In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff & Respondent,* *v.* **GERALD PARKER,** *Defendant & Appellant.*

CAPITAL CASE

Case No. S076169

Orange County Superior Court Case No. 96ZF0039
The Honorable FRANCISCO P. BRISENO, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

In 1978 and 1979, Appellant Gerald Parker was a staff sergeant in the Marine Corps stationed in Orange County. He entered six apartments in three different Orange County cities (Anaheim, Costa Mesa, and Tustin) in order to rape and brutally attack the lone female occupants. Five of his victims died from the massive injuries to their heads from being struck in the head with a blunt object with such tremendous force that their skulls fractured. The one woman to survive his brutal attack was nine months' pregnant when Parker struck her in the head with a blunt object before raping her. Her baby died as a result of Parker's attack.

Parker's crimes went unsolved until 1996 when DNA testing connected homicides in three different cities to each other, and then to Parker. When confronted with the DNA and fingerprint evidence, Parker admitted burglarizing all six homes, recalling details of the crimes and his victims nearly two decades after his crimes. At trial, Parker did not contest his identity as the assailant of all six women, which was unsurprising given that he was connected to five of the six victims because his DNA profile matched DNA recovered from his victims' bodies; his fingerprint was on the window used to gain entry to one apartment, and his palm print was on the ceramic tile of the window sill inside the bathroom where he gained entry to another apartment; and his statements to police connected him to all six homicides. In the guilt phase, Parker relied on his statements to police to claim he lacked the requisite specific intent to commit the crimes due to voluntary intoxication.

In the penalty phase, pursuant to Penal Code section 190.3, subdivision (a), the prosecution relied on the facts and circumstances surrounding Parker's six capital murders, including the impact of the murders on the victims' families. The prosecution also introduced evidence in aggravation pursuant to Penal Code section 190.3, subdivision (b),

regarding the facts and circumstances of uncharged violent criminal acts which included Parker's: (1) vicious assault and rape of a woman home alone in her Costa Mesa apartment in 1979[1]; (2) brutal assault upon a woman he robbed in a parking structure in Pasadena in 1979; (3) rape of a 13-year-old girl he grabbed off a sidewalk as she was walking home from the store in 1980 in Tustin; and (4) assault upon his roommate in a Tehachapi correctional facility in 1984.

Parker's appeal includes claims that the trial court erred in finding Parker failed to establish a prima facie case of improper race-based peremptory challenges by the prosecutor, in excluding his incriminating statements to police and in refusing to instruct on unconsciousness as a complete defense to his crimes. He also contends his death judgment must be reversed because he was denied a fair penalty determination based on admission of victim-impact evidence and restriction on closing argument regarding his lack of future dangerousness. He also challenges the constitutionality of California's death penalty statute and model jury instructions regarding the jury's penalty determination. Parker's claims are meritless. He received a fair trial and his death sentence is richly deserved.

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[1] By the time Parker was tied to the series of rapes and murders in Orange County in 1996, the statute of limitation had expired regarding Parker bludgeoning and raping Jane P. in her Costa Mesa apartment on July 19, 1979. (See Pen. Code, § 800.) Parker's attack on Jane P. occurred 14 weeks after Parker raped and murdered Kimberly Rawlins in her Costa Mesa apartment, and less than eight weeks before his attack on Marolyn Carleton in her Costa Mesa apartment was interupted by her nine-year-old son. (See 7 RT 1317-1319, 1406-1409; 9 CT 2623-2624, 2633-2634.)

STATEMENT OF THE CASE

On September 8, 1998, the District Attorney of Orange County filed an amended indictment charging Appellant Gerald Parker in count 1 with the murder of Sandra Kay Fry, in count 2 with the murder of Kimberly Gaye Rawlins, in count 3 with the murder of Marolyn Kay Carleton, in count 4 with the murder of Chantal Marie Green, in count 5 with the murder of Debora Kennedy, and in count 6 with the murder of Debra Lynn Senior. It was further alleged that the murders were committed under special circumstances, to wit, multiple murder and during the attempted commission or commission of the crimes of rape and burglary within the meaning of Penal Code section 190.2, subdivisions (a)(3) and (a)(17)(C) and (G). It was also alleged that each murder was a serious felony within the meaning of Penal Code section 1192.7, subdivision (c)(1). The information further alleged that Parker had served a prison term following his conviction in Orange County Superior Court on May 13, 1980, for forcible rape in violation of Penal Code section 261.3, and did not remain free of prison custody during the five years subsequent to serving his prison term within the meaning of Penal Code section 667, subdivision (a). Additionally, it was alleged that Parker served a prison term following his conviction in Los Angeles County on October 2, 1980, for robbery with great bodily injury within the meaning of Penal Code sections 211 and 12022.7, and did not remain free of prison custody during the five years subsequent to serving his prison term within the meaning of Penal Code section 667, subdivision (a). (1 RT 2, 34-35, 37-38; 3 RT 449-450, 512-513; 7 RT 1224-1228; 2 CT 534-537; 3 CT 849-852, 861-864; 8 CT 2325.)

Parker's trial by jury began on September 9, 1998. (4 RT 552; 8 CT 2357.) On October 20, 1998, the jury found Parker guilty of first degree murder on all counts, and each special circumstance allegation was found true. (9 RT 1968-1975; 10 CT 2963-2981, 3012-3032.) On November 2,

1998, the penalty phase commenced. (10 RT 2061; 10 CT 3165.) On November 12, 1998, the jury found the appropriate penalty to be death.[2] (12 RT 2618-2620; 12 CT 3739, 3743-3744.)

On January 21, 1999, Parker's motions for a new trial and to modify the jury's penalty verdict were heard and denied. (12 RT 2632-2638; 12 CT 3762-3769, 3861-3862.) Parker was then sentenced to death for the six murders committed with special circumstances. A $10,000 restitution fine was imposed and Parker was awarded a custodial credit of 946 days. (12 RT 2639-2659; 12 CT 3862-3863.)

