and asked him to take custody of Thomas Jr., who was then 12 years old. She was upset at the child for having spent $20 on a Michael Jackson poster. (63 RT 6804.)

Thomas Jr. moved into the Sacramento household with his father. The living situation was chaotic. Thomas Sr. was using drugs, selling drugs, and prostituting women. Joyce's mother was also selling crack cocaine out of the house. Joyce's brother was openly gay and a cross-dresser. Joyce and Thomas Sr. fought often and Thomas Sr. was jailed twice for striking her. (63 RT 6805-6807.) Thomas Sr. described himself as a "lousy parent" to his son. (63 RT 6807.)

Joyce had a young, handicapped child who could not walk. None of the adults looked after the child. Thomas Jr. would bathe and care for him. At school, Thomas Jr. had average grades. There were racial tensions between the black and white children, and Thomas Jr. was involved in some altercations which resulted in his suspension. (63 RT 6808-6815.)

Joyce Smith also recounted the details of her household during the time Thomas Jr. lived there. Thomas Jr. resided in her home for approximately two years when he was between 12 and 14 years old. (63 RT 6817-6819, 6821.) Thomas Jr. was very respectful to her and called her mom. He behaved well, did his chores, and treated everyone in the house with kindness. He had several friends and was not involved in criminal behavior. (63 RT 6820-6821, 6833-6835.)

Thomas Sr. was drinking, dealing drugs, and pimping women. He frequently assaulted Joyce, resulting in bloody battles between the two of them. Thomas Jr. witnessed this violence. Thomas Sr. would discipline his son by spanking him with a belt or a switch. (63 RT 6825-6828.)

Joyce and Thomas Sr. lived with several other people, including Joyce's mother, who was a drug dealer, a man named Robert Size, who was a heavy drinker, Joyce's friend Vera, who was mentally ill, Joyce's brother Kevin who was gay and a cross-dresser, and Joyce's four children, ages ten, nine, four, and one. (63 RT 6828-6832.)

Joyce's youngest son, James, suffered from crippling spinal bifida and hydrocephalus. Thomas Jr. became James's caretaker. He would change the baby, give him his medications, play with him, and take him out on walks. James died at the age of three and a half. (63 RT 6822-6824.)

After Thomas Jr. moved back to Oakland, Joyce saw him only infrequently. He always treated her with respect and did not appear to be a gang member or a "tough guy." Joyce had heard that Thomas Jr. fathered a baby while living in Oakland. (63 RT 6832, 6837.)

Dr. Ronald Bruce, a clinical psychologist, testified for the defense as an expert in forensic psychology. Dr. Bruce prepared a psychological history for Thomas, which is a reconstruction through documentary evidence or interviews of an individual's life experiences. The doctor relied on Alameda County Social Services records for Thomas and interviews of Thomas's family members. (63 RT 6858, 6865-6867.) He did not personally interview Thomas or any other witnesses, and offered no opinion regarding Thomas's mental ability or his psychological state at the time of the crimes. (65 RT 6867, 6892, 6896, 6900, 6919.)

Dr. Bruce opined that the background of a defendant's parents has a direct effect on their parenting skills, which in turn shapes the defendant's life experiences. (65 RT 6868-6869.) He received information that Thomas's mother, Veronica Johnson, had been sexually and physically abused during childhood. (65 RT 6869.) She was whipped with ropes, beaten with a two-by-four piece of wood, and struck with an umbrella. (65 RT 6869.) According to Dr. Bruce, such experiences are highly traumatizing to a child and can compromise the child's psychological integrity later in life. (65 RT 6870.)

Both Veronica Johnson and Thomas's paternal grandmother recounted that Johnson's pregnancy with Thomas was unwanted and that she was forced by her family to carry the baby to term. Johnson was very young when Thomas

was born. She had recently moved out of her home and struggled to survive, living partially on welfare. (65 RT 6870-6871.) She and Thomas lived in a high-crime public-housing district. (64 RT 6761; 65 RT 6903.)

Johnson began physically abusing Thomas "to an extreme degree" using a belt when he was two years old. This continued on and off throughout his childhood. Johnson choked Thomas on a number of occasions. On other occasions she threatened to kill her son. In Dr. Bruce's opinion, "it was a continuing pattern of fairly severe abuse . . . ." (65 RT 6871-6872.)

When Thomas was six or seven years old, social services agencies investigated Veronica Johnson. They found that Thomas had scarring on his back from the beatings. Johnson worked construction and described herself as a strong person. In the estimation of Thomas's paternal grandmother, she was heavy handed and "capable of beating the child quite well." (65 RT 6872-6873.)

Johnson believed that African-American children were troublemakers and required strict physical discipline. She also believed that children should passively submit to discipline. (65 RT 6873, 6876.) There was repetitive evidence in the social service records of Johnson beating Thomas for relatively minor transgressions. During stressful periods in Johnson's life, such as her second pregnancy, her surgery, and the death of her common law husband, she was particularly abusive towards Thomas. (65 RT 6873-6874.) Thomas responded to the abuse by struggling against his mother, running away, and attempting to defend himself. (65 RT 6876.) Johnson repeatedly reported that Thomas had attacked her, but due to the child's young age, Dr. Bruce was skeptical of the claims. (65 RT 6874-6875.)

Johnson reported that when Thomas was between the ages of two and four, he was sexually molested by a 12-year-old girl and that between the ages of

four and five, he was sexually molested by a nine-year-old girl. Johnson laughed about these incidents. (65 RT 6876.)

Johnson recalled one incident around the time Thomas was removed from her custody when she became so angry with him that she choked him. She reported, "I tried my best to kill him up in there. I knocked him from the bed to the front door. I was choking his — his tongue, his eyeballs was rolling all in the back of his head." She opined that she would have killed Thomas had a family member not intervened. (65 RT 6877.)

Thomas was removed from his mother's custody at the age of six. (65 RT 6876.) During that time, Thomas lived with his paternal grandmother, Pauline Thomas, and in foster care with Maud Peoples. Both women reported that Thomas was well-behaved. Pauline Thomas was surprised by Johnson's callous behavior towards her son. She described Thomas as an unwanted child, one who had been "thrown away." (65 RT 6878.)

While Thomas was in out-of-home placement, his mother stridently refused to attend therapy. She never wavered in her belief in corporal punishment, and she was insulted that others would tell her how to raise her child. She believed that a white therapist did not know how to parent or discipline an African-American child. She requested an African-American male therapist who could serve as a role model to Thomas. She and the new therapist concurred that Thomas "just needs a good butt whipping." (65 RT 6879-6880.)

When Thomas was nine or ten years old he returned to his mother's custody. She relented somewhat in beating Thomas during this time. However, when Thomas turned eleven, Johnson threw him out of the house. He lived for a short time with his paternal grandmother and then went to live with his father and Joyce Smith in Sacramento. That home was chaotic and filled with drug abusers. Thomas Sr. was very abusive towards Smith and towards his own son. (65 RT 6879-6880, 6891.) Smith's daughter, Laticia Nears, described one

incident where Thomas Sr. tied a series of switches together and whipped Thomas Jr. until they broke. (65 RT 6891.) When he was not abusing his son, Thomas Sr. paid little attention to him. (65 RT 6891.) Despite this, Thomas Jr. showed a great deal of care and compassion to Smith's youngest son, who suffered from spinal bifida. (65 RT 6905-6906.)

Dr. Bruce explained that a person's psyche develops during the first three to seven years of life. Thomas's life was in turmoil during that time and after. (65 RT 6883, 6889.) When a person's psyche is not well developed, he will have problems with unstable emotions, low self-esteem, mood swings, and lack of direction in life. (65 RT 6884.) Many people repress such feelings and continue on in their daily lives. However, the feelings will continue to haunt them through adulthood unless and until they get therapy. (65 RT 6882.)

Based on Thomas's history, Dr. Bruce opined: "given a childhood with such a confluence of abuse and rejection and abandonment, it would be . . . so pathological developmentally, it would be very hard to believe that Mr. Thomas did not enter early adulthood with severely compromised psychological functioning. [¶] You just cannot go through that kind of—it's not just the abuse. It's also the rejection. It's not just the abuse and the rejection. It's the abandonment. You have all three of those. He—psychologically—let's put it this way, he would be a bit of a mess by the time he reached adulthood." (65 RT 6881.)

Dr. Bruce was particularly struck by the complete lack of nurturing provided by Thomas's mother, observing that "I've rarely seen such a continuing and constant pattern" of rejection. (65 RT 6884.) According to Dr. Bruce, "She made it clear that she did not want any connection with this child and actively worked to break that connection" (65 RT 6885.) In addition, Johnson subjected Thomas to very intense and extensive physical abuse. She

was dominating and inflexible. If Thomas resisted her discipline, she only beat him harder. (65 RT 6885.)

Dr. Bruce explained that when a mother repeatedly abandons and rejects her child, the child loses confidence in the relationship. There is no structure to allow the child to grow physically and mentally. The abused child internalizes tremendous guilt, blaming himself for the failed relationship. Thus, in Thomas's case, his paternal grandmother reported that Thomas would say, "I'm a bad boy. I'm not good. Mom doesn't like me." (65 RT 6887-6888.) Such a child will spend the rest of his life trying to gain acceptance from the abusive parent. An abused child also harbors a tremendous amount of rage, which is very damaging to the psyche. (65 RT 6885, 6888.)

Dr. Bruce emphasized that "an individual who has gone through these kinds of experiences, it is guaranteed, it is absolutely unequivocal, that they will enter adulthood with serious compromises in their ability to function appropriately and psychologically. They will be beset with depression, low self-esteem, lack of direction, chaotic interpersonal relations." The pressure of suffering such life experiences builds up over time and the person "become[s] like a ticking time bomb." According to Dr. Bruce, "You cannot fill the psyche with that much rage and not expect some kind of a response." (65 RT 6892.)

Dr. Bruce agreed that not every child who is abused turns to a life of crime. An abused person will always experience psychological disturbance. How it is expressed is another matter, and depends on the traits of the person from birth. Some people will become depressed and suicidal; others who are more intellectual may develop schizophrenia; yet others will act out their anger and externalize it. (65 RT 6908-6909, 6919.)

Dr. Bruce acknowledged that Thomas did exercise freedom of choice. He opined, however, that his choice was encumbered by the overlay of his own abusive background. (65 RT 6909.) He explained that freedom of choice

depends on one's emotional state. Some people are more able to control their moods than others. (65 RT 6909.) In Dr. Bruce's opinion, a person suffering from depression or hopelessness will have a compromised ability to make decisions in his life. Also, people with severely compromised psychological development frequently lack impulse control. (65 RT 6910, 6912.) When a person gives up all hope in his or her life, that person tends to turn to suicide or homicide. Either act essentially forfeits the person's right to live. (65 RT 6917-6918.)

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE THOMAS'S SIXTH AMENDMENT RIGHT TO COUNSEL BY DISQUALIFYING THE PUBLIC DEFENDER'S OFFICE FROM REPRESENTING THOMAS BASED ON THAT OFFICE'S PREVIOUS REPRESENTATION OF CODEFENDANT GLOVER

Prior to trial, codefendant Glover moved to recuse Deputy Public Defenders Judith Browne and Alex Green from representing Thomas based upon a conflict of interest stemming from their office's previous representation of Glover in eight juvenile matters. At a hearing on the motion, Public Defender Jay Gaskill appeared in court and stated his view that recent Ninth Circuit authority created a conflict between his office's duty of zealous advocacy to Thomas, and its continuing duty of loyalty to former client Glover. Rather than self-recuse, however, the public defender asked that the court sever the trials so that Thomas could be represented by counsel of his choice. The trial court denied the severance motion, recused the public defender's office, and appointed new counsel to represent Thomas.

On appeal, Thomas contends that the trial court abused its discretion by recusing defense attorneys Browne and Green where neither of them previously had represented Glover or had access to Glover's juvenile case files. (AOB 40-54.) He maintains that the error deprived him of his Sixth Amendment right to counsel of choice, and was therefore structural—requiring reversal of the guilt and penalty phase verdicts without an assessment of prejudice. (AOB 54-57.)

We disagree. The public defender's office owed Glover a duty of loyalty not to undertake representation of another client whose interests were directly adverse to Glover on a subject substantially related to the office's prior

representation of Glover. Further, the office had a duty to preserve client confidences revealed during the course of prior representation on matters substantially related to the current prosecution. Here, there existed a substantial relationship between the subject of the former representation of Glover and the current litigation, namely that Thomas intended to rely on Glover's prior criminal record to portray him as the shooter in the charged offenses. And although Browne and Green did not personally represent Glover, at least eight other members of their office had acquired confidential information relevant to Glover's juvenile cases. The trial court had broad discretion to avoid the appearance of impropriety that would have arisen had the public defender been allowed to use cases in which they previously had represented Glover to Glover's disadvantage in a capital trial.

Ultimately, however, even if the trial court abused its discretion in recusing the public defender's office, no constitutional violation occurred. An indigent defendant is entitled to effective representation, not to counsel of choice. Thomas did not and has not alleged that his substitute counsel was ineffective. Because Thomas was not constitutionally entitled to choose his appointed counsel, no constitutional error, structural or otherwise, occurred.

A. Proceedings Below

Assistant Public Defender Judith Browne was appointed to represent Thomas in January 1993. (9 CT 2537.) Assistant Public Defender Alex Green was appointed as *Keenan* counsel in February 1993. (9 CT 2537, 2540.)

As revealed during the course of pretrial proceedings, Thomas's defense strategy was to portray codefendant Glover as the shooter. To that end, on September 19, 1995, Thomas's counsel moved for disclosure of Glover's section 1368 psychiatric evaluations generated in the pending case. (9 CT 2515-2522.) Thomas's counsel represented that the records "may contain

information demonstrating that Mr. Glover; (1) made statements concerning the alleged crimes which could be used to impeach his prior statements, (2) has psychological problems that could affect his credibility as a witness, (3) has in the past been dishonest or distorted the truth, and (4) he has a character for violence or dishonesty, relevant to prove that he may have acted in a similar manner in the present case." (9 CT 2522.) Thomas averred that the materials "may support defendant Thomas's contention that it was co-defendant Glover who was the shooter in this case." (9 CT 2522.) Glover opposed the request on the ground that the sought-after examinations were irrelevant and inadmissible in a criminal proceeding. (9 RT 2655-2660.)

On September 21, 1995, Thomas's counsel moved for disclosure of codefendant Glover's juvenile court records in prior proceedings on the ground that they might disclose psychological problems and/or juvenile-court findings that would evidence Glover's character for dishonesty or violence.[9/] Glover opposed Thomas's request for discovery on the grounds that the records were not relevant to a material issue in the case, that they were privileged against disclosure (Welf. & Inst. Code, § 827), and that they might contain confidential attorney-client information. (9 CT 2492-2498.) Thomas's motion for disclosure was granted following an in-camera examination of Glover's juvenile court files. (9 CT 2531.)

In response to these discovery requests, on October 2, 1995, Glover filed a motion to recuse the Alameda County Public Defender's Office based on a conflict of interests. (9 CT 2572-2579.) Glover's motion averred that 13 attorneys from the public defender's office previously had represented Glover in juvenile court proceedings, which were now the subject of discovery

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9. A copy of Thomas's motion for disclosure of juvenile court records is not included in the Clerk's Transcript in this case, but the existence of the motion is referenced in the parties' moving papers. (9 CT 2492-2493, 2531, 2573.)

requests by Thomas. Glover demanded that the public defender's office withdraw from the case to avoid violating its duty of confidentiality and loyalty to him stemming from the prior representation. (9 CT 2572-2579.) Glover also filed a motion to sever the trials. (9 CT 2556-2558.)

Thomas's attorneys, both members of the public defender's office, opposed the recusal motion. (9 CT 2531-2537.) In support, attorneys Browne and Green proffered declarations stating that they had not personally represented Glover in any prior proceedings, that they had not accessed Glover's confidential juvenile-court files, and that they had not discussed Glover's prior representation with any of their colleagues in the public defender's office. (9 CT 2537-2542.) Public Defender Jay Gaskill proffered a declaration stating that in 1973, the Alameda County Public Defender's Office had instituted a policy, still in place, that no attorney could examine, access, or otherwise seek to learn the contents of a closed case file of a former client without a signed release from that client. He attached a copy of the agency's "no peek" rules. (9 CT 2543-2546.) Supervisor Jean Duenas proffered a declaration stating that eight files regarding Glover's representation in 1987, 1988, 1989 and 1990 were closed between 1987 and 1991 and remained at an off-site location. They had not been retrieved by any member of the office since that time. (9 CT 2547.)

Glover filed a reply to the public defender's opposition (9 CT 2612-2681) and supplemental points and authorities (9 CT 2624-2634), which in turn prompted a supplemental declaration by Green (9 CT 2621-2622).

On October 3, 1995, Thomas filed a motion to substitute counsel under *People v. Marsden* (1970) 2 Cal.3d 118. (9 CT 2595; 1 RT 26-27.) Following an in-camera hearing, the court denied the motion. (9 CT 2595.)

On October 5, 1995, the court heard argument on the motion to recuse. (9 CT 2651.) Counsel for Glover maintained that the public defender's

representation of Thomas, having previously represented Glover in another trial, violated rule 4-101, of the Rules of Professional Conduct, which states that a member shall not accept employment adverse to a client or former client without the written consent of the client. (1 RT 96-97.) Glover's counsel noted that the public defender's strategy in the current case was to implicate Glover as the shooter, using in part documentation from Glover's prior cases in which he was represented by their office. The public defender's office, Glover maintained, had a conflicting duty to safeguard the confidentiality of those prior files, which were now sought to be discovered by other members of the office. (1 RT 97-98.)

Thomas's counsel, Browne, confirmed that the public defender had represented Glover in eight juvenile proceedings between 1987 and 1990, and that she had sought disclosure of these records to prepare a defense case on behalf of Thomas. (1 RT 100.) Browne further maintained that the files had been closed and stored at an off-site location since 1990, that no member of her office had accessed them since, and that neither she nor cocounsel was aware of any information contained in those files. (1 RT 100-101, 104, 130.) As noted, both of Thomas's attorneys proffered declarations to that effect. (1 RT 101-102.) Although Browne acknowledged that her office normally declares a conflict where one of their attorneys previously has represented a codefendant in the litigation, she believed that in this case sufficient time had passed to ensure that she and cocounsel would not glean any information from her office's prior representation of Glover. (1 RT 123.)

The trial court found credible Browne's and Green's declarations that they had obtained no attorney-client information about Glover from any prior representation done by the public defender's office. (1 RT 124-125.) Based on these representations, the court found no substantial relationship between the

former representation and the current representation, and denied Glover's motion to recuse the public defender's office. (1 RT 139-140.)

On October 10, 1995, Glover renewed his motion to recuse the public defender's office based upon a then recently-decided case, *Damron v. Herzog* (9th Cir. 1995) 67 F.3d 211. (2 RT 226-228, 281-287.) The matter was continued to October 16, 1995, for further hearing. At that time, Public Defender Gaskill appeared personally in court. (4 RT 408.)

In an in-camera hearing,[10/] Gaskill represented that the recent Ninth Circuit authority sets a "more expansive view of the substantial relationship doctrine . . . which troubles us because it goes well beyond the question of whether or not confidential information has been leaked from the Glover files, which as I have told you has not." (4 RT 412.) Gaskill acknowledged that "in a joint trial between Thomas and Glover, the trial strategy adopted by Ms. Browne will in effect work to Mr. Glover's detriment," and that the prior attorney-client relationship between the public defender's office and Glover would, in the Ninth Circuit's view, "create a conflict issue." (4 RT 413.) Gaskill was therefore "greatly troubled about the fact of an aggressive representation of Mr. Thomas and its impact on the appellate record." (4 RT 412.) He expressly acknowledged that "because of this *Damron* case that there is a duty owed by Ms. Browne toward—toward Mr. Glover not to be involved in [a joint trial of] the case." (4 RT 419-420; see also 4 RT 422.)

Thomas affirmed on the record that he wanted the public defender's office to represent him. (4 RT 414.) Browne stated that she had been Thomas's counsel since January 1993 and that during that time she had contacted Thomas's family and had prepared for the penalty phase. (4 RT 415.) She

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10. A transcript of the in-camera hearing was ordered sealed by the trial court. (4 RT 412-422.) On November 28, 2007, this Court unsealed the record pursuant to respondent's motion.

professed a unique familiarity with the case and questioned whether new counsel could perform as competently as she. (4 RT 415-417.) Accordingly, rather than self-recuse, Gaskill and Browne asked that the trial court sever the defendants' trials so that the public defender's office could continue to represent Thomas. (4 RT 417-418.)

In open court the trial court summarized the issue as follows: "it's the position of the public defender that because of the recent case, *Damron versus Herzog*, . . . which apparently in the public defender's position expands the duty owed by counsel to a former client[,] they can not [*sic*] in good conscience have Ms. Browne in this case being tried jointly with Mr. Glover, their former client, notwithstanding the fact [that neither] Ms. Browne [n]or Mr. Green has no information about the juvenile case, nor have they been privy to any discussion concerning these juvenile cases [¶] . . . . And what's indicated and suggested in the recent case makes them concerned so that they can not [*sic*] feel in good conscience that she can perform adequately without violating the attorney-client relationship." (4 RT 423.) At the same time, the court continued, the public defender "has taken the position that he can not [*sic*] voluntarily recuse himself or his office from this case because they now have the confidence of their client, Mr. Thomas. They feel that there's a special relationship now between Mr. Thomas and Ms. Browne, and they feel that the proper procedure to be followed in this case would be severing [the trials]." (4 RT 423-424; see also 4 RT 426.)

Browne reiterated that she would not declare a conflict in her representation of Thomas. (4 RT 439, 449.) She argued that Thomas had a Sixth Amendment right to preserve his existing relationship with counsel, which outweighed the preference for a joint trial. (4 RT 438, 440.) According to Browne, "it's an extremely difficult, convoluted case, both in the guilt phase and the penalty phase. We are the ones who have talked to and developed relationships

with—with people on all sides of the fence that the new attorney would not be able to do. We are the ones who have prepared the penalty phase. We are the ones who know the people and that a mere six months would not be sufficient for that attorney, new attorney." (4 RT 443.)

Glover joined in the motion for severance (4 RT 444-445) and the prosecutor opposed it (4 RT 424-425).

The trial court denied Thomas and Glover's motion to sever, citing the preference for joint trials set forth in section 1098. In that regard, the court observed that the public defender's office should have been more "circumspect" regarding the potential for a conflict. The court then ordered that the public defender be recused from representing Thomas, and that new counsel be appointed. (4 RT 428, 449-451.)[11/]

On October 23, 1995, attorney Alfons Wagner was appointed to represent Thomas. (9 CT 2716.) On November 7, 2005, William Cole was appointed as *Keenan* counsel. (10 CT 2749; 7 RT 472.) On February 26, 1996, the trial court resumed motions in limine. (10 CT 2849.) On March 21, 1996, the trial court granted Glover's motion to sever the trials on *Aranda-Bruton* grounds. (10 CT 2979.) Trial against Thomas ultimately commenced on September 4, 1997. (13 CT 3834.)

B. The Trial Court Did Not Abuse Its Discretion In Recusing The Public Defender's Office Based On A Conflict of Interests

"The authority of the trial court 'to disqualify an attorney derives from the power inherent in every court "[t]o control in furtherance of justice, the conduct

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11. After Glover's motion to recuse the public defender's office was granted, Glover filed a writ of mandate with the Court of Appeal challenging the public defender's ability to cooperate with newly-appointed counsel for Thomas. (10 CT 2717-2747.) That petition was denied. (10 CT 2750.) This Court denied review. (10 CT 2752-2769, 2818.)

of its ministerial officers."'" (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846 (*Cobra*), quoting *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145 (*SpeeDee*); and Code Civil Proc. § 128, subd. (a)(5).) In ruling on a disqualification motion, the court must balance the client's right to counsel of his choice against the need to maintain standards of professional responsibility, with the court's paramount concern being "to preserve public trust in the scrupulous administration of justice and the integrity of the bar." (*SpeeDee, supra*, 20 Cal.4th at p. 1145.)

A trial court has "wide latitude" in ruling on a disqualification motion (*United States v. Gonzalez-Lopez* (2006) 548 U.S. __, 126 S.Ct. 2557, 2565-2566), and its decision is reviewed on appeal for abuse of discretion (*Cobra, supra*, 38 Cal.4th at p. 848; *In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556, 561). "The party resisting disqualification bears the burden of establishing the facts making disqualification inappropriate, and [the reviewing court will] 'accept[] as correct all of [the trial court's] express or implied findings supported by substantial evidence.' [Citation.]" (*Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566, 1573.)

"Two ethical duties are entwined in any attorney-client relationship. First is the attorney's duty of confidentiality, which fosters full and open communication between client and counsel, based on the client's understanding that the attorney is statutorily obligated (Bus. & Prof. Code, § 6068, subd. (e)) to maintain the client's confidences. [Citation.] The second is the attorney's duty of undivided loyalty to the client. [Citation.] These ethical duties are mandated by the California Rules of Professional Conduct. (Rules Prof. Conduct, rule 3-310(C) & (E).)" (*Cobra, supra,* 38 Cal.4th at p. 846.)

"Professional ethics demand that an attorney avoid conflicts of interest in which duties owed to different clients are in opposition." (*People v. Baylis*

(2006) 139 Cal.App.4th 1054, 1064, citing *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282 & fn. 2.) Such conflict may arise during concurrent or successive representation of clients with adverse interests. (*Flatt, supra*, at pp. 283-284.) At issue in this case was successive, rather than simultaneous representation.

As to successive representation, Rules of Professional Conduct, rule 3-310(E) provides: "A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." The rule has two purposes: to protect the client's interests, and to prevent the attorney from being placed in a position "where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflict interests, rather than to enforce to their full extent the rights of the interests which he should alone represent." (*American Airlines Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1043, quoting *Anderson v. Eaton* (1930) 211 Cal.113, 116; accord, *Rhaburn v. Superior Court, supra*, 140 Cal.App.4th at p. 1574.)

1. The Public Defender's Representation Of Thomas Adversely Impacted The Office's Duty Of Loyalty Owed To Both Glover And Thomas

In the successive representation context, this Court has observed that "the chief fiduciary value jeopardized is that of client *confidentiality*." (*Flatt, supra*, 9 Cal.4th at p. 283, original emphasis.) The Ninth Circuit has taken a broader view, however, holding that "just as the attorney-client relationship remains intact for purposes of a continuing duty of confidentiality, so does it remain intact for purposes of a continuing duty of loyalty with respect to matters substantially related to the initial matter of engagement." (*Damron v. Herzog,*

supra, 67 F.3d at p. 214.) According to the court in *Damron*, where the prior and current representation are substantially related, "this position creates such a grave risk of breach of confidence, it is anomalous to find that the duty of confidentiality does not have as its direct correlation a duty of loyalty." (*Id.* at p. 215.)

Here, there was a substantial relationship between the subject of the former representation and the current representation. The public defender's office sought to use information from eight juvenile cases where they previously had represented Glover against him in the present litigation to prove that he, and not Thomas, was the shooter, as evidenced by his character for dishonesty and violence.

Although both Browne and Green averred that they did not have access to any confidential information from the prior files, the duty of loyalty, as construed in *Damron*, expands beyond simply maintaining client confidences. As Public Defender Gaskill recognized, Ninth Circuit authority sets a "more expansive view of the substantial relationship doctrine . . . which troubles us because it goes well beyond the question of whether or not confidential information has been leaked from the Glover files . . . ." (4 RT 412.) Under the broader duty of loyalty, the public defender's office had an obligation not to undertake representation of Thomas where his interests were directly adverse to Glover on a subject substantially related to the office's prior representation of Glover. (See *Damron, supra*, 67 F.3d at p. 213 ["we find in the common law a continuing duty owed by attorneys to former clients not to represent an interest adverse to a former client on a matter substantially related to the matter of engagement"].)

Thomas argues that the trial court abused its discretion by relying on *Damron* to find a conflict of interests because that case involved Idaho

standards of professional conduct and was not binding in California. We disagree.

First, the Ninth Circuit found the continuing duty of loyalty to exist in the common law, citing cases from the United States Supreme Court and California, as well as Idaho case authority. (See *Damron, supra,* 67 F.3d at pp. 213-215.) Thus, the case did not rest exclusively on Idaho rules of professional conduct. And the Ninth Circuit's interpretation of common law raised a very real concern that Glover's right to a fair trial would be jeopardized in a capital case by the public defender's continued representation of codefendant Thomas. (See *Yorn v. Superior Court* (1979) 90 Cal.App.3d 669, 677 [where attorney for defendant previously had advised codefendant on matters substantially related to current prosecution, "to submit to [defendant's] claim of unfettered choice of counsel would work an unnecessary but serious prejudice to the interests of his codefendant and unreasonably infringe upon her own right of due process"].) Under these circumstances, the trial court's paramount duty was to "preserve public trust in the scrupulous administration of justice and the integrity of the bar." (*SpeeDee, supra*, 20 Cal.4th at p. 1145.)

Second, the public defender in this case took the position that his office was professionally constrained by the Ninth Circuit authority. Gaskill represented to the trial court that he was "greatly troubled about the fact of an aggressive representation of Mr. Thomas and its impact on the appellate record." (4 RT 412.) He expressly acknowledged that "because of this *Damron* case that there is a duty owed by Ms. Browne toward—toward Mr. Glover not to be involved in [a joint trial of] the case." (4 RT 420; see also 4 RT 422.) As appellant acknowledges (AOB 46), great weight must be given to defense counsel's assertions regarding a conflict of interests. (*Leversen v. Superior Court* (1983) 34 Cal.3d 530, 537; *Uhl v. Municipal Court* (1974) 37 Cal.App.3d 526, 535; see also *People v. Jones* (2004) 33 Cal.4th 234, 242 [trial court did not err in

declining defendant's waiver of potential conflict where defense attorney told the court that the possibility of a conflict was "very troublesome" and had the potential of "creating problems"].) Thus, regardless of its legally binding effect, once the public defender stated his intent to follow Ninth Circuit decisional law on a matter of professional ethics, the trial court could hardly find that no conflict existed between the office's current representation of Thomas and their former representation of Glover. (*Holloway v. Arkansas* (1978) 435 U.S. 475, 485-486 [defense counsel "is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop"].)