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution's Guilt Phase Evidence

In 1978, Appellant Gerald Parker was based at the Marine Corps Station located in the City of Tustin in Orange County. (9 CT 2556.) Parker lived on base for about six months before he moved out of military housing into an apartment. (9 CT 2552.) In late 1979, Parker was stationed at El Toro Marine base in Orange County. (9 CT 2569.) During 1978 and 1979, Parker would go into Orange County neighborhoods, park his car and then look in windows to see if there were any females home alone. (8 CT 2443; 9 CT 2653-2653.) Parker did not commit as many crimes in Anaheim because it was a larger city and was "more lit up at night" whereas the cities of Tustin and Costa Mesa were fairly quiet communities for him to "walk up and down the streets." (9 CT 2667.) As far as victims,

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[2] Trial on the prior conviction allegations was bifurcated from the substantive charges and allegations. (3 RT 464-465.) The prosecutor moved to dismiss the prior conviction allegations after the jury returned a verdict of death. (12 RT 2622-2623; 12 CT 3744.)

Parker explained "[a]nyone would do," as he gave no thought to the size, shape, ethnicity, or nationality of his victims. (8 CT 2444.)

a. Sandra Kay Fry (Count 1)

At the end of November 1978, 17-year-old Sandra Kay Fry moved into Apartment H2 located at 704 South Knott, in the City of Anaheim in Orange County. (7 RT 1272-1273, 8 RT 1753.) She shared a two bedroom apartment with Georgena Stevenson.[3] (7 RT 1272.) On December 1, 1978, Ms. Fry was alone in the apartment. (7 RT 1273.) That evening Parker was driving his car when he noticed an apartment complex near Buena Park. (8 CT 2444-2445.) He decided to approach the apartments using a narrow road behind the complex. (8 CT 2244-2245.) He parked his car and climbed a chain length fence and entered the complex at the back where the garages were located. (8 CT 2445-2446.) Parker passed three or four apartments that had their shades drawn or the lights out before he got to Ms. Fry's apartment – the first apartment that he was able to see inside. (8 CT 2445, 2447.) Parker looked into Ms. Fry's apartment through the window of the bedroom belonging to her roommate. The screen was already off the window and lying up against the apartment when Parker looked through the window. (7 RT 1263-1264, 1268-1270; 8 CT 2447-2448.) The window was unlocked and opened about a quarter of an inch. Parker looked in the bedroom for about a minute before going around and looking through the living room window. (8 CT 2448.) Parker could hear music playing through the open window. (8 CT 2449.) He saw a woman sitting at the table in the kitchen area with her back to the window. She was petite. Parker guessed she was about five feet or five feet six inches

[3] When Ms. Fry's roommate, Georgena Hurley, testified at trial, she used the surname Stevenson. (7 RT 1272.)

tall, and weighed about 118 pounds.[4] He watched her for about a minute through the living room window. (8 CT 2450.)

Parker walked back to the open bedroom window and climbed inside carrying a two-by-four piece of wood. (7 RT 1263-1264, 1268-1270; 8 CT 2451-2452.) Parker walked out of the bedroom and into the living room and stood by the stereo. (8 CT 2452-2453.) Ms. Fry was talking on the telephone. (8 CT 2450.) Parker stood about five feet away from Ms. Fry watching her for between two to five minutes, waiting for her to hang up the telephone. (8 CT 2453.) Ms. Fry hung up the telephone and remained seated at the table in the kitchen area with her back to Parker. He waited a minute or two after she had hung up the telephone before approaching her. He then struck her in the face before striking her in the head. When Parker hit Ms. Fry in the head, he wanted to rape her. (8 CT 2454.) Parker hit her more than once with the two-by-four. (8 CT 2455-2456.) Taking the two-by-four with him, he placed his hands around Ms. Fry's breasts and dragged her into her bedroom.[5] (7 RT 1263-1264, 1268-1270; 8 CT 2456, 2460.)

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[4] At the time Parker attacked her, Ms. Fry was 5 feet, 5 inches tall and weighed 120 pounds. (8 CT 1753.)

[5] Parker subsequently told investigators that no words were spoken to Ms. Fry because he rendered Ms. Fry unconscious immediately by a blow to the back of her head while she was seated at the kitchen table before she was even aware he was inside her apartment, and then dragged her unconscious into her bedroom. (8 CT 2454-2456.) Parker's statements regarding Ms. Fry being unaware of his presence until she was rendered unconscious by a blow to her head is contradicted by the evidence. There were signs of a struggle in her living room (7 RT 1267 [broken glass and strewn candy in living room]), and there were injuries to her face that were consistent with a struggle. The blows to her face occurred prior to the blow to the side of her head that would have caused her to lose consciousness

(continued...)

Parker laid Ms. Fry down on the bed on her stomach, and then he rolled her over onto her back. (8 CT 2457.) Parker pulled his pants and underwear down around his ankles before removing Ms. Fry's pants and then tearing off her panties. (8 CT 2457-2458.) Ms. Fry was unconscious, lying across the bed sideways with her legs spread. Parker stood over her, looking at her vagina. (8 CT 2458-2459.) Parker was unable to get an erection. After a minute or two, he ejaculated on Ms. Fry. (8 CT 2459.) Parker pulled up his pants and picked up the two-by-four. He walked out of Ms. Fry's bedroom and into her roommate's bedroom where he climbed out the same window he had used to enter the apartment. (7 RT 1263-1264, 1268-1270; 8 CT 2460-2461.) As he left, Parker noticed Ms. Fry was having difficulty breathing, "more so than the others."[6] (8 CT 2460.)

At around 11:00 p.m., Ms. Stevenson returned home. There was only one key to their apartment, and Ms. Fry had the key. Ms. Stevenson knocked on the door to their apartment and looked in the window. The lights were on and she could hear the stereo playing inside the apartment. (7 RT 1273.) Two friends of Ms. Stevenson, TJ Jackson and Pat Burns were driving by and she waved to them. She asked Mr. Jackson to go around and climb through her bedroom window and let her into the apartment. Mr. Jackson did so, and then Ms. Stevenson went into Ms. Fry's bedroom and found her lying in bed with no clothes on from the waist down and her head lying off the side of the bed. (7 RT 1274.)

(...continued)
quickly because she was clearly capable of resistance when she was hit in the nose and face. (8 RT 1722-1723.)

[6] Parker explained to investigators that Ms. Fry's breathing was "sort of a muffled sound" and it seemed like the air "was only going half way down" into her lungs. He explained that usually he heard a "gurgling" sound from his victims. (8 CT 2460.)

Ms. Stevenson spoke to Ms. Fry but she did not answer. She moved the hair from her face and saw that her face was all bloody. She called out to Mr. Jackson and Mr. Burns and asked them to call the police. She thought Ms. Fry had been beaten up. (7 RT 1275.) Ms. Stevenson did not know Parker and did not give him permission to be in her apartment. (7 RT 1276.)

Anaheim police officers arrived at the apartment at approximately 11:25 p.m., within about two minutes of being dispatched to the location. (7 RT 1258-1259.) Music was playing in a low tone in the living room, and there were signs of a struggle, including broken glass and bloodstains on the carpet in the hallway. The blouse she was wearing had been pulled up exposing her bra. Her legs were completely exposed and a pair of brown pants appeared to have been thrown over her vaginal area. (7 RT 1260-1264; [People's Exh. No. 11 [photo of Sandra Fry as found].) There were obvious signs of trauma to her head, and she had blood around her mouth, nose and hair. She was not breathing but appeared warm to the touch, so officers contacted the paramedics. (7 RT 1264.) The paramedics arrived shortly thereafter. (7 RT 1264-1265.) Ms. Fry was transported to the emergency room at West Anaheim Community Hospital where she was pronounced dead at 12:35 a.m. on December 2, 1978. (7 RT 1283, 1312; People's Exh. No. 25 [emergency room records].)

There was no sign of forced entry to the door of the apartment. (7 RT 1290.) The sliding glass window in Ms. Stevenson's bedroom was dusted for prints, and a latent print of Parker's left index finger was obtained from the lower right hand side of the window. (7 RT 1270-1271, 1292-1294, 1302-1305; People's Exh. Nos. 14 [latent print], 21 [Parker exemplar].)

Ms. Fry had a laceration on her lip which was consistent with being struck in the face. (8 RT 1715-1717, 724; People's Exh. No. 105 [photograph of injury to lip].) Pathologist Richard Fukamoto[7] explained that the bruises and contusions over the bridge of Ms. Fry's nose were consistent with being struck in her nose and the bruises on her neck were consistent with an attempt to choke her either with fingers or application of some kind of an object. (8 RT 1716-1717, 1724; People's Exh. No. 106 [photograph of neck].) The injuries to Ms. Fry's lip, nose, and throat were consistent with a struggle and indicated she was capable of resisting at the time the injuries were sustained. (8 RT 1722.) Ms. Fry sustained bruising to her upper chest inflicted by some type of blunt trauma. (8 RT 1716.) After being struck in the nose and face, Ms. Fry was struck in the side of the head by a blow that would have caused loss of consciousness quickly. (8 RT 1722-1723.) Her skull was indented and cracked. (8 RT 1720.) In order to crack her skull, there was a tremendous amount of force from an unknown number of blows by a blunt instrument, such as a bat, two-by-four piece of wood, or metal pipe. (8 RT 1721.) Internally, there was a massive bruise behind her right ear lobe extending all the way to the back of her head. (8 RT 1718.) Dr. Fukamoto opined that Ms. Fry died from subdural and subarachnoid hemorrhaging, with cerebral laceration due to blunt force trauma to the head, and skull fractures. (8 RT 1722-1723.)

When Ms. Fry's body was examined at the hospital, there were visible signs of a white substance even before observing her body under ultraviolet light for the presence of semen. (7 RT 1283-1284, 1291.) Swabs were

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[7] Richard Fukamoto, M.D., the Chief Pathologist for the Orange County Coroner's Office testified regarding the autopsy performed on Ms. Fry by pathologist Robert Richards because Dr. Richards was unavailable to testify at the time of trial based on his medical condition. (7 RT 1315; 8 RT 1710-1711.)

taken from her groin, legs and thigh. (7 RT 1285-1286; People's Exh. No. 13 [photograph].) PCR analysis of the swabs taken from Ms. Fry's body yielded DNA that matched Parker's DNA profile. (7 RT 1580, 1622-1623; 8 RT 1631, 1641.) The frequency with which the DNA profile in the sperm fractions recovered from Ms. Fry's body would randomly occur within the general population is 1 in 6.9 million for Caucasians and 1 in 4.4 million for African-Americans. (8 RT 1645-1646.)

b. Kimberly Gaye Rawlins (Count 2)

On April 1, 1979, 21-year-old Kimberly Gaye Rawlins lived with her roommate, Roberta Birrittela, in apartment number 17, located at 307 Avocado Street, in the city of Costa Mesa, in Orange County. (7 RT 1316, 1328, 1330, 1362.) At about 7:30 that evening, Ms. Birrittela and her cousin, Donna Chavez[8] left the apartment with their dates to go dancing. Ms. Rawlins was alone when they left. (7 RT 1329, 1336.) Ms. Chavez and her date, Mr. Perez, returned to the apartment at about 11:30 p.m. Ms. Chavez did not have her identification with her, so she was unable to get into the club where they had gone to dance with Ms. Birrittela and her date. (7 RT 1330, 1337.) Ms. Rawlins was upstairs in another apartment visiting with a friend when they arrived. Ms. Rawlins returned to her apartment and visited with Ms. Chavez and Mr. Perez for about 30 minutes. (7 RT 1338.) Parker stood outside listening to the three talking inside Ms. Rawlins' apartment. (9 CT 2622.) Ms. Rawlins was alone and uninjured when Ms. Chavez and Mr. Perez left the apartment some time after midnight unaware that Parker had been observing them. (7 RT 1339-1340.) Ms. Rawlins asked them not to lock the door on their way out and

[8] When Ms. Birrittela's cousin, Donna Koehler, testified at trial she used the surname Chavez. (Compare 7 RT 1329 with 7 RT 1336.)

explained that she was going to take a shower and go to sleep and Ms. Birrittela did not have a key. (7 RT 1339.)

Knowing that Ms. Rawlins was alone in the apartment, Parker waited until the lights were out before he entered the door of the apartment carrying a two-by-four. (9 CT 2622-2623.) As he entered the darkened bedroom where Ms. Rawlins was sleeping, Parker knew that she was petite.[9] (9 CT 2623.) Parker struck her two or three times with the two-by-four. (9 CT 2624.) Parker left the apartment through the front door. (9 CT 2625.)