Furthermore, despite Browne's representations that she would not pull any punches in her representation of Thomas, the tension between her duty to the current and former clients of the office posed a risk that Thomas's defense would ultimately suffer. As this Court has noted, "Conflicts of interests based on those obligations to clients in different proceedings . . . may impair a defendant's constitutional right to assistance of counsel." (*Leversen v. Superior Court, supra,* 34 Cal.3d 530, 538; see also *id.* at pp. 539-540.) This is precisely the type of dilemma rule 3-310(E) of the Code of Professional Conduct seeks to address, namely, preventing the attorney from being placed in a position "where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interests which he should alone represent." (*American Airlines Inc. v. Sheppard, Mullin, Richter & Hampton, supra,* 96 Cal.App.4th at p. 1043.) The tension inherent in Thomas's defense, compounded by Glover's express demand to recuse the public defender's office from his joint capital trial, amply supported the trial court's decision to substitute counsel for Thomas. In so doing, the trial court preserved the continued duty of loyalty

owed to Glover and ensured that Thomas received effective assistance of counsel unencumbered by a possible conflict of interests.

2. The Public Defender's Representation Of Thomas Adversely Affected That Office's Duty Of Confidentiality To Glover

In addition to the duty of loyalty, the public defender's office also owed Glover a continued duty of confidentiality related to that office's previous representation of Glover in eight juvenile matters. "The enduring duty to preserve client confidences precludes an attorney from later agreeing to represent an adversary of the attorney's former client unless the former client provides an 'informed written consent' waiving the conflict." (*Cobra, supra*, 38 Cal.4th at p. 847, quoting Rules Prof. Conduct, rule 3-310(E).)

"[T]he former client may disqualify the attorney by showing a '"substantial relationship"' between the subjects of the prior and the current representations." (*Cobra, supra*, 38 Cal.4th at p. 847.) Where the attorney had a direct professional relationship with the former client in which the attorney personally provided legal advice on an issue closely related to the current representation, then the attorney is presumed to possess confidential information from the client. (*Ibid.*) Where, by contrast, the attorney's contact was not direct, then the court examines whether the subjects of the prior representation are such as to "make it likely that the attorney acquired confidential information" relevant to the present representation. (*Ibid.*) "If the substantial relationship test is satisfied by the former client, '" . . . the discussion should ordinarily end. The rights and interests of the former client will prevail. Conflict would be presumed; disqualification will be ordered. . . .'" (Citations.)" (*In re Marriage of Zimmerman, supra*, 16 Cal.App.4th at p. 563.)[12/]

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12. The issue of what standard should control disqualification of counsel from legal services agencies and public law firms in juvenile

Thomas argues that neither Browne nor Green represented Glover in any prior litigation, and that both attorneys executed declarations, credited by the court, that they had no confidential information from Glover's public defender files. Accordingly, he maintains that no substantial relationship between the prior and current litigations existed. We disagree.

As noted above, there was a substantial relationship between the subject of the former representation of Glover and the current litigation—namely that the public defender sought to rely on Glover's prior criminal record to portray him as the shooter in the charged offenses. And although Browne and Green did not personally represent Glover, at least eight other members of their office had acquired confidential information relevant to Glover's juvenile cases. The question then becomes whether the trial court abused its discretion in recusing the entire public defender's office based upon the personal knowledge of eight members of its staff.

The State Bar has "issued an opinion to the effect that the public defender —meaning the entire office—should be disqualified from representing a defendant if a previous client is also involved in the case as a potential witness." (*Rhaburn v. Superior Court, supra,* 140 Cal.App.4th at p. 1574, citing State Bar Standing Com. on Prof. Responsibility & Conduct, Formal Opn. No. 1980-52.) Thomas counters that the standards of professional responsibility have since been relaxed to allow an ethical "screening-off" of individual public defenders so as to avoid recusal of the entire office, citing *Rhaburn v. Superior Court, supra,* 140 Cal.App.4th 1566. Thomas's reliance on *Rhaburn* is misplaced.

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dependency proceedings due to successive representation of clients with potentially conflicting interests is currently pending before this court in *In re Charlisse C.*, Case No. S152822, rev. granted July 18, 2007.

In *Rhaburn*, the Court of Appeal held that the lower court erred in applying an *automatic* standard of recusal for the entire public defender's office where any member of that office previously had represented a victim or a witness in the current prosecution against the defendant. (140 Cal.App.4th at p. 1569, 1581.) Rather, in circumstances where the deputy public defender did not have a "direct and personal" relationship with the witness, the trial court must assess the totality of the circumstances to determine whether there is "a reasonable probability that the individual attorney representing defendant either has obtained confidential information about the witness collected by his or her office, or may inadvertently acquire such information through file review, office conversation, or otherwise." (*Id.* at p. 1581.)

Here, unlike in *Rhaburn*, the public defender previously represented a *codefendant* in the current trial, not a witness or victim. Thus, *Rhaburn's* observation that cross-examination of the former client would have at most a tenuous impact (140 Cal.App.4th at p. 1579), is clearly inapplicable where the former client is a codefendant on trial for capital murder. (See *Yorn v. Superior Court, supra*, 90 Cal.App.3d 669, 677 ["in the case at bench it is the claim of privileged communications of a *codefendant* [not a prosecution witness] that is at stake and for whom arguably the protection of the professional rules precluding nonconsensual adverse employment is intended"].) Moreover, the public defender's office represented Glover in not one, but eight prior proceedings. Thus, even taking steps to isolate Glover's prior files, there was a risk that current counsel might at some point inadvertently gain information from one or more of the attorneys involved in the prior litigation.[13/]

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13. *People v. Cox* (2003) 30 Cal.4th 916, and *People v. Clark* (1993) 5 Cal.4th 950, cited by Thomas, are likewise distinguishable. In both cases, the defendants argued on appeal that they were deprived of the effective assistance of counsel due to conflicts of interest arising from their attorneys' prior representation of prosecution witnesses. (*Cox, supra*, at p. 947; *Clark, supra*,

More to the point is *Leverson v. Superior Court, supra*, 34 Cal.3d 530. There, an attorney sought to recuse himself from representing the defendant Gibbs after the codefendant, Hogan, called as a witness a former client of the attorney's law firm, a man named Crisan. Hogan claimed that Crisan was the "mastermind" of the robbery charged against her and Gibbs. The current charges were substantially related to the former representation of Crisan, which involved a substantially similar robbery. (*Id.* at p. 539.) Under these circumstances, this Court found a potential conflict between the attorney's duty to provide adequate assistance of counsel to defendant Gibbs and his professional fiduciary obligations arising out of his law firm's former representation of Crisan. (*Id.* at p. 538.) Specifically, the attorney might be called upon to investigate more thoroughly Crisan's relationship to the charged crimes, or to seek leniency for Gibbs in exchange for his testimony against Crisan. (*Id.* at p. 539.) As the Court observed, "[s]o important is [the] duty [of confidentiality] that it has been enforced against a defendant's attorney at the insistence of his former client (who was also a codefendant) even at the expense of depriving the defendant of his choice of counsel." (*Id.* at p. 538, citing *Yorn v. Superior Court, supra*, 90 Cal.App.3d 669 [trial court properly

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at pp. 1000-1001.) Because neither defendant objected at trial, this Court considered whether the defendants had demonstrated on appeal that an actual conflict of interests adversely affected the lawyers' performance. (See *Cuyler v. Sullivan* (1980) 446 U.S. 335, 348.) That inquiry is very different from the one presented here—whether the trial court abused its discretion in finding that a potential conflict of interests warranted recusal to preserve the objecting codefendant's rights of confidentiality, loyalty, and a fair trial. Moreover, the factual circumstances in those cases differ from our record. Thus, for example, in *Cox*, defense counsel had represented the witnesses in matters that were unrelated to the current trial, and one witness expressly waived any conflict. (*Cox, supra*, at p. 947, 949.) In *Clark*, cocounsel had no involvement in the prior representation, and was able to conduct cross-examination free of any potential conflict. (*Clark, supra*, at p. 1002.) No such mitigating circumstances existed here.

recused attorney on codefendant's motion where attorney previously had advised codefendant on matters related to current prosecution].)

Thus, despite Browne and Green's declarations that they had no actual knowledge of Glover's prior case files, their office's prior relationship with Glover and its relevance to the current capital trial cast grave doubt on the public defender's continued representation of Thomas. "It is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice. This requires that public officials not only in fact properly discharge their responsibilities but also that such officials avoid, as much as possible, the *appearance* of impropriety." (*People v. Rhodes* (1974) 12 Cal.3d 180, 185, original emphasis.) In ruling on a recusal motion, the trial court must consider "whether public awareness of the case, or the conflicted attorney's role in the litigation, or another circumstance is likely to cast doubt on the integrity of the governmental law office's continued participation in the matter." (*Cobra, supra*, 38 Cal.4th at p. 850, fn. 2.) Glover had an "overwhelming interest in preserving the confidentiality of information [he] imparted to counsel during a prior representation. That interest is imperiled when counsel later undertakes representation of an adversary in a matter substantially related to counsel's prior representation of the former client." (*Id.* at p. 851.) Accordingly, the trial court did not abuse its discretion in granting Glover's recusal motion to preserve his right to client confidentiality.

C. The Trial Court's Recusal Of The Public Defender's Office Over Thomas's Objection Did Not Violate His Sixth Amendment Right To Counsel

Thomas argues that the trial court's recusal of the public defender's office violated his Sixth Amendment right to counsel of choice. Such error, he claims, is structural and requires reversal of both the guilt and penalty phase verdicts. He is incorrect. An indigent defendant is not entitled to counsel of

choice, but only to effective assistance of counsel unencumbered by a conflict of interests. Having received such competent representation by substitute counsel, Thomas has failed to establish that the trial court's ruling, even if an abuse of discretion, deprived him of his constitutional rights.

Where a defendant is deprived of his Sixth Amendment right to counsel of choice by a trial court's erroneous disqualification of chosen counsel, the error is structural and no additional showing of prejudice is required. (*United States v. Gonzalez-Lopez, supra,* 126 S.Ct. at pp. 2561-2566.) Two predicates must be met, however, for the rule of structural error to apply. First, the trial court's recusal ruling must be *in error.* (*Id.* at pp. 2561-2561.) A trial court's correct determination that retention of defendant's counsel of choice would create a serious risk of conflict trumps the defendant's Sixth Amendment right. (*Id.* at p. 2563, fn. 3; *Wheat v. United States* (1988) 486 U.S. 153, 159.) Second, counsel must be *retained,* not appointed. "[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them." (*Gonzalez-Lopez, supra*, 126 S.Ct. at p. 2565.)

Here, neither predicate was met. As explained above, the trial court acted within its broad discretion to recuse the public defender's office from further representation of Thomas. Because the right to counsel of choice is not absolute, no constitutional violation occurred.

Moreover, even assuming an abuse of discretion, the ruling did not infringe Thomas's Sixth Amendment right to counsel of choice because Browne and Green were appointed, not retained. "[I]mpecunious defendants [do not] have a Sixth Amendment right to choose their counsel. The Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts. '[A] defendant may not insist on representation by an attorney he cannot

afford.'" (*Caplin & Drysdale Chartered v. United States* (1989) 491 U.S. 617, 624, quoting *Wheat, supra,* 486 U.S. at p. 159; accord, *Gonzalez-Lopez, supra,* 126 S.Ct. at p. 2565.) The defendant's act of paying his own counsel "is the crux of the definition of 'retained.' Here, defendants' counsel was appointed and paid for by the state. Because counsel was provided by the state, the trial court was not required to appoint Hansen, even though he was the attorney whose services defendant preferred. [Citation.] . . . Failure to *appoint* the attorney desired by a defendant is not interference with the right to counsel of choice." (*People v. Easley* (1988) 46 Cal.3d 712, 732, emphasis added.)

It follows that even if "in certain circumstances, a trial court abuses its discretion if it refuses to honor an indigent defendant's request for appointment of an attorney with whom the defendant has a long-standing relationship [citation], . . . this abuse of discretion does not ordinarily violate the defendant's right to counsel." (*People v. Jones, supra,* 33 Cal.4th at p. 244.) Thomas does not allege that substitute counsel Wagner and Cole were constitutionally ineffective or labored under an actual conflict of interests that adversely affected their performance.[14/] Accordingly, he has failed to establish a Sixth Amendment violation.

Thomas asserts, without citation to authority, that "once counsel was appointed and an attorney-client relationship established, Thomas certainly had a right to have his lawyers remain on the case in the absence of a disabling conflict." (AOB 56.) Although support for such proposition may be gleaned from early cases (see, e.g., *Smith v. Superior Court* (1968) 68 Cal.2d 547, 561-

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14. Although Thomas asserts that he was "prejudiced by a substantial delay while awaiting trial" (AOB 56), at no time during the trial did Thomas withdraw his general time waiver or demand his right to a speedy trial. (See 22 RT 1695 [following order severing trials, Thomas affirms his general time waiver].) Moreover, defense counsel Browne's proposed remedy to the conflict problem, which was to sever the trials and allow Glover's trial to proceed first (4 RT 433), would have entailed substantially the same delay.

562; *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 697), this Court has since repudiated such reasoning (see *People v. Jones, supra,* 33 Cal.4th at pp. 242-245). Rather, as the high court has made clear, "[W]e reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel." (*Morris v. Slappy* (1983) 461 U.S. 1, 14.)

In *Jones*, this Court held that the trial court's removal of the defendant's appointed attorney, over his objection, based on a potential conflict of interests arising from the attorney's previous representation of another possible suspect did not violate the defendant's right to counsel under the federal or state constitutions. The court reasoned that, to the extent its prior authority in *Smith* and *Cannon* rested on the federal Constitution, those cases had been superceded by the high court's decision in *Wheat, supra*, 486 U.S. 153. (*Jones, supra*, 33 Cal.4th at p. 243-244.) And, to the extent its prior authority derived from the state Constitution, those cases did not further the goal of ensuring effective assistance of counsel. "[T]he state Constitution does not give an indigent defendant the right to *select* a court-appointed attorney. [Citations.] . . . [True,] [t]he *removal* of an indigent defendant's appointed counsel . . . interferes with an attorney-client relationship that has already been established. But when, as here, a trial court removes a defense attorney because of a potential conflict of interest, the court is seeking to protect the defendant's right to competent counsel. In such circumstances, there is no violation of the right to counsel guaranteed by . . . the state Constitution, notwithstanding the defendant's willingness to waive the potential conflict. [Citations.]" (*Id.* at pp. 244-245, original emphasis.)

Given that the erroneous recusal of *appointed* counsel is not structural error, Thomas's general assertions that he was deprived of counsel of choice, and that there is "no reliable procedure for assessing the harm" to his defense, cannot

establish a Sixth Amendment violation. Thomas has failed to demonstrate that the substitution of counsel, standing alone, violated his right to effective representation, a fair trial, or a reliable penalty phase determination. Accordingly, his challenge to the guilt and penalty phase verdicts fails.

II.

THE TRIAL COURT CORRECTLY HELD THAT THE OAKLAND POLICE OFFICERS' INTERROGATION OF THOMAS DID NOT VIOLATE *EDWARDS V. ARIZONA*

Post-arrest, Thomas invoked his right to counsel during an interview with a Hayward police detective. Several hours later, Thomas reinitiated contact with Hayward police, waived his *Miranda* rights, and gave a statement regarding the Sebrena Flennaugh incident. Thereafter, Sergeant David Kozicki of the Oakland Police Department approached Thomas about the Francia Young murder. Thomas again waived his *Miranda* rights and made several statements to Sergeant Kozicki.

Thomas argues that the trial court erred in admitting his statements regarding the Francia Young murder because they were taken in violation of his Fifth Amendment right to counsel. (*Edwards v. Arizona* (1981) 451 U.S. 477.) He contends that his reinitiation of contact with a Hayward police detective, after the initial invocation of the right to counsel, was offense specific and did not extend to the Oakland crimes. The erroneous admission of his statement, he maintains, was prejudicial error. (AOB 58-73.) We disagree. A suspect reinitiates communications with the police, and thus invokes an exception to the *Edwards* rule prohibiting further interrogation, if he indicates a desire or willingness to engage in a general discussion relating to the investigation. No case law supports Thomas's contention that a suspect's reinitiation of communication is offense specific when the police are investigating multiple crimes. Rather, once a suspect reinitiates contact with police, he can be

interrogated on any subject so long as he validly waives his right to counsel. Here, Thomas waived his *Miranda* rights and agreed to speak with Sergeant Kozicki about the Oakland murder. No error appears in the trial court's admission of his statements at trial.

A. Proceedings Below

Pretrial, Thomas filed a motion to suppress his post-arrest admissions to Detectives Kozicki and Kiefer regarding Franca Young's kidnapping, sexual assault, and murder, on the ground that the interrogation violated Thomas's Fifth Amendment right to counsel as set forth in *Edwards v. Arizona, supra,* 451 U.S. 477. (9 CT 2444.) In lieu of a written response, the prosecutor orally provided authorities to the court, and referenced the response filed by his office on this issue in municipal court. (14 RT 1003-1011; see 6 CT 1639 [opposition filed in municipal court].)

Five witnesses testified at a hearing on the motion. Detective Frank Daley of the Hayward Police Department was the lead investigator on the Sebrena Flennaugh incident. (12 RT 777-778.) After Thomas surrendered at the Oakland Police Department on December 24, 1992, he was transported to Hayward, where Detective Daley interviewed him at approximately 2:00 a.m. (12 RT 778-780.) Detective Daley admonished Thomas pursuant to *Miranda*, and Thomas executed a written waiver of his rights. (12 RT 781-783.) Approximately 30 minutes into the interview Thomas invoked his right to counsel, stating "I'm not got [*sic*] to say anything else until I talk to a lawyer because I'm telling you what I know. I can't, I can't do no more than that. I can't do better than that." (12 RT 784, 791-792.) Detective Daley terminated the interview, and told Thomas that he could no longer speak with him unless he reinitiated the interview. (12 RT 784.) During the interview, Detective Daley discussed only the Hayward crimes. He did not mention the Oakland

homicide, and Thomas did not volunteer any information about that crime. (12 RT 790.)

Detective Daley was aware that Thomas was a suspect in the crimes committed against Francia Young in Oakland. (12 RT 788.) He, or someone in his department, contacted Sergeant David Kozicki of the Oakland Police Department and Detective Laurence Kiefer of the East Bay Regional Parks District Police, and informed them that Thomas had invoked his right to counsel during the Hayward interview. (9 RT 545-546, 554, 547; 11 RT 707-708.)

On December 24, 1992, at around 6:00 p.m., Thomas contacted Anna Christensen, a community services officer at the Hayward jail. Thomas asked to speak to a detective, or words to that effect. Christensen could not recall Thomas's statement verbatim. Shortly thereafter, Christensen saw Detective Richard Allen in the jail. She told him that Thomas had asked to speak with a detective. (12 RT 793-800, 878.) According to Detective Allen's report, Christensen told him that Thomas had asked specifically for him or Detective Daley. (12 RT 803.)

Detective Allen went to Thomas's cell. He told Thomas that Detective Daley was not available but that he knew about Thomas's case and could speak with him. (12 RT 878-879.) Detective Allen asked Thomas if he previously had invoked his rights, and whether he now wished to reinitiate an interview. (12 RT 880, 887.) Thomas said something to the effect that "he had spoken to an attorney and that he wanted to make this right, that he didn't want to take any fall in regards to shooting at a police officer or the robbery portion of it, and he wanted to make that right and he wanted to talk to me." (12 RT 884; see also 12 RT 888.)

Detective Allen *Mirandized* Thomas and obtained a waiver of his constitutional rights. He then interviewed Thomas about the Hayward case. He

did not ask any questions about the Oakland homicide, and Thomas did not volunteer any information about that crime. (12 RT 891, 894.)

After the interview, Detective Allen contacted Detectives Kozicki and Kiefer and informed them that Thomas had reinitiated contact and had given a statement to the Hayward police. (9 RT 525, 527, 544; 11 RT 704, 711-712; 12 RT 895-896.) Neither Detective Kozicki nor Detective Allen were led to believe that Thomas had requested to speak with them specifically about the Francia Young homicide. (9 RT 550-551; 11 RT 712-713.)

Detectives Kozicki and Kiefer went to Hayward to interview Thomas. (9 RT 525-527; 11 RT 701-705.) The detectives introduced themselves. Detective Kozicki told Thomas that he was an Oakland homicide detective and that he wanted to speak with Thomas about an investigation he was conducting. (9 RT 528-529.) Detective Kozicki read Thomas his *Miranda* rights, and Thomas indicated that he understood those rights and wished to waive them. He executed a written *Miranda* waiver. (9 RT 529, 531; 11 RT 705-706.) The detectives conducted an unrecorded interview of Thomas about the Francia Young homicide from 3:50 p.m. to 6:34 p.m., and then conducted a second, tape-recorded interview from 6:34 p.m. to 7:10 p.m. (9 RT 531-533, 559-560.)

At the conclusion of the hearing, the trial court denied the motion to suppress Thomas's statement. The court observed that it had found no case law holding that a reinitiation of contact with the police is offense specific. The court further observed that if Thomas did not want to make a statement to Oakland police, he could have reinvoked his right to counsel at the outset of Sergeant Kozicki's interview. Thomas was aware of his right to an attorney and was specifically readvised of his *Miranda* rights prior to the Oakland interview. Accordingly the court held Thomas's statement admissible. (15 RT 1188-1189.)

B. Because Thomas Reinitiated Contact And Executed A Valid *Miranda* Waiver, The Interrogation By Oakland Police Did Not Violate Thomas's Fifth Amendment Right To Counsel

Police must preface a custodial interrogation by advising the suspect of his right to counsel. (*Miranda v. Arizona, supra*, 384 U.S. at p. 479.) If the suspect requests counsel, the interrogation must cease. (*Edwards v. Arizona, supra,* 451 U.S. 477, 484-485.) Thereafter, the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Id.* at pp. 484-485.) "If the police do subsequently initiate an encounter in the absence of counsel . . . , the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards. This is 'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights' [Citation]." (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 177.)

A suspect reinitiates communications with the police, and thus triggers the exception to the *Edwards* rule prohibiting further interrogation, if he indicates a desire or willingness to engage in a general discussion relating to the investigation. (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045-1046 (plurality opn. of Rehnquist, J.); *People v. Mickey* (1991) 54 Cal.3d 612, 648.) The suspect's comments are judged under an objective standard. (*Oregon v. Bradshaw, supra*, at pp. 1045-1046 (plur. opn. of Rehnquist, J.); *People v. Waidla* (2000) 22 Cal.4th 690, 731; *People v. Mickey, supra*, 54 Cal.3d at p. 648.) A trial court's finding that the accused initiated further communication with the police is a predominately factual determination that is reviewed for substantial evidence. (*People v. Waidla, supra*, 22 Cal.4th at p. 731.)

Even where the suspect initiates further communication, exchanges, or conversation, the police may continue the interrogation only if the suspect validly waives his right to counsel. (*Oregon v. Bradshaw, supra*, 462 U.S. at pp. 1044-1045 (plur. opn. of Rehnquist, J.); *People v. Mickey, supra*, 54 Cal.3d at p. 649.) At minimum, the officer should readmonish the suspect pursuant to *Miranda*, and obtain a new waiver of the right to counsel. (*Patterson v. Illinois* (1988) 487 U.S. 285, 293; *People v. Waidla, supra*, 22 Cal.4th at p. 728.) The People bear the burden of proving that the suspect's subsequent waiver of the right to counsel was voluntary. (*People v. Sims* (1993) 5 Cal.4th 405, 440.) The trial court's determination on this issue is subject to independent review "'in light of the record in its entirety, including "all the surrounding circumstances—both the characteristics of the accused and the details of the [encounter]" . . . ' [Citations.]" (*People v. Neal* (2003) 31 Cal.4th 63, 80.)

It was undisputed that Thomas invoked his right to counsel during the Hayward interrogation. It was also undisputed that Thomas reinitiated further communication with Detective Allen about the Hayward crimes. (See 14 RT 996, 1000 [Thomas does not challenge validity of Hayward interrogation].) The question raised by Thomas was whether his reinitiation of the interview with Detective Allen was offense specific, such that Oakland police could not interrogate him regarding the Francia Young murder without the presence of counsel.

No authority supports Thomas's contention that the reinitiation of contact with police must be deemed offense specific where police are investigating multiple crimes. Quite the contrary, both the waiver of the right to counsel, and its invocation, apply generally to all subjects of questioning by police. Thus, for example, a suspect may validly waive his right to silence and to counsel without being informed of all possible crimes that may be discussed. (*Colorado v. Spring* (1987) 479 U.S. 564, 573-575 [ATF officers investigating firearms

offenses also questioned defendant about murder].) Likewise, once the suspect invokes his Fifth Amendment right to counsel, the invocation applies to all police questioning. The suspect may not be approached regarding any offense, even those unrelated to the current accusation, unless counsel is present or unless the suspect reinitiates further communications. (*Arizona v. Robertson* (1988) 486 U.S. 675, 682-685; *McNeil v. Wisconsin, supra*, 501 U.S. at p. 177; *People v. DeLeon* (1994) 22 Cal.App.4th 1265, 1270.) It strains logic to argue that the initial interrogation and the subsequent invocation of the right to counsel *are not* offense specific, but the reinitiation of contact following these events *is* offense specific.

Thomas does not quibble with this legal proposition. Rather, he argues that, *as a factual matter*, he limited the subject of interrogation by asking to speak directly to detectives Daley or Allen about the Hayward case. (AOB 67.) Thomas's hypertechnical parsing of the record is unpersuasive. The fact that Thomas asked to speak with Detective Daley suggests nothing more than that he asked for the detective with whom he previously had contact. And his comment that he did not want to take the fall for shooting at a police officer or for robbery (12 RT 884), while certainly identifying the topics for discussion, did not meaningfully limit the interrogation in any way. At most, Thomas's interpretation of the statement is ambiguous. Under such circumstances, Oakland police officers were allowed to clarify whether Thomas desired to invoke or waive his right to counsel with respect to their investigation. (*People v. Clark, supra*, 5 Cal.4th at p. 991; *People v. Sims, supra*, 5 Cal.4th at p. 442, fn. 7.) Tellingly, when Sergeant Kozicki approached Thomas, identified himself, and stated that he wanted to ask Thomas about an Oakland homicide he was investigating, Thomas did not reinvoke his right to silence or counsel. A reasonable officer in Kozicki's position could interpret Thomas's waiver of his *Miranda* rights *during the Oakland interview* as indicating a desire or

willingness to engage in a general discussion relating to *all crimes* under investigation. (*Oregon v. Bradshaw, supra*, 462 U.S. 1039, 1045-1046.)

People v. Thompson (1990) 50 Cal.3d 134, is instructive. There, the defendant was arrested on suspicion of murdering a 12-year-old boy. At the station, the defendant was advised of his *Miranda* rights and he requested an attorney. Three days later, the defendant asked to speak to the investigating detective about getting his girlfriend, Lisa, out of jail. The defendant's request led to a several-hour interrogation during which he admitted sexually assaulting the victim and leaving him bound at the scene where he was later discovered dead. (*Id.* at p. 151.) On appeal, the defendant argued that the police interrogation impermissibly went beyond the subject on which he had reinitiated contact—namely a conversation about getting his girlfriend released from jail. This Court disagreed. "Following the analysis of *Oregon v. Bradshaw, supra*, 462 U.S. 1039, we conclude that while defendant's initiation of the conversation may be said to have been ambiguous in that it did not make clear his willingness to engage in a generalized discussion of the crime, it could reasonably be interpreted by the officer as opening a generalized discussion, and that the officer understood the request in that light. On these facts, the officer did not violate defendant's constitutional rights by engaging in a generalized discussion of the crime, after having first obtained a knowing and voluntary waiver of the right to have counsel present." (*Id.* at p. 164.)

A similar result was reached in *People v. Sims, supra*, 5 Cal.4th 405, a case involving interrogation on multiple crimes from different jurisdictions. There, officers from the Glendale Police Department attempted to interview the defendant in a Las Vegas jail about a murder committed in their jurisdiction. The defendant refused to waive his *Miranda* rights. As the officers prepared to leave, the defendant asked them "what was going to happen from this point on" referring to the matter of extradition from Nevada. The officers engaged

the defendant in a general discussion, during which he made certain admissions about killing the Glendale victim. (*Id.* at pp. 437-438.) The following day, the defendant asked to speak with the Glendale officers. He indicated his desire to exonerate an accomplice (Padgett) of any liability for charges he faced in another murder prosecution pending in South Carolina. After receiving *Miranda* warnings, the defendant made admissions regarding both the South Carolina and the Glendale murders. (*Id.* at pp. 438-439.)

On appeal, this Court excluded the defendant's initial statements regarding the Glendale offense, finding that his question about "what was going to happen from this point on" did not reinitiate communication about the substantive crimes. (*People v. Sims, supra*, 5 Cal.4th at pp. 440-444.) The Court found the confession the following day admissible, however. In that regard, the Court did not hold that the defendant's statement that he wanted to discuss Padgett's involvement in the South Carolina crimes effectively limited the interrogation to that case. Rather, the Court upheld the admission of the defendant's statements regarding both the South Carolina and Glendale offenses. (*Id.* at pp. 444-447.)

Another example derives from *People v. Mattson* (1990) 50 Cal.3d 826, where this Court upheld the admission of multiple interrogations by different investigators about different offenses. In that case, the defendant was arrested in Nevada on suspicion of kidnapping and sexual assault. A Las Vegas police officer, Dingle, read the defendant his *Miranda* rights and the defendant invoked his right to counsel. (*Id.* at p. 856.) The following day, after a lineup, the defendant stated to Dingle, "I'd like to talk to you." (*Ibid.*) After receiving and waiving his *Miranda* rights, the defendant made statements to Dingle about the Las Vegas offenses, and about a similar sexual offense in Huntington Beach, California. Two days later, the defendant gave a full, tape-recorded confession to both the Las Vegas and the Huntington Beach offenses. (*Id.* at

p. 864.) Approximately a week later, the defendant again waived his *Miranda* rights and gave an interview to a Los Angeles County sheriff's detective in which he admitted a sexual assault and murder of two additional victims in California. (*Id.* at p. 865.) This Court found all of the statements admissible despite the initial invocation of rights. (*Id.* at pp. 858-862, 865.) Notably, the court nowhere held that the defendant's reinitiation of contact with detective Dingle was limited to the Las Vegas investigation.

In view of this authority, Thomas's reinitiation of contact with Detective Allen could reasonably be viewed as indicating a desire to engage in a general discussion regarding the investigations pending against him. The fact that Thomas mentioned the Hayward offenses cannot fairly be construed as an express request to limit the topic of the interrogation to that offense. Rather, Sergeant Kozicki was free to approach Thomas, explain the subject of his investigation, and obtain a voluntary waiver of his *Miranda* rights, which he did. The trial court correctly admitted Thomas's statements to Sergeant Kozicki at trial.

C. The Trial Court's Error, If Any, In Admitting Thomas's Statements Was Harmless Beyond A Reasonable Doubt

The erroneous admission of an involuntary confession, or one taken without proper *Miranda* advisements, is subject to the harmless-error analysis set forth in *Chapman v. California* (1967) 386 U.S. 18. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-309 [involuntary confession]; *People v. Cahill* (1993) 5 Cal.4th 478, 540-541 [same]; *People v. Sims, supra*, 5 Cal.4th at p. 448 [*Miranda* violation].) Under the *Chapman* standard, the admission of Thomas's statements to Sergeant Kozicki was not prejudicial.

In the guilt phase, there was compelling evidence, independent of Thomas's admissions, that he directly participated in Francia Young's kidnapping, robbery, rape, sodomy, and murder. Reverend Dials saw a man matching

Thomas's description acting as a lookout while a second man forced Francia Young into the trunk of her car. DNA testing revealed the presence of semen consistent with Thomas's DNA in the victim's vaginal and anal cavities. After the shooting, Thomas was captured on videotape using Francia Young's ATM card. This evidence directly implicated Thomas as one of the two men who kidnapped, robbed, sexually assaulted, and murdered Francia Young.

Tellingly, the defense did not seriously challenge the prosecution's evidence on the substantive offenses of kidnap, rape, robbery and felony murder. In closing argument, defense counsel observed that "there is overwhelming evidence about certain counts. It's obviously clear that he had admitted—and there's plenty of evidence besides his admissions—to a kidnap, a rape, and a robbery. There is no question about that." (59 RT 6108, see also 59 RT 6114.) It is not reasonably possible that the jury would have reached a different result as to these counts had Thomas's confession been excluded. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Defense counsel vigorously challenged the sodomy count, the special circumstance allegations, and the firearm use enhancement. (59 RT 6109.) As to those issues, however, Thomas made no admissions. Quite the contrary, he denied in his statement that he was the actual shooter, that he harbored an intent to kill, or that he was even present when the fatal shot was fired. Thus, the special circumstance allegations and the sodomy verdict turned solely on the strength of the prosecution's case, unaffected by Thomas's admissions. And, Thomas cannot complain of prejudice regarding the gun use enhancement which was found not true. Accordingly, any error in the admission of Thomas's statement was harmless beyond a reasonable doubt as to the Francia Young crimes.

There was also compelling evidence that Thomas participated in the robbery of Sebrena Flennaugh. Glover, along with Thomas, went to Flennaugh's

apartment armed with a loaded firearm. Thomas actively participated in the robbery, taking items from the apartment, preventing Flennaugh from using the phone, and striking Flennaugh on the back of the head. At trial, Flennaugh identified Thomas as one of the robbers. (55 RT 5649.) And the firefight between Glover and Hayward police officers was a natural and probable consequence of the armed robbery in which Thomas had participated. Defense counsel in closing argument did not seriously challenge his client's guilt of the Sebrena Flennaugh counts, describing them as "pretty uncontroverted—uncontroverted." (59 RT 6139.)

The admission of Thomas's statement likewise could have had no effect on the penalty-phase verdicts. The prosecutor argued to the jury that the circumstances of the crimes committed against Francia Young were aggravated. He noted that Francia Young had been purposefully targeted, abducted in the trunk of a car, transported to a remote location, raped, sodomized, and then marched up a hill where she was bound and executed. (66 RT 6967-6970.) All of these facts were readily inferred from the eyewitness testimony of Dials and the manner in which Francia Young's body was discovered. None depended on Thomas's confession, in which he attempted to mitigate his involvement and intent during the crimes.

The remaining factors in aggravation included victim impact testimony from Mary Young and Ely Gassoway and Thomas's uncharged criminal conduct—the robbery and attempted kidnapping of Constance Silvey, the attempted robbery of Timothy McNulty, the battery of Cathy Brown, and Thomas's possession of a firearm. These factors were wholly unrelated to Thomas's confession. On this record, it is not reasonably possible that the jury would have reached a different result in the penalty phase had Thomas's confession been excluded.

III.

THE TRIAL COURT PROPERLY DENIED THOMAS'S MOTION TO SUPPRESS HIS STATEMENT TO OAKLAND POLICE BASED ON THE OFFICERS' FAILURE TO RECORD THE STATEMENT IN ITS ENTIRETY

Thomas argues that the trial court erred in admitting his December 26, 1992, statement to Sergeant Kozicki and Detective Kiefer because the officers failed to tape-record the statement in its entirety. According to Thomas, the lack of a complete tape-recording denied him the right to a fair trial and to the use of favorable, exculpatory evidence to advance his defense. Further, Thomas argues that his waiver of his *Miranda* rights was coerced and involuntary. The error in admission of the statement, he claims, deprived him of his right against self incrimination, his right to a fair trial and due process, and his right to a reliable penalty determination, and was not harmless beyond a reasonable doubt. We disagree. This Court has rejected the argument that tape recording of a statement is required to ensure fundamental fairness. (*People v. Holt* (1997) 15 Cal.4th 619, 663.) Further, the record demonstrates that Thomas made a knowing and voluntary waiver of his constitutional rights to silence and to an attorney. The trial court therefore correctly admitted the challenged statement.

A. Proceedings Below

Prior to trial, Thomas moved to suppress his December 26, 1992 statement to Sergeant Kozicki and Detective Kiefer based upon the officers' failure to tape-record the entire interrogation. Thomas argued that the failure to make a complete tape-recording violated his right to due process, denied him the use of material exculpatory evidence, and made it impossible for the court to assess the voluntariness of his confession. (8 CT 2361-2384; 9 RT 514.)

During the hearing on the motion to suppress, Sergeant Kozicki testified that he read Thomas his *Miranda* rights and that Thomas indicated that he understood his rights and wished to waive them. Thomas signed a written waiver of rights. (9 RT 528-529, 531; 11 RT 705-706.) Kozicki interviewed Thomas without a tape recorder from 3:50 p.m. to 6:34 p.m. He took notes of Thomas's answers, but not of his own questions. (9 RT 531-533, 559-560, 570; 8 CT 2385-2411 [copy of notes].) He then conducted a tape-recorded interview from 6:34 p.m. to 7:10 p.m., took a break, and conducted a second tape-recorded interview (the *Aranda* statement) from 7:34 p.m. to 7:52 p.m. (9 RT 531-533.)

Sergeant Kozicki had a tape recorder available to him during the entire interview, and the room he used was equipped with a video-recording device. He chose not to use these devices during the initial portion of the interview, however. (9 RT 558-559.) Kozicki explained that it is Oakland Police Department policy to take an unrecorded statement first with handwritten notes and then to record the statement later on. He has found that most suspects will speak more freely when they are not being recorded. Kozicki also prefers to find out all of the facts first and then later elicit a concise, coherent statement from the defendant on tape. (9 RT 561.)

Both Sergeant Kozicki and Detective Kiefer testified that during the interview, neither of them had employed coercive or threatening tactics, made promises of leniency, or discussed penalty or punishment. (9 RT 535; 11 RT 706.) After obtaining Thomas's waiver of rights, Kozicki told Thomas that Glover had given a statement implicating Thomas in the crimes against Francia Young. (9 RT 562, 602-603.) During the interview, Kozicki inadvertently removed from his briefcase a *Miranda* waiver signed by Glover. He did not intentionally display the form to Thomas, but Thomas was close enough that he could have seen it. (9 RT 567-569.)

The trial court denied Thomas's motion to suppress the statement based on recently-decided California Supreme Court authority holding that officers are not required to tape-record confessions. (14 RT 1014; 15 RT 1182.)

B. The Officers' Failure To Record Thomas's Statement Did Not Deprive Him Of His Right To A Fair Trial Or Constitute Destruction Of Exculpatory Evidence

Relying on out-of-state authority (*Stephan v. State* (Alaska 1985) 711 P.2d 1156; *State v. Scales* (Minn. 1994) 518 N.W.2d 587; *Commonwealth v. DiGiambattista* (Mass. 2004) 813 N.E.2d 516), Thomas urges this Court to adopt a judicially-created rule of criminal procedure requiring that law enforcement officers tape-record the questioning of criminal suspects. (AOB 74-81.) He urges that such a rule is necessary to protect the accused's right to counsel, his right against self-incrimination, and his right to a fair trial. He further argues that judges should not be forced to rule on the admissibility of a confession based on testimony by an interested officer-witness. According to Thomas, several states have passed statutes requiring the recording of interrogations, although he concedes that California has not done so.[15/]

As stated earlier, this Court has already declined to hold that tape recording of statements "is required to ensure fundamental fairness." (*People v. Holt, supra*, 15 Cal.4th at p. 664; accord, *People v. Lucas* (1995) 12 Cal.4th 415, 443; *People v. Marshall* (1990) 50 Cal.3d 907, 925.) As this Court explained: "Defendant asks this court to create an exclusionary rule governing statements made during custodial interrogation. We may not do so. We are not at liberty to create rules which exclude relevant evidence that is not made inadmissible

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15. Thomas refers to Sen. Bill No. 171 (2005-2006 Reg. Sess.), which was vetoed by the Governor on September 30, 2006. A subsequent bill on the same subject was vetoed by the Governor on October 13, 2007. (Sen. Bill. No. 511 (2007-2008 Reg. Sess.); <http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0501-0550/ sb_511_bill_20071013_history.html>.)

by the federal Constitution. [Citations.]" (*People v. Holt, supra*, 15 Cal.4th at p. 664.) The court distinguished *Stephan v. State* on the ground that that case simply established a judicially declared rule of procedure. (*Id.* at p. 665.)

Here, the circumstances of Thomas's statement were established by competent testimony subject to cross-examination. Thomas's due process rights were therefore satisfied. "[T]he fact that a particular procedure might enhance reliability does not make it one that is constitutionally mandated." (*People v. Holt, supra*, 15 Cal.4th at p. 664.)

Thomas's reliance on *California v. Trombetta* (1984) 467 U.S. 479, and *Arizona v. Youngblood* (1988) 488 U.S. 51 (AOB 82-85), is likewise misplaced.

> "Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence 'that might be expected to play a significant role in the suspect's defense.' (*California v. Trombetta* (1984) 467 U.S. 479, 488 []; accord, *People v. Beeler* (1995) 9 Cal.4th 953, 976 [].) To fall within the scope of this duty, the evidence 'must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' (*California v. Trombetta, supra*, 467 U.S. at p. 489; *People v. Beeler, supra*, 9 Cal.4th at p. 976.) The state's responsibility is further limited when the defendant's challenge is to 'the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.' (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57 [].) In such case, 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.' (*Id.* at p. 58 []; accord, *People v. Beeler, supra*, 9 Cal.4th at p. 976.)" (*People v. Roybal* (1998) 19 Cal.4th 481, 509-510 [].)

(*People v. Catlin* (2001) 26 Cal.4th 81, 159-160.)

Sergeant Kozicki's failure to tape-record the interview does not fall within the category of the duty to preserve evidence under *Trombetta*. The failure to tape record is a failure to gather evidence, not a failure to preserve evidence.

(Cf. *People v. Wimberly* (1992) 5 Cal.App.4th 773, 791 ["we reject appellant's argument that the police's 'deliberate and unilateral decision to discontinue the tape-recording of the session during the period they were "confronting the suspect" . . . was the legal equivalent of a post-interrogation erasure of a recording already made.'"].) "It is not entirely clear that the failure to obtain evidence falls within '"what might loosely be called the area of constitutionally guaranteed access to evidence."' [Citation.] Although this court has suggested that there might be cases in which the failure to collect or obtain evidence would justify sanctions against the prosecution at trial, we have continued to recognize that, as a general matter, due process does not require the police to collect particular items of evidence. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 943.) Tellingly, Thomas cites no cases applying *Trombetta* and *Youngblood* to the failure to record a suspect's statement.

Even if the failure to record the statement comes within the scope of *Trombetta* and *Youngblood*'s duty to preserve evidence, Thomas has failed to make the requisite showing that he was deprived of material exculpatory evidence. Thomas argues that the sergeant's failure to tape-record the interview deprived him of his exact answers, the context of those answers, and the tone in which they were given. Thomas, however, was able to obtain comparable evidence by other reasonably available means. Sergeant Kozicki and Detective Kiefer both made notes of the interview documenting Thomas's statements that he did not want the victim harmed (8 CT 2398, 2410), that he had urged Glover to tie Francia Young up and leave her (8 CT 2394, 2407), that he had a hard life (8 CT 2397), and that he believed in God (8 CT 2410). The officers were competent to testify to these statements at trial. And Thomas made several similar statements in the tape-recorded portion of the interview. (See People's Exh. 50A at pp. 12, 19.)

Although the officers' notes do not reflect the intonation and context of the statements, *Trombetta* does not require absolute proof of the lost evidence. Rather, the court "was more than willing to settle for far less satisfactory secondary evidence . . . ." (*People v. Gonzales* (1986) 179 Cal.App.3d 566, 575.) Thus, *Trombetta* held that the defendant could adequately challenge the results of a alcohol breath test, even absent the defendant's actual breath sample, by reviewing the breath machine's weekly calibration results and cross-examining the officer regarding operator error. (*Trombetta, supra*, 467 U.S. at p. 490.) Likewise, *People v. Sassounian* (1986) 182 Cal.App.3d 361, 394-396, held that loss of jail records which tended to show that the defendant had no access to a prosecution witness who claimed the defendant had confessed to him, did not violate due process where a deputy sheriff had examined the records and recalled their content. Further, *People v. Richbourg* (1986) 185 Cal.App.3d 1098, 1103-1104, found that destruction of the defendant's vehicle did not violate due process where the defendant could cross-examine the prosecution expert who examined the vehicle's steering column and could testify himself to the vehicle's faulty steering mechanism. The availability of Sergeant Kozicki and Detective Kiefer's testimony, aided by their notes of the interview, amply satisfied the constitutional mandate of *Trombetta*.

Moreover, the tone and context of the questioning may or may not have been favorable to the defense case. The police do not have "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." (*Arizona v. Youngblood, supra*, 488 U.S. at p. 58.) "Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Ibid.*) Sergeant Kozicki testified that it was standard police department procedure not to audiotape the initial portion of the interview, in order to better facilitate the interview process.

Ordinarily, an officer's actions taken in accordance with normal practice are not held to constitute bad faith. (See *Illinois v. Fisher* (2004) 540 U.S. 544, 548 [destruction of cocaine sample after testing, in accordance with normal practice, is not bad faith under *Youngblood* even in light of a pending discovery request by the defense]; *Trombetta, supra*, 467 U.S. at p. 488 [failure to preserve breath samples after testing and in accord with normal practice is not bad faith]; *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 12 [routine destruction of citizen complaints against law enforcement officers after five years does not evidence bad faith under *Youngblood*].)

Accordingly, neither *Trombetta* nor *Youngblood* mandate the exclusion of Thomas's statements for failure to tape-record the entire interrogation.

C. Thomas's Waiver Of His Fifth Amendment Rights Was Knowing, Intelligent, And Voluntary

Thomas further argues that the trial court should have excluded his statement because he did not make a knowing, intelligent, and voluntary waiver of his rights to silence and counsel. (AOB 85-88.) His claim lacks merit.

The inquiry of whether a valid waiver has been established has two distinct dimensions: "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) It is the state's burden to demonstrate both prongs—voluntariness and a knowing, intelligent waiver—by a preponderance of the evidence. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033, citing *Colorado v. Connelly* (1986)

479 U.S. 157, 168 [voluntariness]; *People v. Whitson* (1998) 17 Cal.4th 229, 248 [knowing and intelligent waiver].) "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." (*Moran v. Burbine, supra*, 475 U.S. at pp. 422-423, fn. omitted.)

Here, both Sergeant Kozicki and Detective Kiefer testified that Kozicki read Thomas his *Miranda* rights, and that Thomas indicated that he understood those rights and wished to waive them. Thomas also executed a signed waiver form. (9 RT 529, 531; 11 RT 705-706.)[16]

Thomas makes no claim that the *Miranda* advisement was incomplete. Rather, he argues that the circumstances of the interview were inherently coercive because Sergeant Kozicki and Detective Kiefer contacted him after he had invoked his right to counsel. As explained in Argument II, however, Thomas reinitiated contact with Hayward police prior to the Oakland interview. The fact that Thomas previously had invoked his right to counsel demonstrates that he in fact understood his constitutional rights. (*People v. Clark, supra*, 5 Cal.4th at p. 992.) And, the fact that he reinitiated contact, while not dispositive, "is strong and essential evidence of a knowing and intelligent waiver." (*People v. Bradford, supra*, 14 Cal.4th at p. 1036.)

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16. Sergeant Kozicki read the following verbatim from the written waiver form: "You have the right to remain silent. Anything you say can be used against you in a court of law. You have a right to talk to a lawyer and have him present with you while you are being questioned. If you can not [*sic*] afford a lawyer, one will be appointed to represent you before any questioning if you wish one." (9 RT 530-531.) Kozicki then asked Thomas, "Do you understand each of these rights I've explained to you?" Thomas replied, "yes," and also answered affirmatively when Kozicki asked him, "Having these rights in mind, do you wish to talk to us now?" (9 RT 531.)

Thomas also cites the fact that he was 19 years old, and that he had been held in custody for about two and a half days, as evidence of coercion. We disagree. Custodial interrogation is inherent in any *Miranda* inquiry, and cannot alone evidence coercion. Further, there was no evidence that the police deprived Thomas of food, water, or sleep, or otherwise mistreated him while in custody. (See *People v. Boyde* (1988) 46 Cal.3d 212, 240 [defendant's statement given a few minutes after he was removed from his cell due to an attack of claustrophobia was not involuntary in light of evidence that defendant had calmed down].) As for Thomas's age, he was 19 years old and not a minor. Even authorities dealing with minors demonstrate that youthful suspects can validly waive their constitutional rights. (See, e.g., *People v. Lara* (1967) 67 Cal.2d 365, 390-391; *People v. Ventura* (1985) 174 Cal.App.3d 784, 791 [valid waiver by 16-year-old who claimed to be "loaded" on alcohol and drugs]; *In re Norman H.* (1976) 64 Cal.App.3d 997, 1002-1003 [valid waiver by "very unintelligent" 15-year-old boy with intelligence level of a 7 or 8-year-old].) There is no evidence that Thomas had a below-normal intelligence or maturity level, or that any physical condition prevented him from voluntarily waiving his rights.

Thomas accuses the officers of engaging in "crude trickery" to induce him to waive his constitutional rights. Again, we disagree. During the initial discussion of Thomas's *Miranda* rights, Sergeant Kozicki removed a *Miranda* form that had been completed and signed by Glover. He was not aware, however, whether Thomas actually saw the form, and Thomas did not testify to that fact. (9 RT 567-569.) Moreover, the fact that Thomas had earlier given a statement to Hayward police cuts against his argument that Glover's waiver form alone prompted him to submit to interrogation.

Thomas also argues that Sergeant Kozicki coerced him to speak by informing him that Glover had made a statement implicating him in the crimes,

and by displaying an ATM photograph of Thomas. These arguments are misplaced. Both of the events in question occurred after Thomas's *Miranda* waiver, and thus could not have affected the voluntariness of his decision to waive those rights. (See 9 RT 562 [Kozicki testifies that after the *Miranda* waiver, he told Thomas that Glover had given a statement implicating him in the offenses; "I did not tell Mr. Thomas anything—any specifics about my investigation until after I admonished him"]; 8 CT 2386 [Kozicki's notes indicate that after the *Miranda* waiver, Thomas commented that he had turned himself in to the police department because of the picture in the Sergeant's folder]; 8 CT 2402 [Kiefer's notes reflect the same sequence]; see also 57 RT 5916-17 [at trial Kozicki testifies that after the *Miranda* waiver, Thomas commented that "you're here to talk to me about that picture in your folder" or words to that effect].) In any event, an officer's reference to the strength of the evidence implicating the defendant in the crimes is not the type of interrogation technique that is likely to elicit an involuntary statement. (See, e.g., *Frazier v. Cupp* (1969) 394 U.S. 731, 737, 739 [misinforming a suspect that his accomplice had been captured and confessed]; *People v. Thompson, supra*, 50 Cal.3d at p. 167 [misinforming a suspect that they had evidence linking him to a homicide].)

In sum, Thomas received complete and accurate admonishments pursuant to *Miranda*, he indicated that he understood those admonishments, and that he wished to waive them. There existed no evidence that Thomas was incapable of understanding his *Miranda* rights, or that he labored under such compulsion that his waiver was not voluntarily. Accordingly, his decision to speak with officers was knowingly and intelligently made, and his statement was properly admitted.

D. The Trial Court's Error, If Any, In Admitting Thomas's Statements Was Harmless Beyond A Reasonable Doubt

Even assuming the trial court's admission of Thomas's confession was error, Thomas did not suffer prejudice from the court's ruling. As discussed in detail above (Argument II.C, pp. 64-66, *ante*), compelling evidence independent of Thomas's admission established his guilt of kidnapping, robbery, rape, sodomy and felony murder of Francia Young, as well as his guilt of the Hayward crimes. As to those crimes and allegations where guilt was contested (namely sodomy, the special circumstance allegations, and the gun use enhancement), Thomas made no admissions which tended to inculpate him. And the jury ultimately found not true the firearm use allegation. On this record, the Court can conclude beyond a reasonable doubt that Thomas's statements to Sergeant Kozicki had no meaningful effect on the jury's verdicts. (*Chapman v. California, supra*, 386 U.S. at pp. 23-24.)

IV.

THE PROSECUTOR'S ARGUMENTS REGARDING THE IDENTITY OF THE SHOOTER WERE CONSISTENT WITH THE EVIDENCE AND MADE IN GOOD FAITH; THOMAS WAS NOT DEPRIVED OF HIS RIGHTS TO DUE PROCESS, A FAIR TRIAL, OR A RELIABLE PENALTY DETERMINATION

Thomas argues that he was deprived of his rights to due process, a fair trial, and a reliable penalty determination because the prosecutor advanced factually inconsistent theories about the identity of the shooter during Thomas's trial and the separate trial of codefendant Glover. (AOB 90-108.) We disagree. Because the evidence was consistent with either Glover or Thomas having been the shooter, the prosecutor could ask the jury in each trial to return a personal use finding, particularly given that neither the guilt nor the special circumstance verdicts depended on that fact. Moreover, the jury's not true finding on the gun

use enhancement conclusively demonstrates that no prejudice resulted from the prosecutor's argument. Accordingly, Thomas's claim of reversible error as to the penalty verdict fails.

A. Proceedings Below

Prior to trial, Thomas moved to dismiss the firearm use allegation (§ 12022.5), on the ground that the prosecutor, having argued that Glover was the shooter in a separate trial, could not now pursue an inconsistent factual theory in this trial that Thomas was the shooter. (13 CT 3727-3731.) Thomas maintained that "[f]or the prosecution to present a theory and a supporting argument that is 'wholly inconsistent' with its exoneration of defendant Thomas at the first trial, amounts to a denial of due process and the right to a fair trial." (13 CT 3730.) In his written opposition (13 CT 3752-3757), the prosecutor acknowledged his argument in the first trial that Glover was the shooter. He observed, however, that "[t]he jury in the Glover trial determined that there was not proof beyond a reasonable doubt that Glover personally fired the gun; it is, correspondingly, the prosecutor's duty to present all the evidence in the Thomas trial and let the Thomas jury determine defendant's personal use, if any." (13 CT 3753.)

On May 30, 1997, after hearing argument from the parties (25 RT 1713-1736), the trial court denied Thomas's motion to dismiss the personal use enhancement (25 RT 1738-1739). The court observed that the prosecutor had consistently maintained that both defendants were legally responsible for the victim's death. The defendants had each implicated the other as the shooter. On those facts, it was permissible for the prosecutor to charge Thomas with personal use of a firearm and to put that issue before the jury. (25 RT 1738-1740.)

On September 17, 1997, prior to the guilt phase closing argument, Thomas renewed his motion to dismiss the personal firearm use allegation and to limit

the prosecutor from arguing that Thomas was the shooter in his closing statement. Alternatively, if the prosecutor were allowed to pursue such a theory, Thomas asked for permission to introduce evidence of the prosecutor's inconsistent theory in the previous trial. (58 RT 6035, 6051-6053.) The prosecutor countered that new evidence had come to light in this trial suggesting that Thomas was the shooter—namely—Thomas's statement that he was in possession of the gun at the MacArthur BART station, Dials's testimony that he believed the two suspects were armed, and the jury's finding in Glover's trial that the personal use enhancement was not true. (58 RT 6055-6056.) The trial court denied the defense motion, noting that California law did not prohibit the prosecutor's arguments, but nonetheless cautioned the prosecutor to tread carefully. (58 RT 6059-6060, 6063-6064.) The defense objection was deemed preserved for closing argument, without the need for a contemporaneous objection. (58 RT 6064.)

In closing argument, the prosecutor emphasized that whether or not Thomas was the actual shooter, he was guilty of felony murder by virtue of his participation in the kidnapping, robbery, rape, and sodomy of Francia Young. (59 RT 6074-6078.) As to the special circumstance allegations, the prosecutor argued that "the evidence requires you to find them to be true no matter which one of these depraved cowards pulled the trigger. No matter which one pulled the trigger, the special circumstances are going to be found true because of the law." (59 RT 6087; see also 59 RT 6106.) The prosecutor explained that even if an aider and abettor harbors no intent to kill, he may be eligible for the death penalty if he acts with reckless indifference to human life and as a major participant in the underlying felonies. (59 RT 6087-6092.) The prosecutor nonetheless urged the jury to find that Thomas was the shooter, based on the fact that he had admitted possession of the firearm at the BART station and that there was no evidence, other than Thomas's self-serving confession, that

Glover had handled the weapon that evening. (59 RT 6094-6096, 6106, 6192, 6205.) The jury ultimately found the personal use enhancement not true. (13 CT 3901, 3906-3909.) During the penalty phase argument, the prosecutor acknowledged this finding, and argued that the jury should return a death verdict based upon Thomas's role as an accomplice rather than the actual shooter. (66 RT 6963-6964, 6994-6995.)

B. The Prosecutor's Arguments Were Consistent With The Evidence And Advanced The Same "Underlying Theory" Of Guilt Regarding Both Defendants; Any Variation Regarding The Shooter's Identity Did Not Concern A Fact Used To Convict The Defendant Or Increase His Punishment

In re Sakarias (2005) 35 Cal.4th 140, recognized that in certain limited circumstances a prosecutor commits misconduct by "intentionally and without good faith advanc[ing] inconsistent and irreconcilable factual theories in two trials, attributing to each defendant in turn culpable acts that could have been committed by only one person." (*Id.* at p. 145; accord, *Thompson v. Calderon* (9th Cir. 1997) 120 F.3d 1045, revd. on other grounds *sub. nom.* in *Calderon v. Thompson* (1998) 523 U.S. 538.) Thomas urges this Court to apply the rule in *Sakarias* to reverse the penalty-phase determination in this case. *Sakarias*, however, involved egregious misconduct by a prosecutor who manipulated evidence to support inconsistent theories of guilt, and, as a result, painted a false picture of the facts directly related to the penalty-phase verdict. No such conduct occurred here.

In *Sakarias*, the defendant and codefendant Waidla broke into the victim's residence and waited for her return. As the victim entered the home, they attacked her using a knife and a hatchet, inflicting multiple injuries to her head and chest. Specifically, the victim suffered three chopping wounds to her head, one of which was inflicted before death and penetrated her skull, the other two which were inflicted after or around the time of death. At some point the victim

was dragged down the hall to a bedroom. (35 Cal.4th at p. 146.)

Sakarias confessed to police that he had wielded a knife during the initial attack, and that Waidla had used the hatchet. Sometime later, at Waidla's direction, he had gone into the bedroom and chopped the victim's head twice with the hatchet. Waidla confessed to police that he inflicted one bludgeoning blow with the hatchet, and maintained that he remembered nothing thereafter. Thus, the evidence introduced in the defendants' separate trials strongly suggested that Waidla struck the first and fatal chopping blow with the hatchet, and that Sakarias inflicted two postmortem chopping blows. (*In re Sakarias, supra*, 35 Cal.4th at pp. 146-147.)