At about 4:45 a.m., Ms. Birrittela returned home. (7 RT 1331.) All the lights inside the apartment were off except for the light in the bathroom. (7 RT 1331.) When she entered the apartment she heard what sounded like a heavy sigh or forced breath. (7 RT 1333.) Ms. Birrittela went into the bedroom she shared with Ms. Rawlins. (7 RT 1331.) She noticed Ms. Rawlins lying off to the side with her bathrobe open. She did not understand why she was lying that way and went over to her to put her into bed. She was talking to her and lifted her legs up and put a blanket over her because she was very cold. (7 RT 1332.) Ms. Birrittela went into shock as she realized Ms. Rawlins was dead and she did not know whether the person who had killed her was still inside their apartment. (7 RT 1333.) She left their apartment and went upstairs to a neighbor's apartment and asked him to check on Ms. Rawlins while she waited upstairs. (7 RT 1334.) He returned and called the police. Ms. Birrittela did not go back inside her apartment, and instead sat outside on the steps by the door. (7 RT 1334.) Ms. Birrittela did not know Parker and never gave him permission to be inside her apartment. (7 RT 1335.)

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[9] At the time Parker attacked her, Ms. Rawlins was 5 feet, 7 inches tall, and weighed 110 pounds. (7 RT 1362.)

The Costa Mesa Police Department and paramedics responded to Ms. Rawlins' apartment. (7 RT 1316-1318.) Costa Mesa police officers arrived about 5:00 a.m. (7 RT 1317.) Ms. Rawlins was wearing a blue bathrobe that was pulled up behind her and a pink blanket was over part of her body. Her face was badly beaten. She was warm to the touch. After an officer detected a faint pulse, two officers gently pulled her off of the bed and onto the floor. An officer began CPR on Ms. Rawlins, and then stepped back when the paramedics arrived and took over administering CPR. (7 RT 1318-1319.) After a short period of time, the paramedics indicated that Ms. Rawlins was dead. (7 RT 1319.)

The doors and windows to Ms. Rawlins' apartment were inspected for signs of forced entry. (7 RT 1319.) The only door to the apartment had no sign of forced entry and all the windows and drapes were closed with the exception of Ms. Rawlins' bedroom window. Her bedroom window was open about an inch and a half, and the screen was partially removed from the outside but the dust on the window frame had not been disturbed. (7 RT 1320.) Ms. Rawlins' purse was sitting on the kitchen table inside her apartment. (7 RT 1323, 1335; People's Exh. No. 31 [photograph].)

Pathologist Peter Yatar noted that Ms. Rawlins' eyes were blackened, with the majority of the hemorrhage on the right side as a result of blunt force trauma that fractured her skull. (7 RT 1362-1364; People's Exh. No. 39 [photograph of facial injuries].) There were small lacerations about two millimeters in size on Ms. Rawlins' lower lip that could have been caused by a blunt force blow or slap or as a result of falling on the floor. (7 RT 1364-1365.) Ms. Rawlins's fingernails were broken on her ring and small fingers of her right hand, and there were small abrasions on the right ring fingertip and left ring fingertip. (7 RT 1365 People's Exh. No. 41 [photograph of right hand] and No. 41 [photograph of left hand].) There was a large bruise on the right temporal area just above her

right ear. There was a similar pattern of a circular contusion on both sides of her head. The contusion on the right side was about two-by-two inches in size, and the contusion on the left side was about two-and-a-half by two inches in size. (7 RT 1366-1367; People's Exh. Nos. 42, 42A [photograph of head injuries].) She sustained three skull factures: a nine-inch skull fracture, radiating out from the location of the contusion to the left side of her head; a three-inch fracture of the right temporal area just above her ear; and a two-and-a-half inch fracture inside her skull, and a second fracture in the right anterior cranial fossa, in the bottom portion of the skull located just over her eyes. (7 RT 1369-1371.) The injuries to her skull were consistent with applying force to the right temporal area with a heavy blunt instrument. (7 RT 1368-1370.)

Dr. Yatar opined that a great amount of force with a blunt force instrument would be required to cause the fractures and brain hemorrhaging. He explained it would require force of about 400 to 600 pounds per square inch to cause the same fracture injuries to a cadaver with hair, and an even greater force to cause the nine-inch fracture sustained by Ms. Rawlins. (7 RT 1372-1373.) He opined that anyone sustaining blows with a blunt force instrument sufficient to cause the injuries Ms. Rawlins sustained would be rendered unconscious immediately. After sustaining these types of injuries, the person would be lying on their back, unconscious in a coma, and would not live more than six hours without medical intervention. (7 RT 1373.) Ms. Rawlins died from a brain contusion with subdural hematoma as a result of multiple skull factures from blunt force trauma to her head. (7 RT 1374.)

Ms. Rawlins' tampon was collected as evidence during the autopsy. (7 RT 1345-1346.) PCR and RFLP testing of semen found on the string of the tampon revealed DNA matching Parker's profile. (8 RT 1614-1615, 1620-1624, 1633-1636.) The frequency of a random match in the general

population of the RFLP DNA profile is 1 in 670 billion. (8 RT 1614.) The frequency of a random match in the general population for African-Americans is 1 in 404 billion. (8 RT 1613-1617.)

c. Marolyn Kay Carleton (Count 3)

In September of 1979, 31-year-old Marolyn Carleton lived with her 9-year-old son, Joey Carleton, in apartment number 10, located at 224 Avocado Street, in the city of Costa Mesa. (7 RT 1406-1407, 1409; 8 RT 1753.) On September 14, 1979, at about 11:45 p.m., the apartment manager who lived next door to Ms. Carleton walked past the patio area of Ms. Carleton's apartment. (7 RT 1415-1416.) The patio was enclosed by a four-foot high wooden fence. (7 RT 1412.) She noticed the glass sliding door was open, the screen door closed, and the drapes were open a few feet. (7 RT 1415.) A light was on in the dining area and she saw Ms. Carleton who appeared to be asleep on the floor of her apartment. (7 RT 1416.)

In the early morning hours of September 15, 1979, Parker entered Ms. Carleton's apartment through the unlocked sliding glass door on her patio. (9 CT 2630.) Ms. Carleton was lying in her bed asleep. (9 CT 2630.) Parker hit her three or four times with a blunt object and attempted to sexually assault her.[10] (9 CT 2634.) Parker heard Joey calling for his mother. Parker exited Ms. Carleton's bedroom and ran into Joey in the darkened hallway. Joey asked him something to the effect of what was wrong with, or what have you done to, "my mother." (9 CT 2631-2633.) Parker moved Joey to the side of the hallway and left the apartment though the sliding glass door. (9 CT 2632-2633.)