In separate trials, the prosecutor argued that each defendant had wielded all three blows with the hatchet, including the first and fatal blow. In Waidla's trial, the prosecutor introduced testimony by Dr. James Ribe, the medical examiner, that an abrasion on the victim's back indicated that she had been dragged, postmortem, into the bedroom. This evidence suggested that the victim was killed during the initial attack when Waidla wielded the hatchet. In Sakarias's trial, however, the prosecution did not introduce Dr. Ribe's testimony, thus suggesting that the victim may have still been alive when Sakarias admittedly struck her twice in the bedroom with the hatchet. The prosecutor argued that Sakarias delivered all three hatchet blade blows, including the fatal one, in the bedroom. (*In re Sakarias, supra,* 35 Cal.4th. at p. 148.)

This Court found that the prosecutor's manipulation of evidence to support his inconsistent theories of the case violated due process:

> Fundamental fairness does not permit the People, without a good faith justification, to attribute to two defendants, in separate trials, a criminal act only one defendant could have committed. By doing so, the state necessarily urges conviction or an increase in culpability in one of the cases on a false factual basis, a result inconsistent with the goal of the criminal trial as a search for truth. At least where, as in Sakarias's case,

> the change in theories between the two trials is achieved partly through deliberate manipulation of the evidence put before the jury, the use of such inconsistent and irreconcilable theories impermissibly undermines the reliability of the convictions or sentences thereby obtained.

(*In re Sakarias, supra*, 35 Cal.4th at pp. 155-156.)[17/]

The Court further held that reversal was required only where the prosecutor's misconduct resulted in prejudice to the defendant. In this regard, the Court set forth a two-pronged inquiry for prejudice: "[F]or each [defendant] we must ask, first, whether the People's attribution of the act to the [defendant] is, according to all the available evidence, probably false or probably true, and, second, whether any probably false attribution of a culpability-increasing act to the petitioner could reasonably have affected the penalty verdict." (*In re Sakarias, supra*, 35 Cal.4th at p. 165.)

Sakarias recognized several limitations to its holding. First, the prosecutor may be found to have acted in good faith where a significant change in the available evidence comes to light in the second trial, warranting a change in the prosecutor's factual theory. (35 Cal.4th at p. 162.) Second, the prosecutor's argument will be deemed fundamentally consistent where the variation in theory between the two trials does not concern a fact used to convict the defendant or to increase his punishment. (*Id.* at p. 161.) Finally, the prosecutor's use of alternative theories may be justified where the evidence is "highly ambiguous" as to each defendant's role in the crimes. (*Id.* at p. 164, fn. 8.)

Here, the prosecutor attributed the act of shooting Francia Young—which could have been committed by only one defendant—to both Glover and to

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17. This Court's opinion in *Sakarias* was decided several years after the trial in this case. Thus, the prosecutor here, as in *Sakarias*, was without controlling California Supreme Court precedent on the use of inconsistent theories at the time of the trial. *Sakarias*, however, rejected the notion that "the lack of settled law on the subject of inconsistent factual theories established a prosecutor's good faith in using such theories." (35 Cal.4th at p. 162, fn. 5.)

Thomas in separate trials. The prosecutor's argument did not offend the principles set forth in *Sakarias*, however, for several reasons.

First, the prosecutor's variation in argument did not concern a fact used to convict the defendant or increase his punishment. (*In re Sakarias, supra*, 35 Cal.4th at p. 161.) Thomas's guilt of first degree murder did not depend upon his role as the shooter, nor did the truth of the special circumstance allegations. (See *id.* at p. 160.) Rather, as the prosecutor explained in closing argument, both findings could be predicated on Thomas's direct participation in the underlying felonies of kidnapping, robbery, rape, and sodomy. Thus, the prosecutor pursued the same "underlying theory" in each case, namely that both defendants were equally responsible for the death no matter who pulled the trigger. (See, e.g., *Nguyen v. Lindsey* (9th Cir. 2000) 232 F.3d 1236, 1240-1241; *Haynes v. Cupp* (9th Cir. 1987) 827 F.2d 435, 439; *Nichols v. Scott* (5th Cir. 1995) 69 F.3d 1255, 1270-1271 & fn. 32.) The case is thus remarkably similar to *Nguyen v. Lindsey*, where two defendants engaged in a gun battle, killing an innocent bystander. In the first trial, the prosecutor introduced evidence that the defendant Phung had fired the initial shot. In the second trial, the prosecutor introduced evidence that someone in defendant Nguyen's car had fired the first shot. Nonetheless, the prosecutor's "underlying theory was the same in both trials—that in a case of voluntary mutual combat, it did not matter who fired the first shot." (*Nguyen, supra*, 232 F.3d at p. 1237.) Accordingly, the Ninth Circuit concluded that no misconduct had occurred because "the prosecutions' theory was not inconsistent in any fundamental way." (*Id.* at p. 1241; accord, *Bradshaw v. Stumpf* (2005) 545 U.S. 175, 186-187 [prosecutor's inconsistent positions about which of two defendants was the shooter did not warrant voiding defendant's guilty plea where the precise identity of the triggerman was immaterial to Stumpf's conviction for aggravated murder].)

The same is true here of the murder charge and special circumstance allegations.

The firearm use enhancement, by contrast, did depend on the prosecutor's theory that Thomas was the shooter. The jury, however, found the enhancement not true. Accordingly, in the penalty phase, the prosecutor did not advance a theory that Thomas was the shooter as a circumstance in aggravation, but rather predicated his arguments on Thomas's role as an aider and abettor. (See 66 RT 6963-6964, 6994-6995.) In *Sakarias*, by comparison, the prosecutor attributed the three hatchet blows to each defendant in turn in order to establish an aggravating circumstance of the crime on the basis of which he urged the jury to sentence each defendant to death. (35 Cal.4th at p. 160.) *Sakarias* is thus critically distinguishable from this case, where any variation in the prosecution's theory "did not concern a fact used to convict the defendant or increase his or her punishment." (*Id.* at p. 161.)

Second, the prosecutor did not act in bad faith by arguing that Thomas was the shooter given the ambiguity in the evidence as to who fired the weapon. "Where the evidence is highly ambiguous as to each accused perpetrator's role, some courts have relied on 'the uncertainty of the evidence' to justify the prosecutor's use of 'alternate theories' in separate cases." (*In re Sakarias, supra*, 35 Cal.4th at p. 164, fn. 8.) In *Sakarias*, the great weight of the evidence pointed to Waidla having inflicted the antemortem, hemorrhagic hatchet blow. Nonetheless, the prosecutor argued that Sakarias had inflicted the blow, and deliberately excluded evidence which he had previously admitted in Waidla's trial suggesting otherwise. Here, by contrast, the evidence was ambiguous as to which defendant shot Francia Young. There were no eyewitnesses to the shooting, and each defendant pointed the finger at the other. "Given the uncertainty of the evidence, it was proper for the prosecutors in the other co-defendants' cases to argue alternate theories as to the facts of the murder. The

issue of whether the particular defendant on trial physically committed the murder was an appropriate question for each of the co-defendants' juries." (*Parker v. Singletary* (11th Cir. 1992) 974 F.2d 1562, 1578; accord, *United States v. Paul* (8th Cir. 2000) 217 F.3d 989, 998-999 ["When it cannot be determined which of two defendants' guns caused a fatal wound and either defendant could have been convicted under either theory, the prosecutor's argument at both trials that the defendant on trial pulled the trigger is not factually inconsistent"].)

Third, and related, there was no claim in this case that the prosecutor intentionally manipulated the evidence in either trial to the detriment of the defendants in order to secure a death judgment. Rather, the evidence adduced at both trials was substantially the same; the prosecutor simply argued different inferences from that evidence. In *Sakarias*, by contrast, the prosecutor intentionally excluded evidence at Sakarias's trial, which he previously had introduced in the codefendant's trial, for the purpose of advancing his inconsistent theories. Thus, it was not simply the prosecutor's act of arguing inconsistent theories based on the same evidence, but rather his decision to present different evidence in the separate trials in a manner designed to deceive the jury that constituted misconduct. (*In re Sakarias, supra*, 35 Cal.4th at pp. 155-156.) Such conduct demonstrated bad faith on the prosecutor's part, and created a reasonable likelihood that Sakarias had been convicted or sentenced by use of a factually false theory. (*Id.* at p. 162.) No such bad faith or intentional deception occurred here.

In summary, it is permissible for the prosecutor to advance different theories about which of two defendants was the shooter where the evidence is ambiguous on that point, the prosecutor's inferences are consistent with the facts surrounding the crimes, and the identify of the shooter is not material to

guilt or punishment. Accordingly, Thomas has failed to demonstrate that the prosecutor's argument amounted to misconduct.

C. The Misconduct, If Any, Did Not Prejudice Thomas

Even where a prosecutor commits misconduct in advancing inconsistent theories regarding the culpability of two or more defendants, there is no cause for reversal absent a showing of prejudice. In this context, prejudice occurs where it is shown both that: (1) the People's attribution of the act to the defendant is, according to all the available evidence, probably false; and (2) the false attribution of a criminal act to the defendant was reasonably likely to have affected the guilt or penalty verdicts. (*In re Sakarias, supra*, 35 Cal.4th at p. 165.)

Thomas argues that strong evidence suggests Glover, not Thomas, was the shooter, including the following facts: (1) According to Dials's testimony, Glover was the kidnapper and Thomas was the lookout in the Francia Young abduction; (2) Glover used the gun in the Flennaugh robbery and shootout with Hayward police; (3) Glover took the most active role in the Silvey attempted kidnapping; and (4) Thomas's act of turning himself in evidenced a lack of consciousness of guilt. (AOB 104-106.) Most of Thomas's inferences derive from evidence of Glover's bad character and propensity for violence that neither party could have argued at trial. (See Evid. Code, § 1101, subd. (a); *People v. Davis* (1995) 10 Cal.4th 463, 501 [character evidence is not admissible to support a claim of third party culpability]; *People v. Tackett* (2006) 144 Cal.App.4th 445, 454 [same].) Further, as the prosecutor observed, it was Thomas who, by his own admission, possessed the AK-47 at the MacArthur BART station. And Thomas was the only perpetrator clearly shown, through DNA evidence, to have raped and sodomized Francia Young. Having committed such heinous sexual assaults, Thomas had a strong motivation to eliminate Francia Young as a witness. Thus, unlike in *Sakarias*,

the "great weight of available evidence" did not point to Glover, rather than Thomas, as the shooter. (*In re Sakarias, supra*, 35 Cal.4th at p. 165.)

In any event, the prosecution's depiction of Thomas as the shooter, even if false, was not reasonably likely to have affected the guilt or penalty verdicts. The jury found the gun use enhancement not true as to Thomas, thus conclusively rejecting the prosecutor's theory for purposes of the guilt and special circumstance findings. (Cf. *People v. Green* (1980) 27 Cal.3d 1, 69, disapproved on another ground in *People v. Martinez* (1999) 20 Cal.4th 225 [where the jury is presented with a legally incorrect theory, the error is harmless if the court can determine from the record that the jury did not base its verdict on that theory]; *People v. Sedeno* (1974) 10 Cal.3d 703, 721, disapproved in part in *People v. Breverman* (1998) 19 Cal.4th 142, 149 [if it is possible to determine that a factual question omitted from the instructions was resolved adversely to defendant under properly given instructions, the error is harmless beyond a reasonable doubt].) As to the penalty phase verdict, the prosecutor acknowledged the jury's not-true finding on the enhancement, and argued the aggravating circumstances based upon Thomas's role as a aider and abettor. (66 RT 6963-6964, 6994-6995.)

Thomas speculates that "[a]lthough the jury returned not true findings on the personal use enhancements, the result means nothing more than the district attorney failed to prove the allegations beyond a reasonable doubt—not that the jury disbelieved the prosecution's theory." (AOB 108.) However, the prosecutor did not urge such a result, and no other evidence suggests that the jury relied on the rejected factual theory to reach a penalty determination. "The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." (*Strickland v. Washington* (1984) 466 U.S. 668, 695.) "Thus, if there are two possible [factual] grounds for the jury's

verdict, one unreasonable and the other reasonable, we will assume, absent a contrary indication in the record, that the jury based its verdict on the reasonable ground." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1127.) It is mere speculation that the jury, having rejected the personal use allegation as to Thomas, nonetheless relied on that factor as decisive in the penalty-phase determination. The error, if any, was harmless beyond a reasonable doubt.

V.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE THOMAS'S RIGHT TO DUE PROCESS BY ADMITTING PHOTOGRAPHS OF THE VICTIM'S INJURIES

On August 24, 1995, Thomas filed a pretrial motion to limit the introduction of photographs of the victim alive and in death on the grounds that they were irrelevant, cumulative to other evidence, and unduly prejudicial, and that admission of such evidence would deny Thomas his right to a fair trial and due process of law under the state and federal constitutions. (8 CT 2412-2418.) The People filed a written opposition, arguing that the photographs of the victim in death were relevant and admissible to (1) illustrate the coroner's testimony, (2) demonstrate the nature and extent of the injuries, (3) demonstrate the manner in which the injuries were inflicted, and (4) support the People's theory of premeditation, deliberation, and malice aforethought. (9 CT 2436-2443.)

On September 4, 1997, the court conducted a hearing on the motion. (52 RT 5244.) The prosecutor proffered a photograph of the victim in life (People's Exh. 1, formerly Exh. 2)[18], a full-body view of the victim at the crime scene, bound and lying in the grass (People's Exh. 5C, formerly Exh. 1C), a

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18. Because the parties' arguments and the court's ruling referred to the exhibit numbers used in the former trial of Glover, we reference both the former number and the current number to avoid confusion.

second full-body view of the victim at the crime scene, from a different angle than 5C, with an "X" marking the spot where the shell casing was found (People's Exh. 13C, formerly Exh. 7C), a photograph of the victim at the crime scene, nude from the waist down, showing the binding of the victim's feet to a branch (People's Exh. 13D, formerly Exh. 7D), a photograph of the exit wound through Francia Young's cheek, with blood, tissue, and grass still present (People's Exh. 13E, formerly Exh. 7G), a photograph of a copper jacket lying in the grass amidst bloody tissue (People's Exh. 13F, formerly Exh. 7H), and a close-up photograph of the bindings on the victim's arms (People's Exh. 13G, formerly Exh. 7J).[19] Defense counsel objected to the prosecutor's use of former exhibits 1A, 1B, 1C, 2, 7C, 7G, and 7H. (52 RT 5222, 5244-5245, 5250-5251.) The court found all proffered photographs relevant, more probative than prejudicial, not cumulative, and thus overruled defense counsel's selective objections. (52 RT 5245-5246, 5251-5252.)

Thomas argues that admission of Exhibits 13C, 13E, and 13F was an abuse of discretion and deprived him of his right to a fair trial and due process under the Fifth and Fourteenth Amendments. The gruesome photographs, he argues, were irrelevant to the issue of felony murder and were a transparent attempt to appeal to the jury's emotions.[20] (AOB 109-117.) We disagree.

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19. Autopsy photographs of the victim's exit wound, cleaned of blood (People's Exh. 7A), and the entrance wound, cleaned of blood (People's Exh. 7B), were not discussed or objected to during the hearing.

20. We do not dispute Thomas's contention (AOB 111) that his counsel properly preserved a constitutional due process challenge to the admission of the photographs. Although Thomas's counsel mentioned only Evidence Code section 352's prohibition against unduly prejudicial and cumulative evidence during the hearing on the motion (see 52 RT 5244-5245, 5250-5251), Thomas referred to the federal and state due process clauses in his written motion to exclude photographs (8 CT 2412), and also made a motion, which was granted, to have all objections be deemed to encompass the state and federal constitution (8 CT 2196; 1 RT 161-163). Moreover, this Court has recognized that an

"The admissibility of victim and crime scene photographs and videotapes is governed by the same rules of evidence used to determine the admissibility of evidence generally: Only relevant evidence is admissible. [Citations.] The trial court has broad discretion in deciding the relevancy of such evidence. [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 641.)

"In a prosecution for murder, photographs of the murder victim and the crime scene are always relevant to prove how the charged crime occurred, and the prosecution is 'not obliged to prove these details solely from the testimony of live witnesses.' [Citation.]" (*People v. Pollock* (2004) 32 Cal.4th 1153, 1170.)

Here, the photographs showing the victim's wounds and the position of her body at the crime scene were relevant to corroborate and illustrate the testimony of the investigating officers who discovered the body and the testimony of the coroner about the victim's fatal head injury, her state of undress, and her bindings. The photographs established that a murder occurred and supported the prosecution's theory of premeditation, deliberation, and felony murder in the commission of a rape and sodomy. (*People v. Hart* (1999) 20 Cal.4th 546, 615-616.) Although these aspects of the case were largely uncontested, this Court repeatedly has recognized that "the absence of a defense challenge to particular aspects of the prosecution's case or its witnesses does not render victim photographs irrelevant. [Citations.]" (*People v. Lewis, supra*, 25 Cal.4th at p. 641; accord, *People v. Vieira* (2005) 35 Cal.4th 264, 293 [photographs of the murder victim "are always relevant to prove how the charged crime occurred

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Evidence Code section 352 objection preserves a federal due process challenge where the basis for the constitutional challenge is that the asserted legal error had the additional legal consequence of violating due process on the same grounds (i.e., that the evidence was more prejudicial than probative). (*People v. Partida* (2005) 37 Cal.4th 428, 433-436.)

. . . even in the absence of a defense challenge to particular aspects of the prosecution's case."].)

While it is true that the photographs depicted blood, tissue, and the disturbing positioning of the victim's body, "murder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant." (*People v. Pierce* (1979) 24 Cal.3d 199, 211.) None of the photographs was unduly gruesome or inflammatory. (Compare *People v. Love* (1960) 53 Cal.2d 843, 857-858 [prejudicial error to admit photograph of victim's face showing expression of excruciating pain accompanied by audiotape of her dying groans in emergency room].)

Nor were the photographs cumulative to each other or to the other evidence introduced at trial. The prosecution introduced two photographs of the victim's body at the crime scene, one of which also depicted the location of the bullet casing relative to the body. The prosecution introduced one close-up picture of the binding on the victim's hands, one close-up picture of the bindings on the victim's feet, one picture of the bullet casing located in the grass, and one picture of the victim's head injury as she was found, with two more autopsy photographs depicting the entry and exit wounds. "The amount of photographic evidence admitted was not excessive, in view of the particular facts of the case." (*People v. Hart, supra,* 20 Cal.4th at p. 616; see also *People v. Thompson* (1988) 45 Cal.3d 86, 115 ["Even somewhat cumulative photographic evidence may be admitted if relevant"].)

Likewise, this Court repeatedly has rejected the argument that photographs of the victim are merely cumulative of the witness testimony they are offered to illustrate and support. (*People v. Pollock, supra*, 32 Cal.4th at pp. 1170-1171.) "Because the photographs and videotape could assist the jury in understanding and evaluating the witnesses' testimony, the trial court was not required to exclude them as cumulative." (*Id.* at p. 1171.)

In sum, Thomas has failed to demonstrate that the trial court abused its discretion in admitting the photographic evidence under the guidelines set forth in Evidence Code section 352. And, because the proper admission of relevant evidence under state statutory rules does not violate due process, Thomas's constitutional claim of error likewise fails. (See *People v. Hart, supra*, 20 Cal.4th at p. 616, fn. 19; *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919-920 [the admission of relevant evidence does not implicate due process].)

Ultimately, however, any error in admission of photographic evidence was harmless under both the state and federal standards for prejudice. (*Chapman v. California, supra*, 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 834-836.) As discussed in detail above, the evidence introduced in the guilt phase was compelling and largely uncontested. (See Arg.II.C, pp. 64-66, *ante*.) The evidence presented in the penalty phase was likewise compelling. Although the circumstances of Francia Young's murder were clearly a factor in aggravation, Thomas concedes that the majority of the photographs, including autopsy photographs (People's Exhs. 7A and 7B), and photographs depicting the victim's body and bindings (People's Exhibits 5C & 13D, & 13G) were admissible. Given the jury's exposure to these relevant and admissible photographs, there is no reasonable possibility that the additional photographs challenged by the defense affected either the guilt or penalty phase determinations. (*Chapman, supra*, at p. 23.)

VI.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING THOMAS'S MOTION FOR MISTRIAL BASED ON *DOYLE* ERROR

During trial, the prosecutor informed defense counsel and the court that he intended to elicit testimony from Detective Frank Daley that Thomas had terminated an interview about the Hayward crimes, without inquiring about the

fact that Thomas had invoked his constitutional right to counsel. (56 RT 5729-5731.) The court agreed that the prosecutor could inquire about the fact that the interview had terminated, but not the reason why it had terminated. Defense counsel stated no objection to the proffered question and answer. (56 RT 5730-5731.)

Detective Frank Daley testified that, after admonishing Thomas pursuant to *Miranda*, he attempted to interview him about the Hayward robbery. Thomas denied any involvement in the crimes. The prosecutor then asked, "And was all questioning stopped at that point in time?", to which Detective Daley responded, "After a few minutes, he said he wanted a lawyer, and I stopped." (56 RT 5817.)

Defense counsel did not lodge a contemporaneous objection to Detective Daley's answer. (56 RT 5817.) However, during a break in the examination, outside the presence of the jury, defense counsel moved for a mistrial. (56 RT 5832-5833.) The prosecutor stated that he had instructed the detective to make no reference to Thomas's invocation and that he had been "caught completely by surprise." (56 RT 5833.) The court denied the mistrial motion, finding that the error had not deprived Thomas of a fair trial. (56 RT 5834.) Defense counsel did not request that the court strike the testimony or otherwise admonish the jury to disregard it. (56 RT 5835.)

Thomas contends on appeal that Detective Daley committed *Doyle* error (*Doyle v. Ohio* (1976) 426 U.S. 610) when he commented on Thomas's invocation of his right to an attorney. He maintains that the testimony deprived him of due process and was incurable by admonition, thus warranting a mistrial. (AOB 118-121.) We disagree.

"A trial court should grant a motion for mistrial 'only when "'a party's chances of receiving a fair trial have been irreparably damaged'"' (*People v. Ayala* (2000) 23 Cal.4th 225, 282), that is, if it is 'apprised of prejudice that it

judges incurable by admonition or instruction' (*People v. Haskett* (1982) 30 Cal.3d 841, 854). 'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' (*Ibid.*) Accordingly, [this court] review[s] a trial court's ruling on a motion for mistrial for abuse of discretion. (See *People v. Valdez* (2004) 32 Cal.4th 73, 128.)" (*People v. Avila* (2006) 38 Cal.4th 491, 573, parallel citations omitted.)

Doyle "prohibits the prosecution from impeaching a defendant's trial testimony with evidence of the defendant's silence after the defendant, having been advised of his constitutional rights under *Miranda v. Arizona*[,] [*supra,*] 384 U.S. 436 [] (*Miranda*), chooses to remain silent." (*People v. Earp* (1999) 20 Cal.4th 826, 856.) "*Doyle* rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'" (*Wainwright v. Greenfield* (1986) 474 U.S. 284, 291.) The rule in *Doyle* extends to a defendant's post-arrest invocation of the right to counsel. (*People v. Crandell* (1988) 46 Cal.3d 833, 878, disapproved on another ground in *People v Crayton* (2002) 28 Cal.4th 346.)

We disagree that the principles of *Doyle* were violated by the brief exchange between the prosecutor and Detective Daley. In *Doyle*, the prosecutor sought to take unfair advantage of the defendants' silence by challenging their defense of a "frame-up" on cross-examination with the fact that they had not come forward with the story after their arrest. The trial court overruled defense counsel's timely objections to the line of inquiry, and permitted the prosecutor to argue the defendants' post-arrest silence to the jury. (*Doyle, supra*, 426 U.S. at pp. 613-615.) Thus, it is not simply the fact of the invocation of rights, but the use of that fact to draw a negative inference against the defendant, which deprives the defendant of due process. It follows that "in each of the cases in

which [the Supreme Court] has applied *Doyle*, the trial court has permitted specific inquiry or argument respecting the defendant's post-*Miranda* silence. [Citations.]" (*Greer v. Miller* (1987) 483 U.S. 756, 764.)

Where, by contrast, the trial court does not permit the prosecution to make unfair use of the defendant's invocation of silence, the mere fact that the invocation is mentioned before the jury does not violate *Doyle*. In *Greer v. Miller, supra*, 483 U.S. 756, the defendant testified that he had not participated in the charged murder. On cross-examination, the prosecutor asked the defendant, "Why didn't you tell this story to anybody when you got arrested?" Defense counsel immediately objected and, out of the presence of the jury, requested a mistrial. The judge denied the mistrial motion but sustained an objection, and directed the jury to "ignore [the] question for the time being." (*Id.* at pp. 758-759.) The prosecutor did not pursue the issue further or mention it in his closing argument. (*Id.* at p. 759.)

The court held that the prosecutor's question about the defendant's post-arrest silence, standing alone, did not violate *Doyle*. "[T]he trial court in this case did not permit the inquiry that *Doyle* forbids. Instead, the court explicitly sustained an objection to the only question that touched upon Miller's postarrest silence. No further questioning or argument with respect to Miller's silence occurred, and the court specifically advised the jury that it should disregard any questions to which an objection was sustained. Unlike the prosecutor in *Doyle*, the prosecutor in this case was not 'allowed to undertake impeachment on,' or 'permit[ted] . . . to call attention to,' Miller's silence. [Citation.]" (*Greer, supra,* 483 U.S. at p. 764, fn. omitted.)

Here, the prosecutor made no attempt, through impeachment or argument, to take unfair advantage of Thomas's post-arrest silence during the Hayward interview. Rather, he recognized that such comment would be impermissible. The bare fact that Detective Daley testified to Thomas's invocation of the right

to counsel, standing alone, did not deprive Thomas of a fair trial. "*Doyle* do[es] not forbid all mention at trial of *Miranda* warnings and the defendant's response to them. [It] establish[es] instead that silence following the receipt of *Miranda* warnings *may not be used against a defendant*. . . . A statement such as 'I told the suspect that he could remain silent, and he did' does not ask the jury to infer guilt from silence." (*United States v. Higgins* (7th Cir. 1996) 75 F.3d 332, 333, emphasis added.) Thus, *Higgins* held that where an agent mentioned the defendant's invocation of the right to silence, the proper corrective measure was to stop the questioning and, if requested, to admonish the jury, not to grant a mistrial. (*Id.* at p. 334.)

It is true that, unlike in *Greer*, the trial court in this case did not strike the detective's testimony or admonish the jury regarding it. Defendant, however, invited such error by failing to make a contemporaneous objection or request for admonition, apparently for tactical reasons. (See *People v. Hinton* (2006) 37 Cal.4th 839, 868, fn. 10; *People v. Davis* (2005) 36 Cal.4th 510, 567.) And, the fact that the detective's answer remained did not automatically establish *Doyle* error because Detective Daley's statement that Thomas had invoked his right to counsel, standing alone, carried no inference of guilt. Accordingly, the sequence of events at trial indicates that Thomas's post-arrest silence was not used against him within the meaning of *Doyle*.

Should this Court conclude, however, that a technical violation of *Doyle* occurred, the trial court was correct in denying the motion for mistrial because defendant did not suffer incurable prejudice which deprived him of a fair trial. (*People v. Avila, supra,* 38 Cal.4th at p. 573; see also *People v. Coffman* (2004) 34 Cal.4th 1, 64 [applying test for prejudice set forth in *Chapman v. California, supra*, 386 U.S. at p. 24, to claim of *Doyle* error].) Contrary to Thomas's argument, a timely admonition requested by defense counsel would have cured the harm flowing from Detective Daley's testimony. (See *Greer v. Miller,*

supra, 483 U.S. at p. 764.) The drastic remedy of a mistrial was thus not warranted. (See *People v. Haskett, supra*, 30 Cal.3d at p. 854 [a mistrial is not warranted unless the trial court is "apprised of prejudice that it judges incurable by admonition or instruction"].)

Moreover, there was no reasonable possibility that the prosecutor's question and resulting answer had a detrimental effect on the verdicts. The reference to Thomas's invocation of rights was "brief and unaccompanied by any suggestion that an inference of guilt should be drawn therefrom." (*People v. Belmontes* (1988) 45 Cal.3d 744, 787.) And Thomas subsequently waived his right to counsel and spoke with both Hayward and Oakland police officers, thus dramatically lessening the risk that the jury would have considered his initial silence as evidence of guilt. (See *People v. Hinton, supra*, 37 Cal.4th at pp. 867-868.) The inference that Thomas had fabricated a defense came, not from his initial invocation of rights, but rather from his multiple inconsistent statements to police in subsequent interviews. As this Court observed in *Hinton*, "defendant's invocation of his *Miranda* rights was both cumulative of—and inferior to—the other evidence indicating that he had fabricated the account he eventually provided during police interviews and reiterated at trial. For that reason, and because the prosecutor never again mentioned the invocation during trial or closing argument [citation], we conclude that these two fleeting references could not have affected the jury's verdicts in this case. [Citations.] For the same reason, we find the trial court did not abuse its discretion in denying a mistrial." (37 Cal.4th at p. 868, fn. omitted.)

Given the strength of the evidence supporting the guilt and the special circumstance verdicts (see Argument II.C, pp. 64-66, *ante*), and the insignificant nature of the violation, the same result is warranted here.

VII.

THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT AND THOMAS'S ALLEGATIONS TO THE CONTRARY ARE FORFEITED

Thomas contends that the prosecutor committed misconduct during closing argument by making several comments which effectively shifted the burden of proof to the defense. (AOB 122-129.) He maintains that the prosecutor's comments amounted to structural error, or alternatively, that they were not harmless beyond a reasonable doubt. Thomas has forfeited these claims of error by failing to object below. Moreover, the claims fail on the merits.[21/]

A. Applicable Principles

The applicable state and federal standards regarding prosecutorial misconduct are well established. Conduct by a prosecutor is misconduct under state law if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Such misconduct is subject to harmless error analysis under *People v. Watson, supra,* 46 Cal.2d 818, 836. (*People v. Bolton* (1979) 23 Cal.3d 208, 214; *People v. Beivelman* (1968) 70 Cal.2d 60, 75, disapproved on other grounds in *People v. Green, supra*, 27 Cal.3d at pp. 33-34.)