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[10] At the time of her death, Ms. Carleton was 5 feet, 4 inches tall, and weighed 140 pounds. (8 RT 1753.)

The first officer arrived at the apartment at 2:56 a.m., within three or four minutes of being dispatched.[11] (7 RT 1407.) Joey met the officer outside of the apartment. He told the officer that his mother had been injured and directed him to their apartment. (7 RT 1408.) The porch light was on as the officer walked into the darkened apartment. (7 RT 1409.) The glass door and screen door from the patio into the apartment were open. (7 RT 1412; People's Exh. No. 52 [photograph].) The drapes to the glass door inside the apartment were closed. (7 RT 1413.)

The officer entered the hallway where a light was on and walked into the darkened master bedroom where he found Ms. Carleton lying mostly on the floor, somewhat propped up against the bed and nightstand. (7 RT 1409.) There was a sheet wadded up on top of her across her midsection. (7 RT 1410-1411.) Her face was covered with blood and her hair was matted with blood. There was a large wound on the top left of her skull. She was wearing a short nightgown that had been pulled up above her waist and her underwear was down around her right leg between her knee and ankle. She was unconscious. Her breathing was labored and forced. (7 RT 1410.) She had a very weak pulse. The officer called for the paramedics and before they arrived, the officer laid her completely on the floor to ease her breathing and moved the sheet off of her. (7 RT 1411.) Paramedics transported Ms. Carleton to Hoag Memorial Hospital. She was pronounced dead shortly after noon the following day on September 16th. (8 RT 1777.)

Ms. Carleton had no defensive wounds. (8 RT 1726.) There were external injuries noted consisting of bleeding in her left eye, her right anterior shin area, right medial calf and thigh, and a large star-shaped or

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[11] During the victim-impact testimony in the penalty phase, Joey Carleton testified that he had been awakened by his mother screaming his name, and after finding her incoherent and bleeding on the floor of her bedroom, he called the operator for assistance. (10 RT 2171-2172.)

stellate laceration to her scalp in the area behind her left earlobe about three inches in length extending almost to the back of her head. Underneath the laceration to the scalp was a depressed skull fracture extending all the way to the base of her skull which caused the bleeding to her left eye. (8 RT 1725, 1730.) The skull fracture required a large amount of force from a blunt instrument. The injuries were consistent with use of a mallet. (8 RT 1728.) Dr. Fukamoto[12] opined that Ms. Carleton died from subarachnoid and subdural hemorrhage and contusions, as well as injury to her brain, as a result of blunt force trauma. (8 RT 1729.)

d. Chantal Marie Green (Count 4)

On September 30, 1979, Diana Lynn Green resided with her husband Kevin Green in Apartment A, located at 230 West 6th Street in Tustin. (7 RT 1477, 1491.) Mrs. Green was nine months' pregnant with the couple's first child, a girl who was going to be named Chantal Marie Green. (7 RT 1492.)

Around midnight, Parker drove up and parked at the Tastee Freeze located within a short walking distance of the Green's apartment. (7 RT 1478; 9 CT 2596.) Parker was walking around the Green's apartment complex when he overheard the Greens arguing. (9 CT 2597.) He then heard Mr. Green's car start up and saw him drive away. He also noticed the door to the Green's apartment had been left open. (9 CT 2598-2599.) Parker went inside the Greens' apartment and saw memorabilia in the living room which indicated to him that Mr. Green was in the Marine Corps. (7 RT 1486.) Parker went into the bedroom and Mrs. Green sat up

[12] Dr. Fukamoto testified regarding the autopsy performed by pathologist Walter Fischer on Ms. Carleton because Dr. Fischer had died prior to Parker's trial. (7 RT 127, 1315; 8 RT 1724.)

and looked at him as though she recognized him before lying back down in bed. (9 CT 2600-2601.) Parker rushed toward her and hit her in the head. After being struck in the head, she was unconscious. She was obviously pregnant and Parker knew she was pregnant before raping her. (7 RT 1491, 1486; 9 CT 2601, 2607, 2618.) Parker ejaculated inside of her. (9 CT 2602.)

A Tustin police officer arrived at the apartment complex located near the Santa Ana Freeway and Newport Boulevard at about 2:15 a.m. and was met by Mr. Green. (7 RT 1477-1478.) Mr. Green appeared to be in shock and stated his wife had been injured. (7 RT 1479.) The officer found Mrs. Green lying on the bed. She appeared comatose and was having a hard time breathing. (7 RT 1481.) There was a hole about two inches in diameter in the middle of her forehead. She was bleeding from the wound in her head, as well as from her ear and nose. The wound in her forehead was so deep that the officer could see what appeared to be brain matter. He also saw blood on the bed, floor, and blood spatter on the wall. Mrs. Green was not wearing any clothing and her legs were spread open. (7 RT 1481.) The wound in Mrs. Green's forehead was so pronounced that the officer initially believed she had been shot. He searched the apartment for handguns and rifles, and also checked to see if anyone had fired a weapon through the window of the bedroom. Mrs. Green was unconscious as paramedics arrived. She was transported to Santa Ana Tustin Community Hospital by ambulance. (7 RT 1482.) Parker's DNA profile matched the DNA in sperm fractions from vaginal swabs obtained from Mrs. Green. (8 RT 1621-1624, 1649-1653.)

Mrs. Green was in a coma for about 10 days and remained in the hospital for about three weeks. (7 RT 1492.) When she regained consciousness she had total amnesia and could not remember anyone. She no longer knew how to talk as she had experienced a complete memory

loss. She had to learn to talk and spell all over – and it took years for her to do so. (7 RT 1493.) While her abilities improved over the years, at the time of trial, 17 years after she was assaulted by Parker, she still could not comprehend speech if a person spoke too fast. (7 RT 1493-1494.) She had to slow down if anything technical was being related to her, and experienced frustration because of requiring more time to respond to others because of the delay between having thoughts and being able to articulate them. (7 RT 1494.)