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21. Thomas's observations, taken from a newspaper article, about Deputy District Attorney James Anderson's view of this case and the specifics of his career prosecuting capital cases (AOB 122) are outside the appellate record and are otherwise not the proper subject of judicial notice. (See *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1141, fn. 6 ["The truth of the content of the [newspaper and periodical] articles is not a proper matter for judicial notice"]; *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1064 [existence of newspaper article on the "reported action by the Federal Trade Commission" is "irrelevant, and the truth of its contents is not judicially noticeable"].)

A prosecutor's behavior violates the federal Constitution only if it comprises "a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.) Misconduct of such magnitude is subject to harmless error analysis under *Chapman v. California, supra,* 386 U.S. 18. (*People v. Woods* (2006) 146 Cal.App.4th 106, 117.)

When the claim of prosecutorial misconduct focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed the remarks in an impermissible or objectionable fashion. (*Samayoa, supra,* 15 Cal.4th at p. 841; *People v. Sanders* (1995) 11 Cal.4th 475, 526.) The prosecutor's allegedly offensive remarks must be viewed in the context of the prosecutor's argument as a whole. (*People v. Lucas, supra,* 12 Cal.4th at p. 475.) The reviewing court will not "lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the statements. (*People v. Frye, supra,* 18 Cal.4th at p. 970.)

B. The Complained-Of Remarks By The Prosecutor

Thomas takes issue with three arguments made by the prosecutor in his closing statement. At the outset of his remarks, the prosecutor observed: "Now, initially this case has been a little unusual because the People's evidence is uncontroverted. That means that there was no contradictory evidence given to us by the defense to challenge it." (59 RT 6074.) Defense counsel did not object to this remark. Later, in rebuttal, the prosecutor observed:

> Ladies and Gentlemen, based on the defense argument—and I just heard Mr. Cole say this not ten, 15 minutes ago—there are three things that the defense has contested in this case, and they are the three things that I have said were the most important part of this case:

He asked you to find the defendant not guilty on the count of sodomy, he asked you to find none of the special circumstances to be true, and he asked you to find that Mr. Thomas did not use the weapon. Those are the three things he is asking you not to find the defendant guilty of.

You all heard that; right? [¶] You all heard that.

So, knowing that, the first thing I would like you to do—and I never like to tell jurors what to do, but I have never heard defense in a case sit there and concede things.

So based upon his argument, when you get the verdict forms, I would like you all to go upstairs and get Count One out. And Count One alleges guilt or non-guilt of the murder. He's conceded it. So go up there, take the verdict form of Count One, and write in "guilty."

He conceded. [¶] Right? [¶] You all heard that. He's not contesting that.

You take Count Two, the verdict for kidnap. Throw away the not guilty one. Guilty

Count Three, the rape, fill that in for guilty, too. They conceded it.

What more proof do I need other than the evidence and their confession of it? [¶] Guilty of Count Three.

Count Four is the sodomy. We'll discuss that.

Count Five is the robbery of Francia Young. Fill out "guilty." They've conceded it.

Count Six, the ex-felon in possession of a firearm, fill that out as guilty. They've conceded it.

Count Seven, the —

[DEFENSE COUNSEL]: Misstates the record. I'm objecting to that.

THE COURT: It's argument. Overruled

[THE PROSECUTOR]: Thank you, Your Honor.

Count Seven, the residential robbery of Sebrena Flennaugh, they've conceded it. Fill that out as guilty.

And Counts Eight and Nine, the assault on the officers with an AK-47, they've conceded that. Fill that out.

[DEFENSE COUNSEL]: Objection. Misstates the record.

THE COURT: Overruled.

(59 RT 6183-6185.)

Later in the rebuttal, the prosecutor observed, "Now, remember what I said. They've conceded eight of the nine counts. So to make these deliberations go more quickly, fill out the guilty forms of the ones I told you they conceded. And then discuss the sodomy, then discuss the special circumstances, and then discuss the use of the firearm." (59 RT 6205.) Defense counsel failed to object to this remark.

C. Thomas Has Forfeited His Claim Of Error On Appeal By Failing To Lodge A Contemporaneous Objection, On The Same Ground, At The Trial

"As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa, supra,* 15 Cal.4th at p. 841; accord, *People v. Ayala, supra*, 23 Cal.4th at pp. 283-284.) Here, defense counsel failed to object to all but two of the prosecutor's comments identified as misconduct. And the two objections that defense counsel did lodge were that the prosecutor had misstated the record—a different basis than that now advanced on appeal. Accordingly, Thomas's claim that the prosecutor's argument improperly shifted the burden of proof to the defense was not properly preserved by contemporaneous objection in the trial court.

A defendant's failure to object will be excused only if an objection would have been futile or if the misconduct was so egregious that an admonition would not have cured the harm. (See *People v. Hill* (1998) 17 Cal.4th 800, 820.) Generally, a prosecutor's misstatement of the law, and more specifically

the People's burden of proof, may be cured by an admonition. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1239 [claim that prosecutor committed misconduct by misstating the burden of proof could have been cured by admonition]; *People v. Bell* (1989) 49 Cal.3d 502, 547 [a prosecutor's misstatement of the law is curable by admonition].) Thomas has made no showing that the prosecutor's alleged misstatements here were so egregious or pervasive that a timely admonition by the trial court would not have cured the harm.

Thomas counters that an objection and request for admonition would have been futile because the record shows that he objected repeatedly without success. (AOB 127.) We disagree. A defendant claiming that an objection to prosecutorial misconduct would have been futile must find support for his claim in the record. "The ritual incantation that an exception applies is not enough." (*People v. Panah* (2005) 35 Cal.4th 395, 462.) Here, Defense counsel made no attempt to object during the prosecutor's initial closing remarks. (59 RT 6073-6107.) During the prosecutor's rebuttal, defense counsel twice objected that the prosecutor's argument misstated the record. Although the court overruled these objections (59 RT 6184-6185), its ruling in no way suggested that it would not consider a proper objection on another ground, namely that the prosecutor was attempting to shift the burden of proof to the defense. And the record indicates that defense counsel was not actually deterred from objecting, as he lodged a timely objection and requested an admonition to a later comment by the prosecutor. (59 RT 6201-6202.) Thus, unlike in *People v. Hill, supra,* 17 Cal.4th 800, our record does not reflect the extreme situation that would justify a departure from the rule requiring objection and timely admonition. (See

People v. Boyette (2002) 29 Cal.4th 381, 432; *People v. Dennis* (1998) 17 Cal.4th 468, 521.)[22/]

D. The Prosecutor's Comments Were Not Misconduct

Even if defense counsel's failure to object is excused, Thomas has failed to demonstrate that the comments of the prosecutor at issue amounted to misconduct under either state law or the federal Constitution.

"[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements." (*People v. Marshall* (1996) 13 Cal.4th 799, 831; accord, *People v. Hill, supra,* 17 Cal.4th at pp. 829-831.) In *Hill*, for example, the prosecutor stated, "it must be reasonable.

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22. In any event, feeling obliged to defend this judgment on all available grounds, the People will proceed to address the merits of appellant's prosecutorial misconduct claims. This Court has no obligation to address the merits of forfeited claims, however, and should instead reject assignments of error on procedural "failure to object" grounds identified by the People throughout this case, thereby upholding California's timely and specific contemporaneous objection rule (Evid. Code, § 353), and its corollary principle that a defendant may not assign misconduct to the prosecutor for the first time on appeal (*People v. Green, supra*, 27 Cal.3d at pp. 27-34; *People v. Benson* (1990) 52 Cal.3d 754, 794.) For purposes of federal habeas corpus review (which is only available for persons in custody in violation of the Constitution or laws or treaties of the United States (28 U.S.C. § 2254, subd. (a)), a failure to properly object to or raise a federal constitutional issue at the state trial ordinarily constitutes a procedural default, foreclosing collateral review of the waived claim. (*Wainwright v. Sykes* (1977) 433 U.S. 72, 86-87.) However, when a state appellate court reaches the merits of an issue despite the lack of a sufficient objection at trial without also or alternatively "plainly stating" that it is invoking the waiver doctrine, its failure to vindicate state procedure justifies federal review on the merits. (*Harris v. Reed* (1989) 489 U.S. 255, 262-264, fin. 10.) Since the federal procedural default rule protects the state's interest in the finality of its judgments, a federal court does no offense to state procedure by refusing to enforce a state procedural rule ignored by the state court. In such a case, the federal court simply accepts the state court's subordination of the state's interest in finality.

It's not all possible doubt. Actually, very simply, it means, you know, you have to have a reason for this doubt. *There has to be some evidence on which to base a doubt.*" After the defense counsel's objection was overruled, the prosecutor continued, "There must be *some evidence* from which there is a reason for a doubt. You can't say, well, one of the attorneys said so." (17 Cal.4th at p. 831, original emphasis, fn. omitted.) This Court found that the prosecutor's comments were misconduct because they could reasonably be interpreted to suggest that there must be some affirmative evidence demonstrating a reasonable doubt and that the defendant had the burden of producing such evidence. (*Id.* at p. 832; see also *United States v. Perlaza* (9th Cir. 2006) 439 F.3d 1149, 1169 [prosecutor committed misconduct in arguing that, once deliberations began, the presumption of innocence shifted to a presumption of guilt].)

Here, no such misstatements occurred. The prosecutor began his remarks by stating that the evidence was "uncontroverted" and that "there was no contradictory evidence given to us by the defense to challenge it." (59 RT 6074.) This comment did not shift the burden of proof to the defense. "A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340; cf. *People v. Hughes* (2002) 27 Cal.4th 287, 374 [prosecutor did not commit *Griffin* error by stating that the evidence was "uncontradicted"]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1229 [same].) The prosecutor's comments simply conveyed the general point that compelling and uncontradicted evidence put before the jury in the prosecution's case in chief proved Thomas's guilt of the crimes beyond a reasonable doubt. (*People v. Panah, supra*, 35 Cal.4th at p. 463.)

Nor did the prosecutor undermine the burden of proof by construing the defense closing statement as a concession of guilt, or by telling the jurors that they had no duty to deliberate on any of the uncontested counts. First, the prosecutor's comment that defense counsel had essentially conceded all but the rape count, the special circumstance allegation, and the firearm use enhancement, was an accurate assessment of the record, and was well within the bounds of permissible argument. (See *People v. Bemore* (2000) 22 Cal.4th 809, 846 [the prosecutor has wide latitude to comment on defense counsel's arguments in closing]; *People v. Frye, supra*, 18 Cal.4th p. 978 [same].) Defense counsel may concede, for tactical reasons, his client's guilt in closing argument in light of overwhelming evidence presented at trial. (See, e.g., *People v. Bolin* (1998) 18 Cal.4th 297, 334-335; *People v. McPeters* (1992) 2 Cal.4th 1148, 1186-1187.) Such was the case here. As defense counsel acknowledged at the beginning of his statement:

> I want to start off on a note of agreeing with Mr. Anderson, at least on a few things. This is as unusual—or perhaps it's not all that unusual—there is overwhelming evidence about certain counts. And I believe we tried to tell you a little bit about that at the voir dire. When we said his name wasn't picked out of a phone book, that's sort of what we were getting at. It's obviously clear that he has admitted—and there's plenty of evidence besides his admissions—to a kidnap, a rape, and a robbery. There is no question about that.

(59 RT 6108.)

Defense counsel later again observed that "as I told you, most of the charges are obviously true—the kidnapping, the robbery, the rape." (59 RT 6114.) Likewise, in commenting on the Hayward crimes, counsel construed the testimony as "pretty uncontroverted—uncontroverted." (59 RT 6139.) Accordingly, the prosecutor did not err in stating the obvious, that defense counsel had expressly conceded his client's overwhelming guilt of several of the offenses.

Second, the prosecutor's arguments, fairly construed, did not urge the jurors to forgo deliberations on any of the charged counts. Rather, the prosecutor simply argued that the evidence of guilt was overwhelming, as defense counsel himself had conceded. In this regard, the prosecutor observed, "What more proof do I need other than the evidence and their confession of it?" (59 RT 6184; see also 59 RT 6205 [prosecutor observes that the state of the record should "make these deliberations go more quickly"].) These comments, fairly construed, did not direct a verdict, but rather urged the jurors to return verdicts of guilt based upon the overwhelming and uncontradicted evidence.

E. Harmless Error

Should this Court find misconduct from any of counsel's comments, the error was harmless by any standard. Contrary to Thomas's contention, a prosecutor's argument misstating the burden of proof is not structural error under *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278. The trial court correctly instructed the jury on the prosecutor's burden of proof beyond a reasonable doubt (60 RT 6222), that counsel's arguments were not evidence (60 RT 6210), and that where counsel's argument contradicted the instructions given, the jury was to disregard the argument and follow the court's instructions (60 RT 6210). "The court's instructions are determinative in their statement of law, and we presume the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (*People v. Sanchez* (1995) 12 Cal.4th 1, 70; *Boyde v. California* (1990) 494 U.S. 370, 384.) "Juries are warned in advance that counsel's remarks are mere argument, missteps can be challenged when they occur, and juries generally understand that counsel's assertions are the 'statements of advocates.' Thus, argument should 'not be judged as having the same force as an instruction from the court. . . .'" (*People v. Gonzalez* (1990) 51 Cal.3d 1179,

1224, fn. 21; *Boyde v. California, supra,* 494 U.S. at pp. 384-385.) Accordingly, no *Sullivan* error occurred.

For the same reasons, any error in the prosecutor's argument was harmless beyond a reasonable doubt. *People v. Gonzalez, supra*, 51 Cal.3d 1179, is instructive. There, this Court found no prejudicial error from the prosecutor's remark that "[t]he defense has to create a reasonable doubt. . . ." (*Id.* at p. 1214.) As the court observed, "The jury received accurate standard instructions that the People bore the burden of proving defendant guilty beyond a reasonable doubt, and that he was presumed innocent until proven guilty. [Citations.] No instruction stated or implied that defendant bore any burden of proof or persuasion. Defense counsel in his closing argument reread CALJIC No. 2.90 and repeatedly emphasized the People's 'very, very, very high burden.' The evidence that defendant was guilty as charged was highly persuasive." (*Id.* at p. 1215.) Similarly here, viewed in light of the instructions as a whole and the overwhelming evidence of Thomas's guilt, the prosecutor's challenged statements do not undermine confidence in the verdict.

VIII.

THERE WAS NO CUMULATIVE ERROR REQUIRING REVERSAL

Thomas argues that the alleged guilt phase errors, considered cumulatively, resulted in a miscarriage of justice and violated his federal constitutional right to due process. However, as argued above, Thomas has failed to demonstrate prejudicial error on any of the grounds raised in the appeal and none of the alleged errors become prejudicial when considered together. Thus, Thomas fails to demonstrate cumulative error. Thomas is entitled to a fair trial, not a perfect one. (See *People v. Bradford, supra*, 14 Cal.4th at p. 1057 [rejecting claim of cumulative error]; *People v. Osband* (1996) 13 Cal.4th 622, 702 [same]; *People v. Cain* (1995) 10 Cal.4th 1, 82 [same]; *People v. Beeler* (1995)

9 Cal.4th 953, 994 [same] *People v. Mincey* (1992) 2 Cal.4th 408, 454 [same]; *People v. Marshall, supra*, 50 Cal.3d at p. 945 [same];.)

IX.

THOMAS'S CHALLENGE TO THE TRIAL COURT'S FAILURE TO EXCUSE JURORS FOR CAUSE IS FORFEITED AND MERITLESS

Thomas claims that the trial court improperly denied his challenges for cause to four prospective jurors who evidenced a pro-death-penalty bias, thereby violating his federal constitutional rights to an impartial jury, to due process, and to a reliable penalty determination. (AOB 132-145.) Thomas, however, forfeited his claim of error on appeal by failing to challenge peremptorily the one juror who was seated as an alternate, and by failing to exhaust his peremptory challenges. Moreover, Thomas cannot demonstrate error or prejudice because the trial court's rulings were supported by the record, and ultimately none of the challenged jurors sat on the jury that returned the penalty-phase verdict. Accordingly, his claim of error fails.

A. Proceedings Below

During voir dire, defense counsel challenged for cause prospective jurors E.H., P.S., R.D., and alternate juror 5, on the ground that the jurors had evidenced a pro-death-penalty bias. The trial court denied the challenges. (35 RT 2992, 3022-3026 [E.H.]; 36 RT 3063, 3093-3096 [P.S.]; 38 RT 3539, 3589; 44 RT 4405, 4476 [R.D.]; 44 RT 4414, 4440-4442 [alternate juror 5].)

Prospective juror P.S. was called to the jury box and excused by defense counsel. (52 RT 5227.) Alternate juror 5 was called to the jury box and seated as an alternate; he was not challenged by defense counsel. (52 RT 5232.) Prospective jurors E.H. and R.D. were not called to the jury box. (52 RT 5224-5232.)

At the time the jury was sworn, defense counsel had only exercised 16 of his 20 peremptory challenges. He did not state his dissatisfaction with the panel. (52 RT 5224-5231; see also Code Civ. Proc., § 231, subd. (a) [granting each side 20 peremptory challenges in a capital case].)

B. Thomas Has Forfeited The Present Claim Of Error

Thomas claims that the court erred in overruling his challenges to four prospective jurors who evidenced a bias in favor of the death penalty. He has forfeited this claim of error on appeal. "To preserve a claim based on the trial court's overruling a defense challenge for cause, a defendant must show (1) he used an available peremptory challenge to remove the juror in question; (2) he exhausted all of his peremptory challenges or can justify the failure to do so; and (3) he expressed dissatisfaction with the jury ultimately selected." (*People v. Maury* (2003) 30 Cal.4th 342, 379.) As Thomas forthrightly acknowledges (AOB 142), he has failed to satisfy any of these requirements: defense counsel did not strike alternate juror five from the panel, he did not exhaust his peremptory challenges, and he did not state dissatisfaction with the jury ultimately selected. Accordingly, he has forfeited his claims for appellate review. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1099; *People v. Carter* (2005) 36 Cal.4th 1114, 1179.)

C. The Trial Court's Findings That The Four Challenged Jurors Were Able To Faithfully And Impartially Apply The Law In The Case Are Supported By Substantial Evidence

Should this Court reach the merits of Thomas's current claim, it fails. Thomas has wholly failed to demonstrate that the court abused its discretion in denying his challenges for cause. "Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. [Citation.] The trial court must determine whether the prospective juror will be 'unable to faithfully and impartially apply the law in the case.'

[Citation.] A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror's responses in deciding whether to remove the juror for cause. The trial court's resolution of these factual matters is binding on the appellate court if supported by substantial evidence. [Citation.] 'Where equivocal or conflicting responses are elicited regarding a prospective juror's ability to impose the death penalty, the trial court's determination as to his true state of mind is binding on an appellate court. [Citations.]' [Citation.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 910.)

Regarding Juror E.H., he stated that he did not have any feelings about the death penalty or life without the possibility of parole that would prevent him from making a choice between either penalty. (35 RT 2995.) When asked to rate himself on a scale of one to ten, with one being a person who could never impose the death penalty, and ten being a person who would always impose the death penalty for murder, the juror gauged himself as a seven and a half. (35 RT 3005-3006.) He affirmed that he would not eliminate life without the possibility of parole as a possible sentence "without hearing the mitigating and aggravating factors" in the case. (35 RT 2996.)

Prospective Juror E.H. was asked several questions regarding his view of mitigating evidence. He initially stated that his predisposition would be to minimize the impact of the mitigating factors and judge the facts of the crime on its face, but he affirmed that he would not refuse to consider mitigating factors in determining penalty. (35 RT 2998.) He explained, for example, that he did not much value the opinion of psychiatrists and that "I think common sense tells you most of the time what you need to know." (35 RT 3008.) He also opined that the fact that a person did not have a good childhood would not mitigate the decision to commit murder. (35 RT 3009.) He affirmed, however, that life without the possibility of parole was an option for him, that the defense

would have a realistic chance of persuading him to return such a verdict (35 RT 3013-3014, 3016), and that he would consider such factors as Thomas's adolescence, whether Thomas was the actual shooter, whether he was a leader or a follower, and whether he harbored specific intent to kill (35 RT 3017-3021).

The trial court denied defense counsel's challenge for cause, noting that the prospective juror had affirmed that he would consider the mitigating factors and was open to returning a verdict of life without the possibility of parole. (35 RT 3023, 3026.) The judge's factual determination was supported by substantial evidence, as set forth above, and did not constitute an abuse of discretion.

With respect to prospective juror P.S., she stated that she did not have any feelings about the death penalty or life without the possibility of parole that would prevent her from making a choice between either penalty. (36 RT 3067.) She affirmed that she would reserve judgment as to penalty until she had heard all of the evidence, including mitigating factors. (36 RT 3069.) When asked to rate herself on a scale of one to ten, with one being a person who could never impose the death penalty, and ten being a person who would always impose the death penalty for murder, the juror gauged herself as a ten. (36 RT 3081-3082.) However, when the judge asked the juror if that meant she would always impose the death penalty regardless of the evidence, the juror stated that she had misunderstood the question. (36 RT 3084.) She affirmed that she was not predisposed to impose death, that she could be persuaded to consider life without the possibility of parole (36 RT 3085, 3093), and that she would take into consideration mitigating evidence such as Thomas's background and upbringing, whether Thomas was the leader or the follower in the crimes, and whether he was the actual shooter (36 RT 3085-3088).

In denying the challenge for cause, the trial court noted that the juror had qualified her initial answer ranking herself as a "ten" in favor of imposing the

death penalty. (36 RT 3095.) The trial court's conclusion, that the juror's responses as a whole indicated she could give fair consideration to imposing a sentence of life without the possibility of parole, was supported by substantial evidence.

Third, with respect to prospective juror R.D., she stated that she had no feelings about either the death penalty or life without the possibility of parole that would keep her from choosing either penalty. (38 RT 3545.) She indicated that she would consider mitigating evidence including the defendant's background, his schooling, and the degree of his participation in the crimes, before making a determination on penalty. (38 RT 3549, 3580-3582, 3585-3586.) When asked to rate herself on a scale of one to ten, one being a person who would never impose the death penalty, and ten being a person who would always impose death, she initially rated herself as a ten. (38 RT 3569.) When asked by the court to clarify, however, she stated that she would not pick the death penalty every time and that she does not believe in an "eye for an eye." (38 RT 3569-3570.) Prospective juror R.D. wrote in her questionnaire, in response to a question asking for her feelings about the death penalty, that some people are not fit to have the privilege of being on earth. (38 RT 3574.) She clarified, however, that in her opinion a person who committed the crimes Thomas had been charged with had not necessarily forfeited the privilege to live. (38 RT 3575.) She also affirmed her belief that the penalty of life without the possibility of parole was an adequate sentence in a murder case. (38 RT 3575-3577.)

This record amply supports the trial court's finding (44 RT 4476) that prospective juror R.D. could perform her duty to assess penalty, and was not predisposed to impose a sentence of death.

Alternate juror 5 stated that he had no feelings about either the death penalty of life without the possibility of parole that would keep him from choosing

either penalty. (44 RT 4419-4420.) He would consider all of the evidence before rejecting a sentence of life without the possibility of parole. (44 RT 4421-4422.) He could not rate himself on a scale of one to ten regarding his disposition to impose the death penalty without knowing the facts of the case. (44 RT 4431.) In response to a question on his questionnaire, the juror stated, "I think that if somebody kills somebody and it can be proven beyond a reasonable doubt, then, you know, it's an eye for an eye" and that under such circumstances, he would always impose the death penalty. (44 RT 4432-4433.) When asked to clarify, however, alternate juror 5 stated repeatedly that he would consider mitigating factors in a particular case before voting to impose a death verdict. (44 RT 4434-4436, 4440.) He also confirmed that he would consider evidence about the defendant's upbringing and his level of participation in the crime in order to determine penalty. (44 RT 4436-4437.)

The court denied the challenge for cause, noting that the juror's statements about being predisposed to impose death were ambiguous, and that when the court sought clarification "over and over again, [the juror] kept telling me that he'd weigh the mitigating factors." (44 RT 4442.) The court's determination that alternate juror 5 could perform his duty to assess penalty, and was not predisposed to impose a death sentence, is supported by substantial evidence.

D. Thomas Cannot Establish Prejudice From The Trial Court's Ruling Because None Of The Challenged Jurors Actually Sat On His Jury

Even if the trial Court's ruling as to any of the four jurors amounted to an abuse of discretion, Thomas cannot show that the ruling "affected his . . . right to a fair and impartial jury." (*People v. Horton* (1995) 11 Cal.4th 1068, 1093; see also *People v. Guerra, supra*, 37 Cal.4th at p. 1099 ["we may reject defendant's claims without examining the merits of his challenges for cause because he cannot show prejudice"].) None of the prospective jurors Thomas challenged sat on the jury. Thomas exercised a peremptory challenge to remove

prospective juror P.S. from the panel. (52 RT 5227.) Prospective jurors E.H. and R.D. were not called to the jury box. (52 RT 5224-5232.) And alternate juror 5 was not called to replace any of the 12 seated jurors and did not participate in deliberations at the guilt or penalty trials. (See 60 RT 6262-6263 [during guilt phase, court instructs alternate jurors that they are not to discuss the case unless they are called to substitute for a deliberating juror and that they will be physically separated from the 12 jurors during deliberations]; 66 RT 7088-7089 [in penalty phase, court instructs alternate jurors not to discuss case unless they are called to substitute for a deliberating juror]; see also *People v. Carter, supra*, 36 Cal.4th at p. 1178 [distinguishing between an alternate juror and the 12 jurors empaneled to decide the case].) Therefore, "defendant cannot show his right to an impartial jury was affected because he did not challenge for cause any sitting juror. No incompetent juror was forced upon him." (*People v. Yeoman* (2003) 31 Cal.4th 93, 114; accord, *People v. Hawkins* (1995) 10 Cal.4th 920, 939 ["It is well settled that even if the trial court erred in denying a defendant's motion to remove a juror for cause, that error will be considered harmless if '[n]one of the prospective jurors whom the defendant found objectionable actually sat on his jury'"].)

Thomas argues that he was harmed by having been forced to use peremptory challenges to cure the trial court's error in denying his challenges for cause. As Thomas acknowledges, however, both the United States Supreme Court and this Court have held that the loss of a peremptory challenge, used to excuse a juror who otherwise should have been excused for cause, does not constitute a violation of the constitutional right to an impartial jury. (*Ross v. Oklahoma* (1988) 487 U.S. 81, 88; accord, *People v. Avila, supra*, 38 Cal.4th at p. 540; *People v. Boyette, supra*, 29 Cal.4th 381, 419.) As the High Court explained in *Ross*, "Petitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court's error. But we reject the notion

that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension. [Citations.] They are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." (487 U.S. at p. 88.) Moreover, Thomas's argument overlooks the fact that he accepted the jury panel with four peremptory challenges remaining. He was thus not prevented by the court's ruling from fashioning a panel of his choosing.

In short, the trial court's denial of Thomas's four challenges for cause did not violate his constitutional rights. His claim of error fails.

X.

THOMAS'S DEATH SENTENCE WAS NOT GROSSLY DISPROPORTIONATE TO THE NATURE OF HIS OFFENSE AND TO HIS INDIVIDUAL CULPABILITY

Following the guilt phase, Thomas moved to preclude the penalty phase trial on the ground that it would constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments to allow the jury to sentence him to death when Glover, who was more likely to be the actual killer, received a sentence of life without the possibility of parole. (60 RT 6355-6359.) The court denied the motion. (60 RT 6358-6359.)

After the jury returned a verdict of death, Thomas filed a motion to modify the verdict to life imprisonment on the ground that imposition of the death penalty would constitute cruel and unusual punishment under the state and federal constitutions. Thomas urged the court to consider whether the punishment was grossly disproportionate to his involvement in the crime, and was arbitrary and capricious given the sentence of life imprisonment imposed

on codefendant Glover. (14 CT 4161-4163.1.) Thomas argued, "[we have found] no decisions where the death penalty was affirmed for a defendant of such clearly lesser culpability than the codefendant. It is the very fact that defendant's jury delivered a death verdict in this incident when two jurys [*sic*] did not reach a death verdict on codefendant Glover that demonstrates that death penalty would be arbitrary and capricious as to defendant Thomas. In this context, it is also disproportional to his personal culpability." (14 CT 4163.1.) The court denied the motion, finding that California law did not support modifying the verdict on proportionality grounds. (67 RT 7131.)

On appeal, Thomas argues that his death sentence is grossly disproportionate to his *individual* culpability, especially considering the verdict of life without parole given to codefendant Glover, and thus violates state and federal proscriptions against cruel and/or unusual punishment. (AOB 146-155.) We disagree.

The Eighth Amendment does not require a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases. (*Pulley v. Harris* (1984) 465 U.S. 37, 43-44.) Accordingly, this Court consistently has declined to undertake intercase proportionality review. (*People v. Cook* (2007) 40 Cal.4th 1334, 1368; *People v. Lewis, supra*, 25 Cal.4th at p. 677; *People v. Barnett* (1998) 17 Cal.4th 1044, 1182; *People v. Mincey, supra*, 2 Cal.4th at p. 476.)