Mrs. Green's unborn child, Chantal Marie Green, ceased having vital signs the afternoon following Parker's attack and was delivered stillborn. (7 RT 1492-1493; 8 RT 1777.) An autopsy was performed on Chantal by Dr. Fukamoto. (8 RT 1731.) There was no external reason why Chantal should have died as there was no evidence of trauma to the baby or congenital anomaly. The baby was dead for less than 12 hours before being delivered. Dr. Fukamoto opined the cause of death was intrauterine anoxia as evidenced by changes to the baby from the lack of oxygen to her tissues. (8 RT 1732-1733.) The head wound to Mrs. Green was caused by a blunt force injury consistent with a bat or a mallet which would render her immediately unconscious and cause severe underlying damage to her brain. (8 RT 1735.) The shock from such a traumatic episode causes the body to shift the oxygenated blood to the heart, lungs and brain of the mother, resulting in the uterus receiving less oxygenated blood to the uterus to the point where Chantal was not able to sustain life in her mother's womb. (8 RT 1733-1734.)

Parker read about the attack on Mrs. Green in the newspaper in 1980 or 1981, and knew that Mr. Green had been convicted for the crimes Parker had committed against Mrs. Green. Parker was under the mistaken belief that Mr. Green was on death row for the attack on his wife. (9 CT 2617.)

e. Debora Kennedy (Count 5)

On October 6, 1979, 24-year-old Debora Kennedy, lived with her sister Yvette Lavey in Apartment B, at 15561 Boleyn Circle, in the city of Tustin.[13] (7 RT 1378, 1388-1389; 8 RT 1754.) Ms. Lavey and her friend Nanette Peavy[14] left the apartment around 9:00 p.m. to go to Las Vegas. Ms. Kennedy was alone and uninjured when they left. (7 RT 1389.)

That same evening, Parker took a mallet out of a pick-up truck parked about two apartments away from Ms. Kennedy's apartment. (9 CT 2610.) He looked in the window of her apartment and could hear the television set. (9 CT 2610.) He entered a bedroom window carrying the mallet. (9 CT 2609-2610.) Ms. Kennedy was on the floor leaning against the couch, asleep, with the television on when Parker entered her living room. (9 CT 2609, 2611.) Parker went over to her and hit her in the head with the mallet, and then raped her and ejaculated inside of her. (9 CT 2611-2612.) Parker recalled that Ms. Kennedy was "kind of heavy."[15]

Ms. Lavey and Ms. Peavy returned from Las Vegas the following day around 6:00 p.m. (7 RT 1389, 1404.) The door to the apartment Ms. Lavey shared with her sister was open. They went inside and saw Ms. Kennedy on the floor in her bed, lying in blood with blood on her face. (7 RT 1390.) Both women left the apartment and police were called. (7 RT 1390.) The police arrived shortly thereafter. Ms. Lavey and Ms. Isaacs were hysterical. (7 RT 1379, 1390.) Ms. Kennedy was lying on her back in an exaggerated spread eagle position. There was massive blunt force trauma to her face

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[13] Parker lived "practically on the same street" as Ms. Kennedy. (9 CT 2583.)

[14] When Ms. Lavey's friend Nanette Isaacs testified at trial she used the surname Peavy. (7 RT 1388.)

[15] At the time of her death, Ms. Kennedy was 5 feet, 4 inches tall, and weighed 135 pounds. (8 RT 1754.)

and a large amount of blood, aspirated material and no signs of life. She was wearing no clothing other than a blue robe, which was opened and laid out neatly on each side. Ms. Kennedy was covered with a knitted shawl. There was what appeared to be a mucous substance between her legs in the vaginal area. Paramedics arrived and confirmed that Ms. Kennedy was dead. (7 RT 1380.)

There were no signs of forced entry to Ms. Kennedy's apartment. There was no sign of a struggle inside the apartment. (7 RT 1381.) A window in a back rear bedroom of the apartment was open and the screen had been removed and was lying adjacent to a window to another bedroom. (7 RT 1381.)

Ms. Kennedy sustained injuries to both sides of her face primarily around the hairline: two lacerations on her right hairline measuring three quarters of an inch to two inches, a bruise to her forehead, a laceration over her lateral left eye area, a 5/8 inch laceration over her eyebrow, and periorbital hemorrhage to her eyes. (8 RT 1736-1737.) She had no defensive wounds. (8 RT 1737.) Ms. Kennedy sustained a fracture of her skull that began in the area of her right earlobe, at the point of impact on the right side continuing all the way down the base of her skull on the opposite side, *i.e.*, she sustained a fracture at the base of her skull that went all the way from left to right. (8 RT 1738, 1741.) The injury was caused by a blunt instrument consistent with a bat, two-by-four, pipe, or the flat end of a hammer. (8 RT 1739.) Dr. Fukamoto[16] opined that it would require at least five blows from the blunt instrument delivered with a large amount of force in order to cause the injuries Ms. Kennedy sustained.

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[16] Dr. Fukamoto testified regarding the autopsy performed by pathologist Walter Fischer on Ms. Kennedy, because Dr. Fischer had died prior to Parker's trial. (7 RT 1237, 1315; 8 RT 1724, 1736.)

(8 RT 1740.) Ms. Kennedy died as a result of laceration of her brain, along with subdural and subarachnoid hemorrhage due to blunt force trauma to her head, with skull fractures. (8 RT 1741.)

DNA testing revealed that the sperm fraction from the vaginal swab obtained during Ms. Kennedy's autopsy matched Parker's DNA profile. (8 RT 1574, 1592-1602.) The frequency of a random match in the general population with the RFLP DNA profile of the sperm fraction is 1 in 670 billion. (8 RT 1574, 1614, 1616.) The frequency of a random match in the general population for African-Americans is 1 in 404 billion. (8 RT 1613-1617.)

f. Debra Lynn Senior (Count 6)

On Saturday October 20, 1979, Debra Lynn Senior resided with her roommate, Debra Chamberlain,[17] in Apartment A, located at 2556 Maple, in the city of Costa Mesa. (7 RT 1418, 1434-1435; 8 RT 1754.)
Ms. Senior and Ms. Chamberlain went to a party in Fountain Valley. (7 RT 1435.) At about 10:30 p.m., Ms. Chamberlain loaned her car to Ms. Senior so she could return home. (7 RT 1435-1436.) Parker broke into the apartment before Ms. Senior arrived home from the party. (9 CT 2639.)