Under the California Constitution, article I, section 27, the Court will conduct an "intracase" proportionality review to determine if a penalty is grossly disproportionate to the defendant's individual culpability for the crime. (*People v. Mincey, supra,* 2 Cal.4th at p. 476.) In determining whether a sentence is cruel or unusual punishment as applied to a particular defendant, the reviewing court examines the circumstances of the offense, including the defendant's motive, his involvement in the crime, the manner in which the

crime was committed, and the consequences of his acts. The court also considers the circumstances of the offender, including the defendant's age, his prior criminality, and his mental capabilities. (*People v. Guerra, supra*, 37 Cal.4th at pp. 1163-1164.)

Thomas's motion to preclude the penalty phase, and his motion to reduce the judgment of death, were based solely upon the fact that Glover, who was more likely the shooter, received a sentence of life without the possibility of parole. (See 60 RT 6355-6359; 14 CT 4161-4163.1.) "However, the punishment received by others who might be involved in the crime is not relevant to . . . 'intracase' proportionality review, because a capital penalty determination is 'based on the character and record of the *individual* defendant and the circumstances of the offense. [Citation.]' (*People v. Mincey, supra*, 2 Cal.4th 408, 476 [].)" (*People v. Arias* (1996) 13 Cal.4th 92, 193, original emphasis; accord, *People v. Riel* (2000) 22 Cal.4th 1153, 1223 ["we do undertake '"intracase' review to determine whether the penalty is disproportionate to a defendant's personal culpability,' although the disposition accomplices received is not part of that review"].) Accordingly, the trial court was correct in denying Thomas's motions on this basis.

Thomas further argues on appeal that under the state constitution, a sentence of death was grossly disproportionate to his crimes based upon his status as an aider and abettor, his youth, and his depraved childhood. Thomas did not argue these factors below in support of his constitutional claim. (See 60 RT 6355-6359; 14 CT 4161-4163.1.) However, even assuming this argument is preserved on appeal, it lacks merit.

As Thomas acknowledges, this was a "terrible" crime. (AOB 150.) He and Glover forcibly abducted, raped, sodomized, robbed, and executed a young woman. The crimes took place over the span of an hour or more, and over some distance, giving both defendants ample time to reflect on their actions.

Although there was no evidence as to which defendant actually shot Francia Young, Thomas clearly played a major role in the events leading up to her death. He acted as a lookout during her abduction, he participated in the rape and sodomy, and he was videotaped using her ATM card after her death. As Thomas acknowledges, the death penalty is not disproportionate when applied to an aider and abettor who acts as a major participant and with reckless indifference to human life, as the jury found here. (*Tison v. Arizona* (1987) 481 U.S. 137, 158.)

Although Thomas was only 19 years old at the time of the offense, he was not mentally impaired, and he had a prior criminal history consisting of battery, gun possession, attempted robbery, and drug dealing. Notably, three days after Francia Young's murder, Thomas and Glover attempted to kidnap Constance Silvey in a strikingly similar fashion. Approximately two weeks later, Thomas and Glover committed an armed, home invasion robbery of Sabrina Flennaugh.

The circumstances of the crime and defendant's individual culpability, as shown by his prior and subsequent criminality and depraved character, placed him well within the class of murderers for whom the Constitution and the statute permit a sentence of death.

XI.

THE TRIAL COURT PROPERLY DENIED THOMAS'S MOTION TO EXCLUDE SILVEY'S IDENTIFICATION OF THOMAS AT THE PENALTY PHASE AS UNDULY SUGGESTIVE

Thomas contends that the trial court erred by admitting Constance Silvey's testimony at the penalty phase identifying Thomas as the second of the two men who robbed and attempted to kidnap her. According to Thomas, Silvey's initial identification was based on an impermissibly suggestive lineup, and her subsequent in-court identification was the product of that initial tainted identification. Admission of such evidence, he maintains, violated his federal

constitutional right to due process of law and his Eighth Amendment right to a reliable penalty determination. (AOB 156-163.) His claim lacks merit.

A. Proceedings Below

Pretrial, Thomas filed a written motion to exclude testimony by Constance Silvey identifying Thomas as the second suspect in the Berkeley assault and robbery, on the ground that her identification was unreliable and tainted by suggestive police procedures. (8 CT 2359.) On March 14 and 18, 1996, the trial court conducted a hearing on the motion.

Patrol officer Pete Gomez took an initial statement from Constance Silvey at the scene of the crime. Silvey described her attackers as two young black men in their early twenties. One was 5'9" to 5'10" tall with a stocky build, the other was about 5'10" with a slender build. (20 RT 1560.) Silvey told Officer Gomez that she did not get a very good look at the second suspect. (21 RT 1677.)

Around December 17, 1992, Inspector Daniel Wolke of the Berkeley Police Department took Silvey to San Jose to prepare a composite sketch of the suspect who had struck her. (20 RT 1517.) Wolke did not ask Silvey to complete a composite sketch of the second suspect, as she had stated that she did not get a good enough look at him. (20 RT 1567-1568.)

On January 7, 1993, Inspector Wolke took Silvey to view a live lineup at the Oakland Police Department. (20 RT 1515, 1517-1518.) Beforehand, Wolke told Silvey that the suspects may or may not be in the lineup. (20 RT 1518-1519.) The lineup consisted of eight black men; Glover was in the number three position and Thomas was in the number seven position. (20 RT 1523-1526; People's Exh. 57.)[23/] After viewing the lineup, Silvey identified Glover

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23. A photograph of the lineup was identified as exhibit 15 at the hearing. (20 RT 1522.) It was renumbered as exhibit 57 during the penalty phase trial. (61 RT 6463.)

as a suspect, and put a question mark next to Thomas. (20 RT 1529.) Silvey explained her marks to Wolke. She was positive that number three was the person who had grabbed and assaulted her. She thought that number seven looked just like the second suspect. Initially, she had focused on number two, but after looking closely, she decided number seven looked more like the second suspect. She used a question mark because she was not positive about the identification. (20 RT 1532-1533, 1555, 1566.)

Inspector Wolke did not tell Silvey that she had positively identified the two suspects in the BART murder. (20 RT 1565-1566.) He had, however, mentioned to Silvey sometime prior to the lineup that he believed her case might be connected to the BART murder. (20 RT 1538-1540, 1553.)

Constance Silvey testified about the circumstances of the lineup. Prior to the lineup, no one told her to select anyone, or even that the suspects would necessarily be in the lineup. (21 RT 1589, 1592, 1671.) The men in the lineup were asked to wear a hat and to say the words, "Shh, be quiet. Don't say a word. Get in. Get in." (21 RT 1590, 1660.) When Glover put on the hat and spoke the words, it "all came back to her." She recognized his voice, his eyes and his physique. She positively identified him by placing an X on the figure in position three. (21 RT 1591, 1659-1662.)

Silvey placed a question mark next to Thomas's position. She recognized Thomas as the second suspect, but because she had not seen him as clearly, she did not make a positive identification. She was not "quite as clear in [her] mind" about her identification of Thomas as she was of the identification of Glover. (21 RT 1591-1592, 1619-1620.) Silvey testified at a preliminary hearing in Oakland, and identified both Glover and Thomas as the suspects. (21 RT 1594-1596.)

Silvey described her ability to view the suspects at the time of the crimes. She was assaulted around 8:00 p.m. There was no lighting in her driveway, but

the area was well lit by the streetlights and the lighting from her neighbor's house. (21 RT 1636-1638, 1640.) Both men approached Silvey in the driveway, and then the first man assaulted her. Although she saw more of the first suspect than the second, she did see the second person well enough to identify him. (21 RT 1673-1674.)

Silvey was questioned in detail regarding her knowledge, prior to the lineup, of the circumstances of Francia Young's murder. She recalled reading about the BART kidnapping in the newspaper prior to her own incident, but she did not follow the investigation in that case. (21 RT 1600-1601, 1625-1627.) She did not see any suspect photographs related to the BART incident in the media. (21 RT 1586, 1597.) She was also unaware, at the time of the lineup, if anyone had been arrested for the BART crimes. (21 RT 1665.) Silvey initially opined that, prior to the lineup, she did not connect in her mind her own crime with the BART kidnapping. (21 RT 1603.) She acknowledged, however, that it was possible she had made such a connection. (21 RT 1604, 1611, 1614.)

At the conclusion of the hearing, the trial court found that there was no evidence that the lineup was suggestive or that law enforcement had engaged in improper tactics. The court therefore denied Thomas's motion to exclude Silvey's identification. (21 RT 1678.)

B. Silvey's Identification Testimony Was Not Unreliable Or Tainted By Suggestive Police Procedures, And Was Thus Properly Admitted At The Penalty-Phase Trial

"In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, [this Court] consider[s] (1) whether the identification procedure was unduly suggestive and unnecessary, and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's

degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 989, citing *Manson v. Brathwaite* (1977) 432 U.S. 98, 104-107 and *Neil v. Biggers* (1972) 409 U.S. 188, 199-200.) "If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable. [Citation.]" (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242, disapproved on another ground in *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

"The defendant bears the burden of demonstrating the existence of an unreliable identification procedure." (*People v. Cunningham, supra*, 25 Cal.4th at p. 989.) On appeal, the trial court's determination of historical facts and assessment of witness credibility is reviewed with deference, while the court's ultimate legal conclusion regarding whether an identification procedure was or was not unduly suggestive is reviewed de novo. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608-609.)

As to the first issue, "for a witness identification procedure to violate the due process clauses, the state must, at the threshold, improperly suggest something to the witness—i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure." (*People v. Ochoa* (1998) 19 Cal.4th 353, 413.) "The question is whether anything caused defendant to 'stand out' from the others in a way that would suggest the witness should select him. [Citation.]" (*People v. Carpenter* (1997) 15 Cal.4th 312, 367.) In general, it is "'settled that a photographic identification is sufficiently neutral where the persons in the photographs are similar in age, complexion, physical features and build . . .' [Citation.]" (*People v. Leung* (1992) 5 Cal.App.4th 482, 499, 500 [Asian males "approximately 20 years old with straight black hair, broad noses, small eyes

and similar skin tone"].) A suspect's photograph is not impermissibly suggestive if it is similar to that of the others, even if all participants do not share all common features. (See *People v. Cunningham, supra*, 25 Cal.4th at p. 990.)

Thomas argues that the identification procedure at the lineup was unduly suggestive because Inspector Wolke told Silvey sometime prior thereto that her case could be related to the BART murder, thus giving Silvey an opportunity to view the BART murder suspects in the newspapers. (AOB 160.) Silvey, however, testified that she did not see any pictures in the paper of the BART suspects prior to participating in the lineup. (21 RT 1586, 1597.) The trial court's implicit finding of credibility on this point is entitled to deference. Accordingly, no evidence supports Thomas's assertion that Silvey was exposed to photographs in the media of Glover or Thomas that would have tainted her lineup identification.

Thomas also contends that the lineup was unduly suggestive because Glover stood out as the only man with facial hair. While this assertion is difficult to assess from the photographs (see People's Exhs. 57-59), Thomas's argument is beside the point, because it fails to establish that the lineup was suggestive as to *him*. Quite the contrary, all eight men participating in the lineup were of the same race, all appeared similar in age, and all had the same haircut. Thomas was not significantly shorter, taller, heavier, or thinner than any of the other suspects. And Thomas was nearly identical in height and build to suspects four and five. Thus, even accepting Thomas's assertion that Glover would immediately stand out to Silvey (AOB 161-162), Silvey was left with a lineup of seven other similar men from which to choose Thomas as the second suspect. Accordingly, the trial court correctly held that the lineup was not unduly suggestive.

Moreover, even assuming the lineup procedure was unduly suggestive, Silvey's identification of Thomas as the suspect was nevertheless reliable under the totality of the circumstances, "taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. [Citations.]" (*People v. Cunningham, supra*, 25 Cal.4th at p. 989.)

Silvey testified at the hearing that the area where the defendants approached her was well lit by the streetlights and the lighting from her neighbor's house. (21 RT 1636-1638, 1640.) Both suspects walked up to Silvey in the driveway. Although she saw more of the first suspect (Glover) than the second, she did see the second person "very well." (21 RT 1673-1674.)

Thomas notes that Silvey was uncertain of her lineup identification of Thomas, and put a question mark next to his number. Silvey explained, however, that she recognized Thomas as the second suspect, but was not as certain of her identification as she was of Glover. For this reason, she used a question mark. (21 RT 1591-1592, 1619-1620.) At trial, Silvey unequivocally identified Thoms as the second suspect. (61 RT 6471, 6505.) She saw Thomas from a distance of approximately two feet and the street lighting was sufficient to make out his face. (61 RT 6470-6473, 6479, 6483, 6488-6489, 6519.) Under the totality of the circumstances, Silvey's identification of Thomas was reliable and the trial court did not err in admitting her identification testimony at trial. (See *People v. Kennedy, supra*, 36 Cal.4th at pp. 610-611 [witness identification was reliable even though she initially failed to mention defendant's prominent beard and failed to identify a picture of him, where her

subsequent identification of him in a video, at a pretrial hearing and at trial was unequivocal].)

XII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING VICTIM IMPACT TESTIMONY FROM MARY YOUNG AND ELY GASSOWAY

Thomas argues that the trial court erred by admitting victim impact testimony from Mary Young about Francia's funeral, her own loss of her daycare business, and the debts she incurred for grief counseling. He maintains that the Eighth Amendment precludes testimony regarding characteristics of the victim not known to the defendant at the time of the crimes. He also claims that the prosecutor violated the trial court's in limine ruling by calling Ely Gassoway to testify, because he was not a direct family member of the victim. According to Thomas, these errors deprived him of a reliable penalty phase determination, and were not harmless beyond a reasonable doubt. (AOB 164-171.) We disagree.

Prior to trial, Thomas moved to limit the use of victim impact evidence in the penalty phase to those personal characteristics of the victim which were known to the defendant at the time of the offense. He argued that broader evidence of the family member's opinions about the crime, the defendant, or the appropriate sentence would violate the Eighth Amendment. Thomas also requested a hearing outside the presence of the jury to determine the prejudicial impact of the evidence proffered by the prosecution. (8 CT 2162-2178.)

On October 10, 1995, the trial court ruled that the prosecution could only call direct family members to testify about the impact of the crimes. (2 RT 235-242.) The court deferred an Evidence Code section 352 ruling on the scope of the proffered testimony until after the guilt phase. (2 RT 241-242.)

On October 3, 1997, the parties revisited the victim impact testimony. The trial court observed that, in the Glover case, it had ruled admissible "victim impact evidence to be presented only by immediate family members and/or immediate friends of the family." (60 RT 6324.) The prosecutor stated his intent to use the same witnesses he had presented in the Glover trial—Mary Young and Ely Gassoway. (60 RT 6342.) Thomas objected to any testimony from Mary Young regarding the debt she incurred for counseling services after her daughter's death or the loss of her daycare business. (60 RT 6343-6348.) The trial court overruled these objections. (60 RT 6346, 6348.)

As set forth above (Statement of Facts, *ante*, at pp. 17-18), Mary Young and Ely Gassoway testified about the victim's life and their own devastating loss as a result of the murder. Mary described Francia as a kind person and an active member of the church. When Mary learned of Francia's death, she could not believe it was true until she saw her daughter's body at the funeral. Francia was buried in Texas with a pink, heart-shaped headstone that read, "My Beloved Daughter, Francia Young." (62 RT 6605-6606.)

Following Francia's death, Mary was unable to sleep for approximately three months, and was eventually hospitalized for a week. (62 RT 6607.) After she was released from the hospital, she sought counseling, at a personal expense to her of around $9,000. (62 RT 6608.) Mary's personal business also failed after Francia died, due in part to Mary's need to care for her own ailing mother. (62 RT 6607-6608.)

Ely Gassoway was a good family friend and a de facto stepfather to Francia when she was growing up. (62 RT 6610.) Francia was his daughter "in every sense of the word." (62 RT 6610.) Gassoway was "destroyed" by Francia's murder. He could not function, both because he missed Francia and because of his good friend Mary's pain and sadness. (62 RT 6611-6612.)

The testimony from Mary Young and Ely Gassoway was properly admitted. "In a capital trial, evidence showing the direct impact of the defendant's acts on the victims' friends and family is not barred by the Eighth or Fourteenth Amendments to the federal Constitution." (*People v. Pollock, supra*, 32 Cal.4th at p. 1180; accord, *Payne v. Tennessee* (1991) 501 U.S. 808, 825-827.) "[A] state may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. '[T]he state has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.' [Citation.]" (*Payne v. Tennessee, supra*, 501 U.S. at p. 825.)

Under California law, victim impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime. (*People v. Boyette, supra*, 29 Cal.4th at p. 444; *People v. Edwards, supra*, 54 Cal.3d at pp. 835-836.) "The jury, in making a normative decision whether the defendant should live or die, is entitled to hear how the defendant's crime has harmed the survivors. [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 573.) Admission of victim impact evidence is subject to the trial court's discretion. (See *People v. Raley* (1992) 2 Cal.4th 870, 916.)

Relying on Justice Kennard's concurring and dissenting opinion in *People v. Fierro* (1991) 1 Cal.4th 173, 263-264, Thomas argues that victim impact evidence should be limited to personal characteristics of the victim known to the defendant at the time of the crime. He contends that the effect on the victim's mother, including months of sleeplessness, her debt incurred in grief counseling, and the loss of her business, were inadmissible under this standard. (AOB 167-169.)

Justice Kennard's concurring and dissenting opinion in *Fierro* does not represent the controlling standard in California. This Court repeatedly has held that the defendant need not anticipate the consequences of his acts to the family members in order for such evidence to be admissible. (*People v. Jurado* (2006) 38 Cal.4th 72, 131.) "We have approved victim impact testimony from multiple witnesses who were not present at the murder scene and who described circumstances and victim characteristics unknown to the defendant." (*People v. Pollock, supra*, 32 Cal.4th at p. 1183, citing *People v. Boyette, supra*, 29 Cal.4th at pp. 440-441, 443-445.) Construing section 190.3(a) to include such evidence does not render the statute unconstitutionally vague or overbroad. (*People v. Brown, supra,* 31 Cal.4th at pp. 573-574; *People v. Pollock, supra*, at p. 1183; *People v. Boyette, supra*, at p. 445, fn. 12.)

Applying this standard, this Court repeatedly has upheld admission of victim impact evidence similar to that presented here. In *People v. Harris* (2005) 37 Cal.4th 310, 351-352, the trial court properly admitted testimony by the murder victim's mother about viewing the victim's body at the mortuary, and photographs of the victim's gravesite, as circumstances of the crime. Also the murder victim's mother was properly allowed to "describe[] how she learned of the murder, and of the emotional and financial costs involved in planning and attending the funeral." (*Id.* at p. 328, 351-352 [holding this evidence properly admitted].) In *People v. Jurado, supra*, 38 Cal.4th 72, 133, the victim's parents were properly allowed to testify about their visits to the gravesite, and that the father had lost his job due to his daughter's death. As in these cases, the victim impact evidence introduced here "did not surpass constitutional limits." (*People v. Boyette, supra*, 29 Cal.4th at p. 444.)

Thomas is likewise incorrect in asserting that the prosecutor violated a court order by presenting the testimony of Ely Gassoway. Victim impact evidence is not limited to the impact on the victim's immediate family, but rather extends

to the suffering and loss inflicted on close personal friends. (*People v. Pollock, supra*, 32 Cal.4th at p. 1183.) Although the trial court initially limited the prosecution to calling only direct family members to testify about the impact of the crimes (2 RT 235-242), the court later expanded its ruling to include both family members and friends (60 RT 6324). Thus, on October 3, 1997, the court observed that, in the Glover case, it had ruled admissible "victim impact evidence to be presented only by immediate family members and/or immediate friends of the family." (60 RT 6324.) The prosecutor stated his intent to use the same witnesses he had presented in the Glover trial—Mary Young and Ely Gassoway. (60 RT 6342.) Neither defense counsel nor the court expressed concern that Ely Gassoway's testimony fell outside the parameters of the court's ruling.

Admission of testimony from Mary Young and Ely Gassoway fell within constitutional bounds and within the scope of the trial court's evidentiary ruling. Thomas's challenge to this aspect of the penalty case fails.

XIII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING SPECIFIC DETAILS ABOUT DEFENDANT'S MOTHER'S HISTORY AS IRRELEVANT TO THE DEFENSE CASE IN MITIGATION

Thomas contends the trial court impermissibly limited testimony regarding Veronica Johnson's upbringing in violation of his Eighth Amendment right to present mitigating evidence. Specifically, he challenges the trial court's exclusion of hearsay evidence that Johnson was sexually abused by her own father, and that she attempted to kill her stepbrother with a meat cleaver. (AOB 172-180.) Thomas has failed to demonstrate an abuse of discretion.

A. Proceedings Below

On October 8, 1997, the trial court heard argument about the scope of evidence proffered by the defense in mitigation. Defense counsel sought to introduce hearsay evidence through the expert testimony of Dr. Bruce, that Veronica Johnson had been physically and sexually abused as a child, and that this abuse explained her lack of parenting skills towards Thomas. (63 RT 6622, 6624.) Specifically, he wished to elicit details about specific instances of abuse towards Johnson, explaining that "if my . . . expert, testifies that she was physically and sexually abused as a child, without some flesh on those bones, those are flat statements. I think to corroborate those and lend some flesh and some meat to them, I should be allowed to present some of the specific examples of the type of . . . abuse that she had." (63 RT 6628.) Counsel proffered that Johnson was abandoned by her mother as a child, that she was sexually molested by her father between the ages of nine to twelve, that she was physically abused by her stepmother, including being burned in her mouth with a hot egg and being beaten with ropes, and that she was held down and slapped by a stepbrother. (63 RT 6626-6629.) Counsel also sought to introduce evidence that Johnson tried to kill her brother with a meat cleaver. (63 RT 6629.)

The prosecutor agreed that the defense expert should be allowed to testify that Johnson was physically and sexually abused as a child, but objected to evidence of specific instances of abuse. (63 RT 6630-6631.) The prosecutor further objected that none of the specific instances of misconduct would be subject to cross-examination. (63 RT 6632.)

The trial court indicated that it would permit introduction of some evidence of Johnson's background, but within limits. (63 RT 6625, 6633.) Under Evidence Code section 352, the court ruled that it would allow the defense expert to testify that Johnson was sexually abused as a child, but without

providing details. (63 RT 6633-6634, 6638.) The court would also admit evidence that Thomas was an unwanted child, and that Johnson was forced to carry him to term. (63 RT 6641-6642.) And, the court would admit specific examples of physical abuse that Johnson suffered to the extent they were similar to the abuse she inflicted on Thomas. The court included in this ruling Johnson's attempt to murder her stepbrother. (63 RT 6634-6639, 6646.) The court observed that "there is not too much guidance in this *Rowland*[24] case, so maybe I'm expanding the envelope a little bit. But also I'm doing this out of an abundance of caution." (63 RT 6634.)

On October 9, 1997, the prosecutor asked the court to revisit its ruling regarding Veronica Johnson's attempt to kill her stepbrother. (64 RT 6733.) The prosecutor recounted the facts surrounding this incident as follows: Veronica Johnson previously had been molested by her stepbrother. When she was 14 years old, she came home and saw her stepbrother attempting to sexually abuse her stepsister, who was then 12 years old. Johnson retrieved a meat cleaver and chased her stepbrother out of the house. (64 RT 6734.) The prosecutor argued that this incident did not prove Johnson's propensity for violence because she was attempting to defend a third person. (64 RT 6736.) The trial court clarified that, when it had earlier ruled the incident admissible, it was under the mistaken impression that Johnson had been the victim of an attempted homicide. The court agreed with the prosecutor that the incident, as described on the record, was too remote to have probative value regarding the defendant's background and circumstances. (64 RT 6735, 6738.)

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24. *People v. Rowland* (1992) 4 Cal.4th 238.

B. Defendant's Mother's Sexual Victimization, And Her Attempt To Kill Her Stepbrother, Were Not Mitigating Factors Relevant To Thomas's Character

The capital defendant's background is material to penalty. (*People v. Rowland, supra,* 4 Cal.4th 238, 278.) Under the Eighth Amendment, "the sentencer . . . [may] not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [plur. opn. by Burger, C. J.], original emphasis; accord, *Penry v. Lynaugh* (1989) 492 U.S. 302, 317; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110.)

"By contrast, the background of the *defendant's family* is of no consequence in and of itself. That is because under both California law (e.g., *People v. Gallego* (1990) 52 Cal.3d 115, 207 (conc. opn. of Mosk, J.) [construing Pen. Code, §§ 190 et seq.]) and the United States Constitution (e.g., *Enmund v. Florida* (1982) 458 U.S. 782, 801 [construing U.S. Const., Amend. VIII]), the determination of punishment in a capital case turns on the defendant's personal moral culpability. It is the '*defendant's* character or record' that 'the sentencer . . . [may] not be precluded from considering'—not *his family's.* [Citations.]" (*People v. Rowland, supra,* 4 Cal.4th at p. 279, original emphasis, parallel citations omitted.) "The background of the defendant's family is material [only] if, and to the extent that, it relates to the background of defendant himself." (*Ibid.*)

In ruling on the admissibility of mitigating evidence, "'the trial court determines relevancy in the first instance and retains discretion to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury.' [Citation.]" (*People v. Carpenter, supra,* 15 Cal.4th at p. 404.)

Here, the trial court allowed Thomas reasonably wide latitude to present mitigating evidence regarding Veronica Johnson, consistent with the laws of evidence. Thomas introduced extensive evidence that his mother physically beat him with a belt and an electrical cord beginning at a very young age. She showed little affection for him, and repeatedly relinquished him to child welfare services, claiming that he was uncontrollable. On one occasion, she knocked him unconscious during a beating. On another, she attempted to choke him to death. On several occasions, she had others hold Thomas down so that she could inflict a beating on him.

As to Veronica Johnson's background, Thomas was allowed to present evidence that she reported having been sexually molested by either her father or stepbrother between the ages of nine and twelve. (64 RT 6751; 65 RT 6869.) Her stepmother had beat her with a two-by-four board, a rope, and an umbrella. (64 RT 6752; 65 RT 6869.) She became pregnant with Thomas when she was 17 years old, and was forced by the family to carry the baby to term against her will. When Thomas was born, Johnson struggled to survive, living partly on welfare. (65 RT 6780-6781.)

Given the scope of the evidence admitted, the trial court did not abuse its discretion by excluding details regarding Johnson's sexual victimization by her father. The jury learned generally that Johnson was the victim of sexual abuse by her father or her stepbrother. Thomas fails to explain how further details about the incest would reflect on Thomas's character. Notably, Johnson did not sexually abuse Thomas in a pattern similar to that which she experienced. Thus, while incest is unquestionably "taboo" (AOB 178), Thomas fails to explain how this fact, without more, had any bearing on his relationship with his mother, or his motivation to rape and sodomize a young woman.

Likewise, the fact that Veronica Johnson attempted to assault her stepbrother with a meat cleaver after she found him sexually abusing his own

sister had little tendency in reason to explain her motivations for striking her own child. Much more relevant was the fact that Johnson had been physically beaten as a child, and that she in turn inflicted severe beatings on Thomas. This area was explored in great detail.

"The trial court allowed defendant reasonably wide latitude to present his mitigating evidence consistent with California law of evidence. The few restrictions it placed on the extensive expert testimony neither abused its discretion nor violated defendant's right to present mitigating evidence." (*People v. Carpenter, supra*, 15 Cal.4th at p. 404.)

For the same reasons, any error in excluding relevant mitigating evidence at the penalty phase was harmless beyond a reasonable doubt. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1117 [exclusion of relevant mitigating evidence violates the constitutional requirement that a capital defendant be allowed to present all relevant evidence to demonstrate he deserves a sentence of life rather than death, and is subject to harmless error review under *Chapman v. California, supra*, 368 U.S. 18].) The circumstances in aggravation, including the facts of the crime and the defendant's criminal history, were egregious. Thomas and Glover purposefully targeted Francia Young, abducted her in the trunk of her car, transported her to a remote location, raped and sodomized her, and then marched her up a hill where she was bound and executed. A mere three days later, Thomas and Glover robbed and attempted to kidnap Constance Silvey in much the same fashion. Thomas was also involved in an uncharged attempted robbery of Timothy McNulty, an uncharged battery of Cathy Brown, and an uncharged unlawful possession of a firearm. As against these aggravating factors, Thomas presented a detailed case in mitigation regarding the horrors of his early childhood, which included severe abuse and abandonment by his mother, and exposure to extensive criminality by his father. There is no reasonable possibility that the jury would have been swayed to return a different

penalty verdict based upon the omission of two tangential details about Veronica Johnson's life.

XIV.

THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT DURING THE PENALTY-PHASE ARGUMENT

Thomas alleges several instances of misconduct during the prosecutor's penalty-phase closing argument, including use of vilifying epithets, inappropriate appeals to passion and prejudice, *Griffin*[25] error, and *Boyd*[26] error. (AOB 181-192.) These comments, he insists, deprived him of his constitutional right to a fair and reliable penalty determination. Thomas forfeited the majority of these claims by a failure to object below. In any event, none amounted to prejudicial misconduct.

A. Applicable Law

As set forth above, conduct by a prosecutor is misconduct under state law if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Samayoa, supra,* 15 Cal.4th at p. 841; *People v. Espinoza, supra,* 3 Cal.4th at p. 820.) A prosecutor's behavior violates the federal Constitution only if it comprises "a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gionis, supra*, 9 Cal.4th at p. 1214; *Donnelly v. DeChristoforo, supra*, 416 U.S. at pp. 642-643.) When the claim of prosecutorial misconduct focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed the remarks in an impermissible or

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25. *Griffin v. California* (1965) 380 U.S. 609.

26. *People v. Boyd* (1985) 38 Cal.3d 762.

objectionable fashion. (*Samayoa, supra*, 15 Cal.4th at p. 841; *People v. Sanders, supra*, 11 Cal.4th at p. 526.)