Parker parked a "considerable distance" from Ms. Senior's apartment and was pretending to be a jogger. He was jogging through the neighborhood looking in windows and "circling around" Ms. Senior's apartment." (9 CT 2768, 2770.) Parker entered Ms. Senior's apartment knowing it was empty at the time. (9 CT 2769.) He gained entry through a

[17] When Ms. Senior's roommate, Debra Buttery testified at trial she used the surname Chamberlain. (7 RT 1434.)

bathroom window.[18] (9 CT 2769; 7 RT 1449.) The window was a crank-out style and about two feet by two feet in size. The window was about five feet off the ground and located right above a row of gas meters for the apartment complex which made it an easy boost by stepping on the gas meters below the window. (7 RT 1451.) Parker left his left palm print on the interior window sill on the horizontal surface of the ceramic tile where people often place shampoo bottles. (7 RT 1452, 1460.) He slid down the tile, knocking down the shower curtain and curtain rod. (7 RT 1439, 1450; 9 CT 2639-2640.)

Parker knew that Ms. Senior had a roommate because he saw there were two bedrooms and he also knew she came home alone that night. (9 CT 2638-2639.) Parker recalled seventeen years later "this one was young. I don't know, 17, 18 something like that." (9 CT 2638.) He knew that she was "small, probably about" five feet, five or six inches, tall.[19] (9 CT 2648.) Parker was inside the apartment when Ms. Senior arrived home. He watched from a crack in the bathroom door as she made a drink in the kitchen. (9 CT 2641.) She sat down on the couch with her drink, and then she fell asleep. (9 CT 2642.) Parker came out of the bathroom and went up to her in the living room and hit her in the head two or three times with a blunt object. (9 CT 2643.) Parker carried her, unconscious, into her

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[18] Parker told investigators that he entered the apartment around sunset, at about 7:00 p.m. (9 CT 2769.) He also said he was inside only 8 or 10 minutes before he heard Ms. Senior drive up and put a key in the lock of the front door to the apartment. (9 CT 2774). However, Ms. Senior did not leave the party she was attending to return home that evening until 10:30 p.m. (7 RT 1435-1436.)

[19] At the time of her death, Ms. Senior was 17 years old, 5 feet, 10 inches tall, and weighed 120 pounds. (8 RT 1754.)

bedroom and onto a mattress on the floor of her bedroom.[20] (9 CT 2644-2645.) He removed her underwear, raped her and ejaculated inside of her. (9 CT 2645.)

At about 2:30 a.m., Mark Weber drove Ms. Chamberlain home from the party. Ms. Chamberlain was not able to get into the apartment she shared with Ms. Senior. (7 RT 1436.) As Mr. Weber was pulling out of the driveway of her apartment complex, she stopped him and asked him to help her get into her apartment. She asked him to enter the apartment through a living room window. As she stood outside, she was surprised to hear the stereo playing inside her apartment at that hour of the morning. Mr. Weber entered through the living room window and then opened the door for Ms. Chamberlain. When she entered her apartment, she turned off the stereo. (7 RT 1437.) The lights were on inside the apartment. (7 RT 1438.) She walked toward Ms. Senior's bedroom. (7 RT 1437.) She found Ms. Senior unclothed, lying on the floor at the entrance to her bedroom. She had been injured in the head. Ms. Chamberlain asked Mr. Weber to call the police. (7 RT 1438.) Ms. Chamberlain started to touch Ms. Senior, but then backed away. (7 RT 1439.) Mr. Weber dialed the police and handed the phone to Ms. Chamberlain. They waited outside for the police to arrive. (7 RT 1439.)

When police found Ms. Senior, she had no clothing on the lower half of her body other than a pair of socks. Her blouse was torn and missing buttons; the blouse and her unsnapped bra were up around her shoulders. (7 RT 1420, 1441; People's Exh. No. 74 [photograph].) Buttons were on the floor adjacent to her body. Part of a green towel that had apparently

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[20] When police arrived, the living room curtains were closed. (7 RT 1439.) Parker closed the living room curtains but could not recall whether it was before or after striking Ms. Senior in the head. (9 CT 2643.)

been ripped in half was around her neck area and another part of the towel was under her body. (7 RT 1442.) A pair of underpants was lying on a pair of tennis shoes at the foot of the bed, and one leg of the underpants was completely torn. (7 RT 1426-1427, 1445-1446; People's Exh. No. 73 [photograph].) A pair of Levi overalls with a blood stain on them was on the floor. (7 RT 1445.) The contents of a purse and a Polaroid camera were on the floor near Ms. Senior's feet. (7 RT 1446, 1451.) She was bleeding profusely and her hair was matted and there was quite a bit of blood around her eyes. There were two lacerations visible on the right side of her head. Ms. Senior had no pulse. Paramedics arrived and pronounced her dead. (7 RT 1420-1421.)

Ms. Senior sustained lacerations, contusions and bruises to her head and facial area consisting of a laceration a half inch in length outside of her right eyebrow, a one-and-one-half inch laceration to her right upper forehead, two elongated lacerations on the right side of her head on her earlobe measuring between two-and-1/2 to two-and-3/4 inches long from what appeared to be two separate blows, and a bruise separate from the two lacerations behind her right ear lobe. A fracture was associated with the two lacerations with the fracture line radiating downwards. (8 RT 1743.)

A large amount of force was required to inflict the two lacerations to the side of Ms. Senior's head fracturing her skull all the way to the base of the skull, causing bleeding around the eyes, and causing skull fragments to lacerate the brain. (8 RT 1743-1746.) The blows could have been from a pipe, two-by-four or baseball bat. (8 RT 1746, 1750.) Dr. Fukumoto[21] opined the blows would have rendered Ms. Senior unconscious almost

[21] Dr. Fukamoto testified regarding the autopsy performed by pathologist Walter Fischer on Ms. Senior, because Dr. Fischer had died prior to Parker's trial. (7 RT 1237, 1315; 8 RT 1724, 1742.)

immediately. (8 RT 1748.) The blood splatter at the scene was consistent with Ms. Senior being struck while lying down, and she would not have moved after sustaining those blows. (8 RT 1751.) Ms. Senior would not have lived more than six hours because the swelling would have resulted in compression of her brain against her skull, which would cause death. (8 RT 1747.) Dr. Fukumoto opined that Ms. Senior died as a result of hemorrhage to the brain, and laceration, contusions from blunt force trauma with skull fractures. (8 RT 1748.)