B. Use Of Epithets

Thomas challenges the prosecutor's use of epithets which he claims were intended to dehumanize Thomas and make it easier for the jury to vote for death. He identifies the following comments as objectionable: "predator of the women of Alameda County" (66 RT 6962), "predators," (66 RT 6964), "two hyenas" (66 RT 6969), "depraved predator" (66 RT 6974), "vile, nasty predator of women" (66 RT 7010), "sociopath" (66 RT 6963, 6973), and a "cancer" that the jury should "cull out" by giving the death penalty (66 RT 6970).

"Defendant failed to object to any of these comments, though a prompt admonition would have cured any harm. He has therefore forfeited the claim on appeal." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1172; accord, *People v. Samayoa, supra,* 15 Cal.4th at p. 841; *People v. Ayala, supra*, 23 Cal.4th at pp. 283-284.)

His claim lacks merit in any event. "There is a wide range of permissible argument at the penalty phase. (E.g., *People v. Ochoa* (1998) 19 Cal.4th 353, 463.) Argument may include opprobrious epithets warranted by the evidence. (*Sandoval, supra*, 4 Cal.4th 155, 180.) Where they are so supported, we have condoned a wide range of epithets to describe the egregious nature of the defendant's conduct. (E.g., *Farnam, supra*, 28 Cal.4th 107, 168, [defendant is 'monstrous,' 'cold-blooded,' vicious, and a 'predator'; evidence is 'horrifying' and 'more horrifying than your worst nightmare']; *People v. Thomas* (1992) 2 Cal.4th 489, 537, [defendant is 'mass murderer, rapist,' 'perverted murderous cancer,' and 'walking depraved cancer']; *Sully, supra*, 53 Cal.3d 1195, 1249 [based on facts of crime, defendant is 'human monster' and 'mutation'].)" (*People v. Zambrano, supra*, 41 Cal.4th at p. 1172, parallel citations omitted [prosecution's characterization of the defendant as "evil" a liar, and a

"sociopath" was not misconduct]; see also *People v. Hawkins, supra*, 10 Cal.4th at p. 961 [prosecutor's characterization of defendant as a "coiled snake" and a "rabid dog" was not misconduct].)

Thomas and Glover kidnapped, robbed, raped, sodomized, and brutally murdered Francia Young. Three days later, they attempted to carjack and kidnap a second woman in a similar manner. Approximately two weeks later, they burglarized, robbed, and assaulted a pregnant woman in her home, resulting in a shootout with police. These facts amply justified the prosecutor's depiction of Thomas as a "depraved predator," a "sociopath," and a "cancer," on society. (*People v. Zambrano, supra,* 41 Cal.4th at p. 1173 ["the label of sociopath—someone who acts without conscience or remorse—certainly fit defendant, based on the facts of his crimes"].) Moreover, viewing the prosecutor's penalty phase argument as a whole, "these epithets played an extremely minor role, in comparison to the lengthy discussion of defendant's prior criminal and violent acts." (*People v. Hawkins, supra*, 10 Cal.4th at p. 961.) No misconduct occurred.

C. Appeals To Passion And Prejudice

Thomas maintains that the prosecutor improperly appealed to the jury's passion and prejudice through the following comments:

"So when Dr. Bruce says he is a walking time bomb, an LWOP verdict logically gives him a Gold VISA card to continue his marauding ways in the state prison system." (66 RT 7011.) Defense counsel made no objection to this comment. (66 RT 7011.)

"Think about this: there is not one thing they can do to him by way of punishment. Now, they may take away his color TV or his tape recorder or restrict his basketball or weight room privileges. . . . But as far as additional time? [¶] You give him a verdict of life without parole, they can't give him one day of additional time. Maybe take away some privileges. Life without

parole maxes him out as far as additional time. You remember that. He will have a Gold Card." (66 RT 7011-7012.) The defense objection to this comment was overruled. (66 RT 7012.)

"Now, I'm telling you that you 12 jurors are the conscience of the community, and I ask right now, should this community—should our community, should Alameda County show any mercy, any compassion, any sympathy for the defendant?" (66 RT 7013-7014.) A defense objection to this argument was sustained, and the trial court directed that "[t]he jury can disregard the whole community comment." (66 RT 7014.)

"Ladies and Gentlemen, I implore you to send a message out that this kind of—" (66 RT 7016.) A defense objection was sustained, and the trial court directed that "[t]he jury can disregard that comment." (66 RT 7016.)

The first comment Thomas complains of was forfeited on appeal by failure to object. (*People v. Zambrano, supra,* 41 Cal.4th at p. 1172; *People v. Samayoa, supra,* 15 Cal.4th at p. 841; *People v. Ayala, supra,* 23 Cal.4th at pp. 283-284.) As to the remaining comments, we disagree that they amounted to prejudicial misconduct.

"Unlike the guilt determination, where appeals to the jury's passions are inappropriate, in making the penalty decision, the jury must make a moral assessment of all the relevant facts as they reflect on its decision. [Citations.] Emotion must not reign over reason and, on objection, courts should guard against prejudicially emotional argument. [Citation.] But emotion need not, indeed, cannot, be entirely excluded from the jury's moral assessment." (*People v. Smith* (2003) 30 Cal.4th 581, 634.)

Specifically, the "prosecutor's comments on defendant's potential to endanger others in prison . . . if sentenced to life imprisonment without possibility of parole were . . . proper. We approved of similar remarks in *People v. Bradford* (1997) 14 Cal.4th 1005, 1063-1064." (*People v. Huggins*

(2006) 38 Cal.4th 175, 253, parallel citation omitted; see also *People v. Michaels* (2002) 28 Cal.4th 486, 540-541 ["This court has 'repeatedly declined to find error or misconduct where argument concerning a defendant's future dangerousness in custody is based on evidence of his past violent crimes admitted under one of the specific aggravating categories of section 190.3.'"].) Likewise, this Court has held that "'"[i]solated, brief references to retribution or community vengeance . . . , although potentially inflammatory, do not constitute misconduct so long as such arguments do not form the principal basis for advocating the imposition of the death penalty."' (*People v. Wash* (1993) 6 Cal.4th 215, 262.)" (*People v. Davenport* (1995) 11 Cal.4th 1171, 1222, parallel citation omitted.)

The prosecutor's comments about Thomas's future dangerousness in prison, his lack of incentive not to engage in violent behavior in the future, and the community's need to impose the death penalty in such cases, did not transgress the bounds of permissible argument. They "were not particularly inflammatory, nor did they constitute the principal basis of his argument in favor of the death penalty." (*People v. Davenport, supra,* 11 Cal.4th at p. 1222.)

In any event, the trial court sustained defense counsel's objections to the "conscious of the community" arguments, and directed that "[t]he jury can disregard" those comments. (66 RT 7014; see also 66 RT 7016.) The trial court instructed the jury that it must not be influenced by bias or prejudice against the defendant or swayed by public opinion or public feelings (66 RT 7071-7072), that it was to disregard any question for which an objection was sustained (66 RT 7075), that it was not to consider for any purpose any offer of evidence that was rejected or any evidence that was stricken by the court (66 RT 7075) and that statements made by the attorneys during the trial are not evidence (66 RT 7075). "Ordinarily, a cautionary instruction is presumed to have cured prejudicial impact." (*Dubria v. Smith* (9th Cir. 2000) 224 F.3d 995,

1002; accord, *People v. Price* (1991) 1 Cal.4th 324, 462 ["[A]n admonition that the prosecutor's opinion was irrelevant would have avoided any possible prejudice. [Citation.]"].) And the jury is presumed to follow the court's instructions in that regard. (*People v. Osband, supra*, 13 Cal.4th at p. 676; *People v. Bonin* (1988) 46 Cal.3d 659, 699, disapproved on other grounds in *People v. Hill, supra*, 17 Cal.4th at p. 823; *People v. Seiterle* (1963) 59 Cal.2d 703, 710; *People v. Duncan* (1960) 53 Cal.2d 803, 818; accord, *Weeks v. Angelone* (2000) 528 U.S. 225, 234; *Drayden v. White* (9th Cir. 2000) 232 F.3d 704, 713; *United States v. Brady* (9th Cir. 1978) 579 F.2d 1121, 1127.) The prosecutor's comments in this case were not "so clearly prejudicial that a curative instruction could not mitigate their effect." (*Dubria v. Smith, supra,* 224 F.3d at p. 1002.)

D. *Griffin* Error

Thomas contends that the following comments by the prosecutor about the Constance Silvey crimes amounted to *Griffin* error: "Think about this, too. Did you ever hear an alibi put forth for Keith Thomas on the evening of December 11, 1992? Did you ever hear an alibi? [¶] Anybody come forward and say he couldn't have done it, he was with me? [¶] Not one person came forward." (66 RT 6989-6990.) The trial court overruled defense counsel's "Griffin error" objection. (66 RT 6990.) The prosecutor continued, "Not one person came forward for Mr. Thomas and said: He couldn't have done it. He was with me. He couldn't have done it. [¶] Why is there silence for any witness for the defense? [¶] Nobody came forward for him. No alibi. . . . If you were on trial for your life and accused of this subsequent attack, wouldn't you get your alibi witness to go to the police? Wouldn't you? If you were being accused of this, wouldn't you have your alibi witness go: Hey, go to the police, tell him I didn't do Connie Silvey? You were with me." (66 RT 6990.)

The trial court properly overruled defense counsel's objection, as the prosecutor's argument did not amount, directly or by implication, to a comment on Thomas's failure to testify. It is improper for the prosecutor to comment on a defendant's failure to testify or to urge the jury to infer guilt from such silence. (*Griffin v. California, supra*, 380 U.S. at p. 615; *People v. Hardy* (1992) 2 Cal.4th 86, 154.) "'*Griffin* forbids either direct or indirect comment upon the failure of the defendant to take the witness stand. The rule, however, does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses.' [Citation.]" (*People v. Hovey* (1988) 44 Cal.3d 543, 572, accord, *People v. Mitcham* (1992) 1 Cal.4th 1027, 1051.) In reviewing a claim of *Griffin* error, this Court asks whether there was a reasonable likelihood that the remarks could have been understood, within their context, to refer to a defendant's failure to testify. (*People v. Clair* (1992) 2 Cal.4th 629, 663.)

This Court has repeatedly held that a prosecutor's argument that the defense did not produce alibi witnesses for the critical period does not violate *Griffin*. In *People v. Brown, supra*, 31 Cal.4th at p. 554, the prosecutor argued: "'If he wasn't there, where was he? Everyone else says he was there. Where was he? No alibi witness took the stand and said he was with me that night watching T.V. You didn't hear any of that, did you?'" (*Id.* at p. 552.) On appeal, the court found no misconduct. "By directing the jury's attention to the fact defendant never presented evidence that he was somewhere else when the crime was committed, the prosecutor did no more than emphasize defendant's failure to present material evidence. [The prosecutor] did not capitalize on the fact defendant failed to testify. Accordingly, there was no *Griffin* error." (*Id.* at p 554.)

In *People v. Bradford, supra*, 15 Cal.4th 1229, the prosecutor commented on the defendant's failure to call any witnesses or produce any evidence

pointing to his innocence, specifically mentioning the defendant's failure to present an expert witness and alibi witnesses. (*Id.* at p. 1339.) This Court rejected the claim of *Griffin* error because the prosecutor's comments on the defendant's failure to call witnesses or present evidence "cannot fairly be interpreted as referring to defendant's failure to testify." (*Ibid.*) "Neither the general comment directed to the lack of defense evidence or testimony, nor the more particularized comments regarding the possibly bloodstained mat, the coroner's opinion, *or the absence of alibi for a particular time period*, would have required defendant to take the stand." (*Ibid*, emphasis added.)

In *People v. Ratliff* (1986) 41 Cal.3d 675, where the defendant did not testify or call any alibi witnesses, the defendant challenged the prosecutor's remark that he had failed to produce "any evidence, such as alibi testimony, to show that defendant did not commit the charged offenses." (*Id.* at pp. 690-691.) The Court rejected the argument: "Nor were *Griffin* principles violated by the prosecutor's argument. As we recently explained, the *Griffin* rule forbids any reference to a defendant's failure to take the stand in his defense, but 'that rule does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. [Citation.]'" (*Id.* at pp. 690-691, accord, *People v. Szeto* (1981) 29 Cal.3d 20, 34.)

Here, the prosecutor's reference was expressly directed to Thomas's lack of alibi witnesses for the Constance Silvey crimes. The crimes occurred at 8:00 p.m. Any number of friends or relatives could have vouched for Thomas's whereabouts at that time. Thus, Thomas was not the only person who could effectively provide alibi testimony. Thomas focuses on the prosecutor's comment, "[n]ot one person came forward" as broad enough to have encompass his failure to testify. (66 RT 6990.) However, in context, the prosecutor made clear that he was commenting on the lack of *third party* alibi witnesses. In the

very next sentence, he observed, "Not one person came forward for Mr. Thomas and said: He couldn't have done it. He was with me. He couldn't have done it." (66 RT 6990.) It is not reasonably likely that the jury construed the prosecutor's argument as a comment on Thomas's failure to testify as to his whereabouts that evening. No *Griffin* error occurred.

E. *Boyd* Error

Thomas contends that the prosecutor committed *Boyd* error (*People v. Boyd, supra,* 38 Cal.3d 762), by arguing that evidence presented in mitigation under section 190.3, factor (k) was in fact aggravating. He cites two examples. First, the prosecutor agreed that Thomas had a "rotten, lousy, abusive childhood" (66 RT 6996), but argued that he still had freedom of choice, and he chose to do wrong (66 RT 6999). The prosecutor observed, "The defense is going to beg you for sympathy because of his upbringing, but not every abused, unloved, unwanted child turns to murder, kidnap, rape, robbery, or sodomy." (66 RT 6999.)

Second, citing testimony by defense expert Dr. Bruce, the prosecutor argued "isn't he telling us that Keith Thomas is going to be a walking time bomb forever? [¶] That's how I interpret those words. . . . So when Dr. Bruce says he is a walking time bomb, an LWOP verdict logically gives him a Gold VISA card to continue his marauding ways in the state prison system." (66 RT 7011.)

Defense counsel did not object to the first comment. (66 RT 6999.) Counsel objected to the second comment on the ground it was beyond the scope of the record—a ground different from that now advanced on appeal. (66 RT 7011.) Accordingly Thomas's claims of *Boyd* error are forfeited. (*People v. Lewis, supra*, 25 Cal.4th at p. 672 [defendant forfeited claim of *Boyd* error by failing to lodge a timely objection].) In any event, neither comment amounted to error.

Factor (k) of section 190.3 is "an open-ended provision permitting the jury to consider any mitigating evidence." (*People v. Boyd, supra*, 38 Cal.3d at p. 775.) In *Boyd, supra*, 38 Cal.3d at page 775, this Court observed: "The language of factor (k) refers to circumstances which extenuate the gravity of the crime, not to circumstances which enhance it." Accordingly, the court held that while the defendant may present evidence relevant to any factor listed in the statute, including factor (k), "the prosecution's case for aggravation is limited to evidence relevant to the listed factors exclusive of factor (k) . . . . " (*Ibid.*)

Boyd is inapplicable to the challenged comments here because that case "concerns the *admission* of aggravating and mitigating *evidence*, not the scope of permissible argument." (*People v. Avena* (1996) 13 Cal.4th 394, 439.) "At the penalty phase of a capital trial, a prosecutor is permitted to argue any reasonable inferences from properly admitted evidence . . . ." (*People v. Lewis, supra*, 25 Cal.4th at p. 672.) As this Court explained in *People v. Caro* (1988) 46 Cal.3d 1035, the prosecutor does not "overstep that line in arguing that defendant's evidence under factor (k) did not excuse his conduct—it made it worse. He was merely arguing the lack of weight of defendant's evidence." (*Id.* at pp. 1062-1063, disapproved on another ground as stated in *People v. Whitt* (1990) 51 Cal.3d 620, 657, fn. 29.)

In *People v. Sims, supra,* 5 Cal.4th 405, the prosecutor argued that "evidence of defendant's childhood history of physical, sexual, and emotional abuse, presented by the defense in mitigation, in fact had no mitigatory significance, because there was no 'bridge' between defendant's family background and the crimes committed in South Carolina and California. The prosecutor urged that criminals generally have a violent childhood . . . , and that there was no connection between defendant's subjugation to sexual abuse during his childhood and his deliberated crimes of murder, attempted murder, and robbery involving his prior employer, Domino's Pizza. The prosecutor

finally argued that the vile events of defendant's childhood did not constitute a mitigating factor because if 'it were a mitigating factor that a person had a bad childhood, that would apply to v[i]rtually every violent felon currently incarcerated. [¶] If that were, therefore, a mitigating factor, then you would be emptying prisons because it would apply to v[i]rtually everybody.'" (*Id.* at pp. 463-464.)

This Court found no misconduct based on the prosecutor's characterization of the mitigating evidence. "The prosecutor's remarks, in general, fall within the bounds of proper argument. For the most part, he did not imply that the jury should disregard the evidence of defendant's background, but rather that, in relation to the nature of the crimes committed, it had no mitigating effect. 'A prosecutor does not mischaracterize such evidence [offered in mitigation] by arguing it should not carry any extenuating weight when evaluated in a broader factual context. We have consistently declined to criticize advocacy of this nature.' [Citations.]" (*People v. Sims, supra*, 5 Cal.4th at p. 464.)

Likewise, here, the prosecutor permissibly commented in closing argument that the factors defendant advanced in mitigation—his terrible childhood and his lifelong emotional scars—carried little weight in mitigating the atrocious crimes he had committed as an adult. These arguments did not violate the teachings of *Boyd*. (*People v. Caro, supra,* 46 Cal.3d at pp. 1062-1063.)

F. Harmless Error

Even assuming the prosecutor committed misconduct by one or more of the comments made at the penalty-phase argument, the error was harmless under any standard. As this Court has observed, "prosecutorial commentary should not be given undue weight in analyzing how a reasonable jury understood . . . instructions," particularly given that "[j]uries are warned in advance that counsel's remarks are mere argument . . . ." (*People v. Gonzalez, supra*, 51 Cal.3d 1179, 1225, fn. 21.)

Here, the jury instructions neutralized any potential harm from the prosecutor's remarks. Regarding the prosecutor's colorful epithets, the trial court instructed the jury that "[y]ou must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict." (66 RT 7071-7072.)

Regarding the prosecutor's comment on the lack of an alibi defense, the court instructed the jury that "[a] defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way." (66 RT 7072.)

Regarding the prosecutor's comment on mitigating evidence, the trial court instructed the jury that it could consider as a mitigating circumstance "[a]ny other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (66 RT 7087.) Consistent with this instruction, defense counsel vigorously argued that Thomas's terrible upbringing had relevance in mitigation. (66 RT 7039-7042, 7046-7057.)

It is presumed that the jury properly followed the court's instructions and viewed the prosecutor's comments as exactly what they were—the comments of an advocate. (See *People v. Osband, supra,* 13 Cal.4th 622, 676; *People v. Bonin, supra,* 46 Cal.3d 659, 699; *Weeks v. Angelone, supra,* 528 U.S. 225, 234; *Dubria v. Smith, supra,* 224 F.3d 995, 1002.) Viewed accordingly, and in

light of the strength of the prosecution's case in aggravation, none of the statements at issue here undermined confidence in the penalty verdict.

XV.

THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AT THE PENALTY PHASE WERE COMPLETE AND ACCURATE

On October 14, 1997, the court and counsel discussed penalty phase jury instructions. Aside from requesting that the trial court delete irrelevant factors in mitigation from CALJIC No. 8.85 (66 RT 6954-6955), defense counsel concurred with the instructions selected by the court (66 RT 6943-6956). In its penalty phase instructions, the court directed the jury to "[d]isregard all other instructions given to you in other phases of this trial." (66 RT 7071.)

Thomas now contends that the trial court erred by omitting several general instructions upon which it was required to instruct sua sponte, including CALJIC Nos. 2.00 and 2.01 (direct and circumstantial evidence), and CALJIC No. 2.22 (weighing conflicting testimony). He also contends that the court gave an incomplete version of CALJIC No. 2.90 (presumption of innocence), and erroneously failed to delete the irrelevant factors in mitigation from CALJIC No. 8.85. (AOB 193-209.) Thomas's contentions lack merit.

A. Applicable Law

"It is the duty of the trial court to instruct on general principles of law relevant to the issues raised by the facts of the case before it." (*People v. Wiley* (1976) 18 Cal.3d 162, 174.) Where, as here, the trial court instructs the jury at the penalty phase to disregard the instructions previously given in the guilt phase, it must reinstruct the jury with those instructions applicable to the penalty phase. (*People v. Moon* (2005) 37 Cal.4th 1, 37.)

B. CALJIC Nos. 2.00 and 2.01

The trial court has a duty to instruct the jury on the definitions of direct and circumstantial evidence (CALJIC No. 2.00), and the sufficiency of circumstantial evidence (CALJIC No. 2.01) whenever the government's case rests substantially or entirely upon circumstantial evidence. (*People v. Marquez* (1992) 1 Cal.4th 553, 577; *People v. Wiley, supra*, 18 Cal.3d at p. 174.)

Here, the prosecution's case in aggravation presented at the penalty phase consisted of direct evidence. Constance Silvey testified as an eyewitness to the circumstances of her robbery and attempted kidnapping and identified Thomas as one of the suspects. Inspector Wolke testified as an eyewitness to the circumstances of the lineup and his conversations with Silvey. Officer Sherman Bennett testified as an eyewitness to the circumstances in which he found Thomas in possession of a weapon. Timothy McNulty testified as an eyewitness to the circumstances of an attempted robbery and his identification of Thomas as one of the suspects. Cathy Brown testified as an eyewitness to two instances of abuse Thomas perpetrated against her. Mary Young and Ely Gassoway testified to the direct impact that Francia Young's death had on them.

The defense witnesses in mitigation likewise provided direct testimony regarding the circumstances of Thomas's upbringing. Several witnesses testified to their personal observations of abuse. And Dr. Bruce testified to the direct observations of others which formed the basis for his opinion. Accordingly, because neither the government's case in aggravation nor the defense case in mitigation rested substantially or entirely upon circumstantial evidence, the trial court had no sua sponte duty to instruct with CALJIC Nos. 2.00 and 2.01.

Thomas counters that the government's case for the murder of Francia Young and the corresponding special circumstance allegations consisted of circumstantial evidence, as there were no testifying eyewitnesses to the crime.

However, the jury at the guilt phase was instructed with CALJIC Nos. 2.00 and 2.01 on the difference between direct and circumstantial evidence, and returned its verdicts of guilt based upon proper and complete instructions. (60 RT 6212-6214.) That the jury in the penalty phase could consider the facts of the crimes *which it had already found to be true* as a factor in aggravation did not warrant repeated instruction with CALJIC Nos. 2.00 and 2.01.

Ultimately, however, even if the trial court erred by failing to reinstruct with CALJIC Nos. 2.00 and 2.01, no prejudice resulted from the omission. The failure to instruct on an evidentiary principle is generally reviewed under the miscarriage of justice standard, asking whether it is reasonably likely that the jury would have reached a different result had the omitted instruction been given. (See Cal. Const., art. VI, § 13; *People v. Flood* (1998) 18 Cal.4th 470, 487-490; *People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837.)

People v. Carter (2003) 30 Cal.4th 1166, rejected a similar claim of reversible error based upon the trial court's failure to instruct with CALJIC No. 2.00 at the penalty phase. There, the court observed that the defendant had "fail[ed] to suggest how the jury, lacking CALJIC Nos. 2.00 and 3.01, might have misunderstood or misused that evidence. . . . Under the applicable test of a claim that the failure to instruct a sentencing jury deprived a defendant of rights under the Eighth and Fourteenth Amendments to the federal Constitution, [the] defendant fails to demonstrate that the instructions given in his case, to a reasonable likelihood, precluded the sentencing jury from considering any constitutionally relevant mitigating evidence." (*Id.* at p. 1221, accord, *People v. Moon, supra*, 37 Cal.4th at pp. 37-39.) "In short, the penalty phase evidence was entirely straightforward, and the trial court's failure to reinstruct the jury with [CALJIC Nos. 2.00 and 2.01] was harmless under any standard." (*People v. Moon, supra*, at p. 39.)

C. CALJIC No. 2.22

CALJIC No. 2.22 admonishes the jury not to decide an issue by the simple process of counting the number of witnesses who testify on opposing sides, and reminds the jury that ultimately the test is in the convincing force of the evidence, not in the relative number of witnesses. Where there is conflicting testimony concerning material issues of fact, the trial court is required to give CALJIC No. 2.22 sua sponte. (*People v. Cleveland* (2004) 32 Cal.4th 704, 751; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885.)

Thomas identifies two areas of alleged conflicting testimony. First, in the guilt phase trial, William Dials testified that he saw one man (Thomas) standing as a lookout while the other man (Glover) put Francia Young into the car. Thomas, by contrast, told police in a post-arrest statement that he left to retrieve a gun, and when he returned, Glover was closing the trunk of the car (with Francia Young inside). This discrepancy, however, does not invoke the conflicting testimony instruction because Thomas's statement was not given under oath and subject to cross-examination. Moreover, the jury heard Dial's testimony and Thomas's confession in the guilt phase of the trial. The jury was instructed with CALJIC No. 2.22 at the guilt phase (60 RT 6218), and necessarily resolved this discrepancy in assessing Thomas's liability as an aider and abettor to the kidnapping. That the jury in the penalty phase could consider the facts of the crimes *which it had already found to be true* as a factor in aggravation did not warrant repeated instruction with CALJIC No. 2.22.

Thomas's second alleged conflict arises from the testimony of Inspector Wolke and Constance Silvey at the penalty phase. Inspector Wolke testified that he asked Silvey about her lineup identification, and that she told him she initially thought the second person in the lineup was the suspect, but later focused on the seventh person (Thomas). (62 RT 6557-6558.) Silvey testified that she did not recall such a conversation. (61 RT 6496, 6499-6500.) Silvey's

lack of recollection was not in direct conflict with Inspector Wolke's testimony and did not warrant an instruction with CALJIC No. 2.22. The more appropriate instruction, and the one given to the jury at the penalty phase, was CALJIC No. 2.21.1, which read: "Discrepancies in a witness's testimony or between his or her testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance." (66 RT 7076.) Accordingly, the court did not err in omitting CALJIC No. 2.22 from the penalty-phase instructions.

In any event, should this Court find that CALJIC No. 2.22 was warranted by the penalty-phase evidence, the court's failure to instruct was harmless. In *People v. Snead* (1993) 20 Cal.App.4th 1088, 1097, the appellate court found no prejudice from the trial court's failure to instruct with CALJIC No. 2.22 where several other standard instructions provided guidance for the jury in its consideration and evaluation of witness testimony. (*Ibid.*) Here, for example, the trial court instructed the jury at the penalty phase with CALJIC No. 2.11 which informed the jury that neither party was required to call all possible witnesses at trial. (66 RT 7072.) CALJIC No. 2.20 informed the jury that they were "the sole judges of the believability of a witness and the weight to be given the testimony of each witness" and delineated nine factors, including "[t]he ability of the witness to remember" and "[t]he character and quality of that testimony[,]" in determining the believability of a witness. (66 RT 7074; see also 66 RT 7078 [eyewitness identification testimony].) CALJIC No. 2.21.1 informed the jury that discrepancies in the testimony of two witnesses might be the result of innocent misrecollection and did not mean necessarily

that either witness should be discredited. (66 RT 7076.) CALJIC No. 2.21.2 instructed the jury that a witness who is willfully false in a material part of his testimony is to be distrusted in others. (66 RT 7076.) And CALJIC No. 2.13 instructed the jury that evidence that a witness previously made a statement inconsistent with his testimony at trial may be considered both to assess the witness's credibility and as evidence of the truth of the prior statement. (66 RT 7076-7077.)

It is well settled that whether jury instructions are correct is to be determined from all the instructions, not from a consideration of parts of an instruction or from a particular instruction. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) The thrust of CALJIC No. 2.22 is to advise the jury that the jurors must decide an issue of fact based on "the convincing force of the evidence" and not based on the number of witnesses on one side or the other. The essence of this instruction was covered adequately by the witness instructions which were given. As in *Snead,* there was no reasonable likelihood of juror misunderstanding caused by the omission of CALJIC No. 2.22. (*Snead, supra,* 20 Cal.App.4th at p. 1097.)

D. CALJIC No. 2.90

Regarding the uncharged criminal acts proffered in mitigation, the trial court instructed the jury: "Before a juror may consider any criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did, in fact, commit the criminal acts. . . . The burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crime of attempted kidnapping and robbery of Constance Silvey. If, after considering the circumstances of the identification and any other evidence in this case, you have a reasonable doubt whether the defendant was the person who committed the crime, you must give the defendant the benefit of that doubt and find that he did not commit that

crime." (66 RT 7078-7079.) The court further instructed that "Reasonable doubt is defined as follows: [¶] It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they can say they feel an abiding conviction of the truth of the charge." (66 RT 7081.)

Thomas complains that the burden of proof instruction read to the jury did not contain the admonition that "A defendant in a criminal action is presumed to be innocent until the contrary is proved . . ." (CALJIC No. 2.90.) In *Taylor v. Kentucky* (1978) 436 U.S. 478, the high court declared that the principle of a presumption of innocence was basic to the administration of our criminal law and that failure to instruct thereon violated the right to a fair trial. This requirement does not apply to a penalty phase trial, however.

In *People v. Benson, supra,* 52 Cal.3d 754, 810, this Court acknowledged that a defendant ". . . during the penalty phase of a trial is entitled to an instruction to the effect that the jury may consider evidence of other crimes [in aggravation] only when the commission of such other crimes is proved beyond a reasonable doubt. [Citations.]" In that case, the trial court failed to instruct the jury to the effect "that defendant was presumed innocent of the offense until the contrary was proved or that the People bore the burden of proof on the issue." (*Id.* at p. 809.) The omission of such language did not implicate the federal constitution, however. "[T]he special rules governing the consideration of 'other crimes' evidence in aggravation are 'statutorily based' [citation] and 'not constitutionally mandated' [citation]." (*People v. Benson, supra*, 52 Cal.3d at p. 810.) As explained in *Benson*, "the 'requirement' cannot be discerned either within the words of the statute or without. Nor are we persuaded that the United States Constitution requires the instruction in question. We have never

held that the Constitution requires such an instruction—neither, to our knowledge, has any other appellate court in a reported decision. And we decline to so hold now." (*Ibid.*)

As appellant acknowledges, *People v. Prieto* (2003) 30 Cal.4th 226, upheld the analysis of *Benson* despite the high court's later pronouncements in *Ring v. Arizona* (2002) 536 U.S. 584 and *Apprendi v. New Jersey* (2000) 530 U.S. 466.) (*People v. Prieto, supra*, 30 Cal.4th at pp. 262-263.) "Because any finding of aggravating factors during the penalty phase does not 'increase[] the penalty for a crime beyond the prescribed statutory maximum' (*Apprendi, supra*, 530 U.S. at p. 490 [120 S.Ct. at pp. 2362-2363]), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings. Accordingly, our rulings rejecting the need to instruct on the presumption of innocence during the penalty phase still control. (See, e.g., *People v. Benson, supra*, 52 Cal.3d at p. 810.)" (*People v. Prieto, supra*, 30 Cal.4th at p. 263.)

Thomas argues that this Court's analysis in *Prieto* must be reexamined in light of *Cunningham v. California* (2007) 549 U.S. ___, 127 S.Ct. 856, 166 L.Ed.2d 856. This Court has rejected the claim. "The *Cunningham* decision involves merely an extension of the *Apprendi* and *Blakely* analyses to California's determinate sentencing law and has no apparent application to the state's capital sentencing scheme. In *Apprendi, supra*, 530 U.S. 466, 120 S.Ct. 2348, the high court 'found a constitutional requirement that any fact, other than a prior conviction, which increases the maximum penalty for a crime must be formally charged, submitted to the fact finder, treated as a criminal element and proved beyond a reasonable doubt. [Citation.] But under the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of

parole.' [Citation.]" (*People v. Prince* (2007) 40 Cal.4th 1179, 1297-1298.) Accordingly, this Court found "no basis to conclude that [*Cunningham*] should cause us to alter our views." (*Id.* at p. 1298; accord, *People v. Carey* (2007) 41 Cal.4th 109, 136, fn. 6.)

Absent any constitutional mandate, the statutory requirement of proof beyond a reasonable doubt for uncharged crimes submitted in aggravation is satisfied by defining the concept of reasonable doubt for the jury. "That standard provides whatever substance is possessed by the presumption of the defendant's innocence and the imposition on the People of the burden of proof. The jury was effectively instructed on the reasonable-doubt standard. No more was required here." (*People v. Benson, supra,* 52 Cal.3d at p. 810.)

E. CALJIC No. 8.85

Thomas faults the trial court for failing, upon request (66 RT 6954), to delete inapplicable factors in mitigation from CALJIC No. 8.85. Specifically, defense identified factor (e), "Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act," and factor (f), "Whether the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct." (66 RT 6954, 7086.)

This Court has "repeatedly rejected the claim. 'Sentencing discretion is best guided where the jury is fully apprised of the factors which the state deems relevant to the penalty determination. The jury is entitled to know that defendant's crimes lack certain characteristics which might justify more lenient treatment than other offenses in the same general class. [Citations.] The jury itself decides which of the listed factors apply in the particular case. [Citation.]' (*People v. Whitt* (1990) 51 Cal.3d 620, 653.)" (*People v. Webb* (1993) 6 Cal.4th 494, 532-533, parallel citation omitted.)

XVI.

THOMAS IS NOT ENTITLED TO REVERSAL OF THE PENALTY-PHASE VERDICT BASED ON THE CUMULATIVE EFFECT OF THE ALLEGED ERRORS

Thomas contends that the cumulative effect of the errors he has alleged in the penalty phase was so prejudicial that the penalty verdict must be set aside. (AOB 210.) We disagree. As demonstrated above, Thomas's trial was nearly free of error, and to the extent error was committed, it was harmless. Thomas's claim of cumulative error lacks merit. (*People v. Carter, supra*, 36 Cal.4th at p. 1281.)

XVII.

THE TRIAL COURT PROPERLY DENIED THE MOTION TO MODIFY THE VERDICT

Thomas contends that the trial court erred by denying his motion to modify the death verdict. He accuses the trial court of failing to reweigh the aggravating and mitigating circumstances as required by statute, and of dismissing outright the defense case in mitigation because it was not a "causal" factor in the commission of the crimes. (AOB 211-215.) His challenges are meritless.

A. Proceedings Below

Following the jury's penalty verdict, Thomas filed a motion to modify the verdict of death. (14 CT 4155.) The trial court conducted a hearing on the motion and denied it. (67 RT 7124-7138.) The court set forth its reasoning on the record as follows:

> The Court also has to review and take into account the automatic application for modification of the death verdict as returned by the jury.

In that regard, in this case the defendant was convicted by a jury verdict of a felony as alleged in Count One of the Information, to wit, murder, a violation of section 187 of the Penal Code, in that on or about the 8th day of December, 1992, he murdered Francia Young.

The jury further fixed the degree of murder as that of the first degree.

The jury further found that in and during the commission and attempted commission of the offense that the defendant was armed with a firearm, to wit, handgun.

The jury further found that the First Special circumstance as alleged, that is that the defendant, Keith Tyson Thomas, was engaged in or was an accomplice in the commission, attempted commission, and the flight thereafter of a felony, to wit, robbery, in violation of section 211 of the Penal Code, killed Francia Young, was true.

The jury further found that the Second Special Circumstance as alleged, that the defendant, Keith Tyson Thomas, was engaged in or was an accomplice in the commission, the attempted commission, and the flight thereafter of a felony, to wit, kidnapping for the purpose of committing robbery in violation of section 209 of the Penal Code killed Francia Young, was true.

The jury further found that the Third Special Circumstance as alleged, that the defendant, Keith Tyson Thomas, was engaged in or was an accomplice in the commission, the attempted commission, and the flight thereafter of a felony, to wit, rape, in violation of section 261 of the Penal Code, killed Francia C. Young, was true.

The jury further found that the Fourth Special Circumstance as alleged, that the defendant, Keith Tyson Thomas, was engaged in or was an accomplice in the commission, the attempted commission, and the flight thereafter of a felony, to wit, unlawful sodomy in violation of section 286 of the Penal Code, killed Francia C. Young, was true.

The jury rendered the above verdicts on September 29th, 1997.

Thereafter, on October 6th, 1997, the penalty phase of the trial was begun before the same jury, and on October 22nd, 1997, the jury returned the following verdict:

"People of the State of California versus Keith Tyson Thomas, number 118686B:

"We, the jury in the above entitled cause, fix the penalty at death.

"Dated October 22nd, 1997.

"Signed by Foreperson Juror Number 12."

The statutes of the State of California under which this case was tried provide that the defendant shall be deemed to have made an application for modification of said verdict. Penal Code section 190.4(a) provides that in every case in which the trier of fact has returned a verdict imposing the death penalty, the defendant is deemed to have made an application for the modification of the verdict under Penal Code section 1181.7.

In conducting a hearing as to Penal Code section 190.4(e), the Court must review the evidence presented, take into account and be guided by the aggravating and mitigating circumstances referred to in section 190.3 of the Penal Code, and make a determination as to whether the jury's finding that the aggravating circumstances are so substantial when compared to the mitigating circumstances is contrary to the law or to the evidence presented.

It is the law of the state that the trial judge is required to make an independent determination whether imposition of the death penalty upon the defendant is appropriate in light of the relevant evidence and the applicable law. The trial judge has the duty to review the evidence to determine whether in his independent judgment the weight of the evidence supports the jury verdict. If he decides that it does not, the Court has the power to reduce the penalty to life in prison without the possibility of parole.

In determining whether in his independent judgment the weight of the evidence supports the verdict, the judge is required to assess the credibility of the witnesses, determine the probative force of the evidence, and to weigh the evidence. Further, the law requires that the Court will set forth its reasons for its rulings on the application and direct that they be entered into the Court's minutes.

In this case, the Court has reviewed the presence or absence of each aggravating and mitigating circumstance listed in Penal Code section 190.3 and specifically agrees that the jury's finding that the circumstances in aggravation are so substantial when compared to the circumstances in mitigation is supported by the weight of the evidence.

Further, the Court finds that the evidence supports the truth of the special circumstances, to wit, that the murder of Francia C. Young occurred while the defendant was engaged in the commission or attempted commission of a robbery, rape, sodomy, and kidnapping is overwhelming and proven beyond a reasonable doubt and that the jury's

assessment that the evidence in aggravation is so substantial when compared to the evidence in mitigation so as to support the selection of the death penalty as the appropriate penalty is overwhelmingly supported by the weight of the evidence.

In terms of credibility, the Court agrees with the jury that the witnesses for the People were credible and believable.

Section 190.4 direct the judge to state on the record its reasons for its findings and its reasons for its rulings on this application and direct that they be entered into the Court's minutes.

The Court in this case has examined and reviewed all the evidence that was presented to the jury both in the guilt phase and in the penalty phase. And in making its determination as to the appropriate penalty, the Court has examined all the exhibits submitted into evidence, reviewed the daily transcripts of the proceedings, both in the guilt phase and penalty phases, the special circumstance issue, and the question of aggravating and mitigating circumstances concerning the selection of the appropriate penalty. The Court has also reviewed its own personal notes relating to the evidence received after both the guilt and penalty phases of the trial.

From the evidence submitted at the guilt phase of the trial, the Court is satisfied beyond a reasonable doubt that the said defendant, Keith Tyson Thomas, is guilty of murder of the first degree as alleged in Count One of the Information and, two, that the four special circumstances alleged therein are true beyond a reasonable doubt.

The Court has reviewed and independently taken into account and is guided by the following factors in aggravation and mitigation:

The Court has reviewed the circumstances of the crimes for which the defendant has been convicted and the existence of the special circumstances found to have been true by the jury, and the Court independently finds and agrees with the jury that the circumstances surrounding the first-degree murder of Francia C. Young were particularly cruel, savage, and cold blooded.

The Court further independently finds and agrees with the jury that there is no question that the first-degree murder of Francia C. Young was committed during the commission or attempted commission of the special circumstances found to have been true by the jury.

The Court further independently finds and agrees with the jury that the evidence presented with respect to other crimes of violence or threats

of violence involving civilians has been proven beyond a reasonable doubt.

The Court has further examined the evidence offered in the penalty phase by the defendant and independently finds that there were no circumstances presented which extenuate the gravity of the crime, whether or not it be a legal excuse.

The Court has reviewed and taken into consideration the fact that the defendant was a product of a broken home, was raised in a dysfunctional family, suffered corporal punishment during his formative years, was raised by a mother who suffered from drug abuse and may have suffered an unhappy childhood. However, the Court does not find independently that the circumstances extenuate the seriousness and gravity of the crime.

The Court further independently finds that the defendant's background and upbringing is not a moral justification or an extenuating factor for his conduct.

The Court finds that at the time of the offense, the defendant was not in any way impaired as a result of mental defect or the effects of intoxication.

The Court has also taken into consideration the age of the defendant at the time of the crimes and finds that this is not a mitigating factor.

The Court has further taken into consideration any other circumstances which could extenuate the gravity of the crime, even though it's not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character that the defendant offered as a basis for a sentence less than death, whether or not it is related to the offense for which he is now on trial, and finds that there are none which extenuates the gravity of the crime or mitigates the offenses accordingly and by independent review.

The Court further finds that in evaluating the evidence in the penalty phase, in addition to the circumstances of the crime for which the defendant was convicted, and considering the existence of special circumstances found to be true, and in consideration of the evidence offered by the defense in mitigation, that there are no factors in mitigating which would extenuate or mitigate the gravity and seriousness of the crimes committed.

Considering all of the evidence and by independent review, the Court's assessment is that the factors in aggravation are so substantial

when compared to the factors in mitigation that death is warranted and not life without possibility of parole.

Therefore, for the reasons stated, the automatic motion for said modification for a verdict of death is denied.

(67 RT 7131-7138.)

B. Discussion

In *People v. Steele* (2002) 27 Cal.4th 1230, this Court explained the trial court's duty in ruling on a motion to modify the death verdict as follows:

> Section 190.4 provides for an automatic motion to modify the death verdict. In ruling on the motion, the trial court must independently reweigh the evidence of aggravating and mitigating factors presented at trial and determine whether, in its independent judgment, the evidence supports the death verdict. The court must state the reasons for its ruling on the record. On appeal, we independently review the trial court's ruling after reviewing the record, but we do not determine the penalty de novo.

(*Id.* at p. 1267.)

Thomas argues that the trial court misunderstood its legal duty. He maintains that by focusing on whether the factors in mitigation "extenuated" the gravity of the crimes, the court essentially dismissed the case in mitigation because it did not have a "nexus" to the murder. This claim is specious. Section 190.3, subdivision (k), specifically provides that the factfinder may consider "Any other circumstance which *extenuates* the gravity of the crime even though it is not a legal excuse for the crime." (Emphasis added.) The trial court's comments precisely tracked this statutory language.

Moreover, other statements by the trial court amply demonstrated that it understood its legal duty to reassess the weight of the evidence, including the defense case in mitigation, in determining whether the death judgment was appropriate. Thus, the court observed that its duty was to "review the evidence presented, take into account and be guided by the aggravating and mitigating

circumstances referred to in section 190.3 of the Penal Code, and make a determination as to whether the jury's finding that the aggravating circumstances are so substantial when compared to the mitigating circumstances is contrary to law or to the evidence presented." (67 RT 7133-7134.) The trial court acknowledged its duty to "make an independent determination whether imposition of the death penalty upon the defendant is appropriate in light of the relevant evidence and the applicable law." (67 RT 7134.) And the court specifically indicated that it took into consideration "the fact that the defendant was the product of a broken home, was raised in a dysfunctional family, suffered corporal punishment during his formative years, was raised by a mother who suffered from drug abuse and may have suffered an unhappy childhood." (67 RT 7137.) This record belies Thomas's contention that the trial court failed to consider the case in mitigation in assessing the propriety of the death judgment.

In *People v. Smith, supra*, 30 Cal.4th at p. 640, this Court rejected the defendant's attempt to show legal error in the motion to modify the verdict based upon a selective reading of isolated phrases of the court's decision. "In this case, the court's preliminary remarks show that it understood this duty precisely. The court also stated detailed reasons for denying the motion. . . . [¶] 'In short, the court carefully and conscientiously performed its duty under section 190.4.'" (*Id.* at p. 640, internal citation omitted.)

The same is true here. The trial court's comments, viewed in context, showed that it understood its obligation to reweigh the evidence of aggravating and mitigating factors and determine whether, in its independent judgment, the evidence supports a sentence of death rather than life imprisonment. The court concluded that the evidence supported the death verdict and stated the reasons for its conclusion. "[T]he court's discussion as a whole made clear it did apply the correct test." (*People v. Smith, supra*, 30 Cal.4th at p. 640.)

Thomas also faults the trial court for concluding that his age at the time of the crimes was not a factor in mitigation. He asserts, "This finding was simply wrong. Youth is indeed a mitigating circumstance." (AOB 214-215, citing *Johnson v. Texas* (1993) 509 U.S. 350.) On the contrary, this Court has observed that "Chronological age . . . is neither aggravating nor mitigating, 'but is used in the statute "as a metonym for any age-related matter suggested by the evidence or by common experience . . . ."' [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 190.) Here, the court's comment suggests that it found Thomas, at age 19, to be old enough to appreciate the wrongfulness of his conduct. Such a factor "is a permissible age-related inference." (*Ibid.*)

A review of the record shows that the trial court carefully and conscientiously reweighed the evidence of aggravating and mitigating factors presented at trial and applied the correct legal standard in upholding the death judgment.

XVIII.

PENAL CODE SECTION 190.2 ADEQUATELY NARROWS THE CLASS OF DEATH-ELIGIBLE OFFENDERS

Thomas argues that the use of the death penalty as regular punishment for a substantial number of crimes amounts to cruel and unusual punishment under the Eighth Amendment. He maintains that section 190.2 fails to narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (AOB 218-219.) This Court has repeatedly rejected the claim, holding unequivocally that "[t]he death penalty law adequately narrows the class of death-eligible offenders." (*People v. Brown* (2004) 33 Cal.4th 382, 401; accord, *People v. Prieto, supra,* 30 Cal.4th 226, 276; *People v. Sakarias* (2000) 22 Cal.4th 596, 632.)

XIX.

PENAL CODE SECTION 190.3, SUBDIVISION (A) IS NOT ARBITRARY AND CAPRICIOUS

Thomas argues that section 190.3, subdivision (a) is arbitrary and capricious in that it allows extraordinarily disparate use of the "circumstances of the crime" factor to impose death sentences a wide variety of cases. (AOB 220-222.) Not so.

"Consideration of the circumstances of the crime under section 190.3 factor (a) does not result in arbitrary or capricious imposition of the death penalty." (*People v. Brown, supra,* 33 Cal.4th at p. 401; *People v. Prieto, supra,* 30 Cal.4th 226, 276; see *Tuilaepa v. California* (1994) 512 U.S. 967, 979-980.) "Defendant's argument that a seemingly inconsistent range of circumstances can be culled from death penalty decisions proves too much. What this reflects is that each case is judged on its facts, each defendant on the particulars of his offense. Contrary to defendant's position, a statutory scheme would violate constitutional limits if it did not allow such individualized assessment of the crimes but instead mandated death in specified circumstances." (*People v. Brown, supra*, 33 Cal.4th at p. 401, citing *Lockett v. Ohio, supra*, 438 U.S. at pp. 602-606.)

XX.

CALIFORNIA'S DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL FOR FAILING TO REQUIRE A UNANIMOUS JURY FINDING BEYOND A REASONABLE DOUBT OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH

Thomas raises several challenges to California's death penalty scheme under the Sixth, Eighth, and Fourteenth Amendments which have been presented to and rejected by this Court in previous cases. Among them are that the statute is unconstitutional for (1) failure to require juror unanimity and proof beyond

a reasonable doubt of the aggravating factors used to impose death; (2) failure to require proof beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors; (3) failure to require written findings regarding factors in aggravation; (4) failure to require intercase proportionality review; (5) allowing use of uncharged criminal activity as a circumstance in aggravation under section 190.3, subdivision (b); (6) using impermissibly restrictive adjectives such as "extreme" and "substantial" in the description of mitigating factors; and (7) failure to affirmatively identify factors (d), (e), (f), (g), (h), and (j) as factors in mitigation. (AOB 223-244.)

This Court has repeatedly rejected the foregoing challenges (and others) to California's death penalty statute.

(1) The jury is not required to find the aggravating factors (except for other crimes under section 190.3, subdivision (b))[27] true beyond a reasonable doubt, or to find that aggravating factors outweigh mitigating factors beyond a reasonable doubt. (*People v. Cox*, *supra*, 30 Cal.4th at p. 971.) The United States Supreme Court decisions in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466 and *Ring v. Arizona, supra,* 536 U.S. 584, do not alter this conclusion:

> [D]efendant argues that *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] mandates that aggravating circumstances necessary for the jury's imposition of the death penalty be found beyond a reasonable doubt. We reject that argument for the reason given in *People v. Anderson*, *supra*, 25 Cal.4th at pages 589-590, footnote 14: "[U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death *is* no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without possibility of parole. (§ 190.2 subd. (a).) Hence, facts which bear upon, but do not

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27. In this case the trial court indeed instructed the jury that it must find the other crime evidence admitted in the penalty phase true beyond a reasonable doubt before it could consider such evidence in aggravation. (CALJIC No. 8.87; 66 RT 7078-7079, 7081.)

> necessarily determine, which of these two alternative penalties is appropriate do not come within the holding of *Apprendi*." The high court's recent decision in *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] does not change this analysis. Under the Arizona capital sentencing scheme invalidated in *Ring*, a defendant convicted of first degree murder could be sentenced to death if, and only if, the trial court first found at least one of the enumerated aggravating factors true. (*Id.* at p. 603 [122 S.Ct. at p. 2440].) Under California's scheme, in contrast, each juror must believe the circumstances in aggravation substantially outweigh those in mitigation, but the jury as a whole need not find any one aggravating factor to exist. The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another. Nothing in *Apprendi* or *Ring* suggests the sentencer in such a system constitutionally must find any aggravating factor true beyond a reasonable doubt.

(*People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32, original emphasis; accord, *People v. Cox, supra*, 30 Cal.4th at p. 971; *People v. Martinez* (2003) 31 Cal.4th 673, 700-701 ["We see nothing in *Apprendi* that would require specific findings regarding the truth of the aggravating circumstances, their relative weight, or the appropriateness of a death penalty"]; *People v. Nakahara* (2003) 30 Cal.4th 705, 721-722 [*Apprendi* and *Ring* "have no application to the penalty procedures of this state"]; *People v. Smith*, *supra*, 30 Cal.4th at p. 642 [*Ring* and *Apprendi* "do not affect California's death penalty law"]; *People v. Prieto, supra,* 30 Cal.4th at p. 272 ["*Ring* does not apply to California's penalty phase proceedings"].)

Thomas argues that this Court's analysis must be reexamined in light of *Cunningham v. California*, *supra*, 549 U.S. ___, 127 S.Ct. 856, 166 L.Ed.2d 856. This Court has already rejected the claim. "The *Cunningham* decision involves merely an extension of the *Apprendi* and *Blakely* analyses to California's determinate sentencing law and has no apparent application to the state's capital sentencing scheme." (*People v. Prince, supra*, 40 Cal.4th 1179, 1297-1298.) Accordingly, this Court found "no basis to conclude that

[*Cunningham*] should cause us to alter our views." (*Id.* at p. 1298; accord, *People v. Carey, supra,* 41 Cal.4th 109, 136, fn. 6.)

(2) The jury is not required to unanimously agree on aggravating circumstances or to make written findings in support of its penalty verdict. (*People v. Martinez, supra,* 31 Cal.4th at p. 700, and cases cited therein.) The United States Supreme Court decisions in *Apprendi* and *Ring* do not alter this conclusion either. "Failure to require written findings [or] unanimity as to aggravating circumstances . . . does not invalidate the death penalty." (*People v. Smith, supra,* 30 Cal.4th at pp. 641-642.) Neither *Ring v. Arizona* nor *Apprendi v. New Jersey* affects California's death penalty law. (*Ibid.*; accord, *People v. Prieto, supra,* 30 Cal.4th at p. 272 ["*Ring* does not apply to California's penalty phase proceedings"]; *People v. Navarette* (2003) 30 Cal.4th 458, 520-521.)

(3) The statute is not constitutionally defective for failing to require intercase proportionality review. (*People v. Prieto, supra,* at p. 276; *People v. Farnam* (2002) 28 Cal.4th 107, 193; *People v. Crittenden* (1994) 9 Cal.4th 83, 156-157.)

(4) Allowing the jury to consider uncharged criminal conduct as a circumstance in aggravation under factor (b) does not violate the defendant's rights of due process, fair trial, and a reliable penalty determination guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*People v. Morrison* (2004) 34 Cal.4th 698, 729; *People v. Anderson* (2001) 25 Cal.4th 543, 584; *People v. Jenkins* (2000) 22 Cal.4th 900, 1054; *People v. Barnett, supra,* 17 Cal.4th 1044, 1178; *People v. Samayoa, supra,* 15 Cal.4th 795, 863; *People v. Cain, supra,* 10 Cal.4th at pp. 69-70; *People v. Medina* (1990) 51 Cal.3d 870, 906-907; *People v. Balderas* (1985) 41 Cal.3d 144, 204-205.)

(5) "Use in the sentencing factors of such adjectives as "extreme" (factors (d), (g)) and "substantial" (factor (g)) does not act as a barrier to the

consideration of mitigating evidence in violation of the federal Constitution." (*People v. Morrison, supra*, 34 Cal.4th at pp. 729-730; accord, *People v. Hughes, supra*, 27 Cal.4th at pp. 404-405; *People v. Catlin, supra,* 26 Cal.4th at p. 174; *People v. Mendoza, supra*, 24 Cal.4th at p. 190.)

(6) The trial court was not constitutionally required to inform the jury that sentencing factors (d), (e), (f), (g), (h), and (j) were relevant only in mitigation. (*People v. Morrison, supra*, 34 Cal.4th at p. 730.) Indeed, "no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors." (*People v. Arias, supra,* 13 Cal.4th at p. 188.)

Thomas can do no more than request that this Court reconsider its prior holdings. It need not do so; the challenges should again fail.

XXI.

CALIFORNIA'S DEATH PENALTY LAW DOES NOT VIOLATE EQUAL PROTECTION BY UTILIZING DIFFERENT PROCEDURES THAN THOSE AFFORDED UNDER THE DETERMINATE SENTENCING SCHEME

Thomas contends that the capital sentencing scheme denies him equal protection of the laws because it utilizes different procedures than those provided for under the determinate sentencing scheme. (AOB 245-247.)

Contrary to Thomas's argument, death-eligible murder classifications are not subject to strict scrutiny under the equal protection clause. (*People v. Ward* (2005) 36 Cal.4th 186, 217-218.) Nor is Thomas similarly situated to those people who have been convicted of noncapital crimes. (*Ibid.*) Thus, his equal protection claim fails at the threshold. (*In re Eric J.* (1979) 25 Cal.3d 522, 530 ["The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner"].)

In any event, "the fixing of penalties for a crime is a legislative function [citations], and [this Court] will not nullify the legislative judgment as to the appropriate penalties for the heinous crime of first degree murder. It is for the Legislature and not this court to decide whether it is sound public policy to empower the imposing of the death penalty. [Citation.]" (*In re Anderson* (1968) 69 Cal.2d 613, 632.) This Court consistently has rejected the claim that the procedural protections afforded under the determinate sentencing scheme must extend to capital sentencing. (*People v. Jenkins, supra*, 22 Cal.4th at p. 1053; *People v. Arias, supra*, 13 Cal.3d at pp. 192-193; *People v. Marshall, supra*, 50 Cal.3d at p. 945; *People v. Lang* (1989) 49 Cal.3d 991, 1043; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) As this Court observed in *Allen*, "[b]earing in mind the fundamental liberty interests implicated by such a classification, the Legislature could properly conclude that th[e] statutory scheme, fashioned for use under the DSL, is entirely unsuited to the separate premises on which capital sentencing proceeds." (42 Cal.3d at p. 1286.) Thus, for example, "under the DSL, [the] range [of sentences] may be broad, because it can be affected by consecutive sentencing and by various statutory enhancements, employed in different ways by different judges. By contrast, when one stands convicted of first degree murder with one or more special circumstances, the 'range' of possible punishments narrows to death or life without parole. The defendant becomes eligible for the law's two most severe penalties and for no others. By definition, therefore, either is within the 'normal range' of expected sentences for offenses such as those the death-eligible defendant has committed. . . . Under these circumstances, the Legislature could properly conclude that superficial factual similarities among capital cases with opposite sentencing results establish no presumption that the cases in which the more severe sentence was imposed are 'disparate.'" (*Id.* at p. 1287.)

Because there are legitimate reasons to distinguish between capital

sentencing and determinate sentencing, Thomas has failed to demonstrate an equal protection violation.

XXII.

THOMAS'S DEATH SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW

Thomas contends that his death sentence violates the Universal Declaration of Human Rights adopted by the United Nations in 1948. (AOB 248-251.) This Court has previously rejected an international law claim directed at the death penalty in California. "Although the Untied States is a signatory [of the ICCPR], it signed the treaty on the express condition '[t]hat the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.' [Citations.]" (*People v. Brown, supra*, 33 Cal.4th at pp. 403-404.) Moreover, "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) "International law does not compel the elimination of capital punishment in California." (*People v. Snow, supra*, 30 Cal.4th 43, 127; accord, *People v. Jenkins, supra*, 22 Cal.4th 900, 1055; *People v. Ghent* (1987) 43 Cal.3d 739, 779.)

Thomas's final assignment of error, like all of the previous contentions, fails.

CONCLUSION

Accordingly, respondent respectfully requests that this Court affirm the guilt and special circumstance verdicts, and the judgment of death, in their entirety.

Dated: January 10, 2008

Respectfully submitted,

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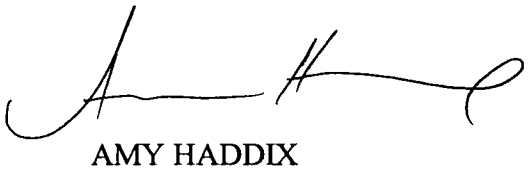

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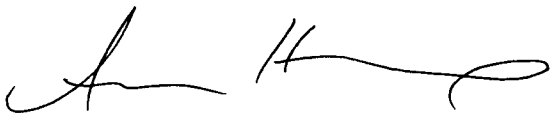
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 53861 words.

Dated: January 10, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California



AMY HADDIX
Deputy Attorney General

Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Keith Tyson Thomas**

No.: **S067519**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 10, 2008, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

David Joseph Macher
Attorney at Law
P.M.B. 298
40485 Murrieta Hot Springs Road, Suite B-4
Murrieta, CA 92563

County of Alameda
Rene C. Davidson Courthouse
Superior Court of California
1225 Fallon Street
Oakland, CA 94612-4293

Hon. Thomas Orloff
District Attorney
Alameda County District Attorney's Office
1225 Fallon Street, Room 900
Oakland, CA 94612-4203

Mike Lasher
Attorney at Law
California Appellate Project (SF)
101 Second Street, Ste. 600
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January ~~10,~~ 2008, at San Francisco, California.

Pearl Lim
Declarant

Signature

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