DNA testing of the sperm fraction from the vaginal swab recovered during the autopsy of Ms. Senior matched Parker's DNA profile. (8 RT 1574, 1602-1624.) The frequency of a random match in the general population with the RFLP DNA profile of the sperm fraction is 1 in 670 billion. (8 RT 1574, 1614, 1616.) The frequency of a random match in the general population for African-Americans is 1 in 404 billion. (8 RT 1613-1617.)

In 1996, investigators interviewed Parker regarding the DNA results linking him to homicides in three different cities.[22] A detective asked Parker if he ever went into an apartment to rape a female without hitting her over the head. (9 CT 2793-2974.) Parker indicated he had "thought about that earlier, in the early stages" but "...call me what you will, you know, I determined I was just plain ole' being a coward, to have, the only thought

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[22] During the guilt phase, the prosecution offered a redacted 77-page transcript of the June 14 interview of Parker by Detectives Giesler and Redmond (Trial Exh. No. 93; see 8 CT 2466-2543); a redacted 130-page transcript of the June 14 interview of Parker by Detectives Tarpley, Giesler and Redmond (Trial Exh. No. 95; see 9 CT 2545-2674); a redacted 193-page transcript of the June 18 interview of Parker by Detectives Giesler and Redmond and Sergeant Boyland (Trial Exh. No. 103; see 9 CT 2681-2873A); and a redacted 25-page transcript of the June 16 interview of Parker by Detective Raulston (Trial Exh. No. 24; see 8 CT 2439-2464.)

that occurred, it never occurred to me that I could do that without killing somebody."[23] (9 CT 2794.)

2. Defense

Parker did not affirmatively present any evidence during the guilt phase and engaged in limited cross-examination for tactical reasons, *i.e.*, to foster as much credibility with the jury as possible before arguing aspects of the case at its conclusion. (8 RT 1709, 1778; 9 CT 2876.) In closing argument, the defense conceded identity but relied on Parker's statements to police and argued he was guilty of only second degree murder as to each victim based on diminished capacity due to intoxication. (8 RT 1873-1886.)

B. Penalty Phase

1. Evidence in Aggravation

In addition to relying on the facts and circumstances of the murders of Sandra Fry, Kimberly Rawlins, Marolyn Carleton, Chantal Green, Debora Kennedy, and Debra Senior, the prosecution introduced evidence of Parker's brutal rape of a Costa Mesa woman, brutal assault and robbery of a woman in Pasadena, abduction and rape of a 13-year-old Tustin girl, and assault on his roommate at a correctional facility. Parker's record of conviction for the robbery with great bodily injury in Pasadena, the kidnap

[23] Parker's statements to police are discussed more fully in Argument II responding to Parker's contention on appeal that the statements were improperly admitted into evidence.

and rape of the child in Tustin, and the assault upon an inmate in a correctional facility was also introduced into evidence.[24]

a. 1979 Rape of Jane P.

On July 19, 1979, Jane P. lived in an apartment located at 381 Hamilton Street in the city of Costa Mesa. She went to bed around 11:00 p.m. Her apartment was locked except for her windows. (10 RT 2193-2196.) Parker frequently visited his friend, Albert Garcia, who lived up the street from Ms. P.'s apartment. (10 CT 2192-3202.) Ms. P. lived downstairs in a two-story apartment building at the back of an apartment complex. Parker could not recall whether he grabbed a two-by-four or a piece of firewood in order to knock Ms. P unconscious and rape her. (10 CT 3210-3214.) Ms. P. heard a noise in her hallway and saw Parker coming toward her. She called out, "who is it?" Parker grabbed her and told her to shut up in an angry voice. She then lost consciousness. (10 RT 2193-2196.)

Parker described Ms. P. as being asleep in the nude. He raised his weapon over his head and delivered two or three blows. In an apparent attempt to claim it was not his intent to kill Ms. P, Parker explained to officers that he did not count how many times he hit her, but that he did not stand there delivering blows for 20 minutes. (10 CT 3210-3214.) Parker told detectives that Ms. P. fought to maintain consciousness more than the other women that he assaulted as she "flopped around" and "actually spoke a few words." Parker turned her nude body sideways and unzipped his

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[24] The fact of conviction was not considered by the jury as a factor in aggravation, as the jury was instructed that factor (c) refers to prior felony convictions that were entered on a defendant's record before the offenses were committed, and expressly instructed that "in these proceedings Factor (c) in inapplicable." (12 RT 2574; 10 CT 3057.)

pants, dropping them to his ankles. Parker recalled ejaculating without being able to obtain an erection; something that had happened to him seven or eight times when assaulting women. When Parker was told his semen was recovered from Ms. P., he conceded he may have engaged in sexual intercourse. (10 CT 3214-3217, 3221-3222.) When Parker was done raping Ms. P., he pulled up his pants and exited her apartment the same way he entered: through the dining room window. He heard her continuing to struggle, moving around on the bed and breathing with a loud gurgling noise. He could make out words through the gurgling sound. He claimed he threw away his weapon before getting in his car and leaving. (10 CT 3217-3221.)

The following day Ms. P. had planned to meet a friend for lunch. When he could not reach her to confirm their plans, and learned that she had not arrived for work, he went to her apartment. At about 11:00 a.m., he found the door to her apartment open about three or four inches. He entered the apartment and found her lying in her bed on her back. He could see that her eyes were swollen and she had been beaten. Her appearance reminded him of a prize fighter after a fight. Her pillow was covered in blood and blood was spattered on the bedroom wall. Her bed sheet was up to below her neck and folded across. He was concerned someone might still be inside the apartment. He telephoned police.

Police arrived and summoned paramedics. Detective Giesler noticed that the screen was off a sliding glass window leading into the dining area, and the window was open. She noticed bloody rolled up towels in the bedroom. A rape kit was collected from Ms. P at the hospital. Ms. P. had scratches on her face, bruising behind her right ear and her eyes were extremely black and blue. Detective Giesler did not see any defensive injuries on Ms. P. (10 RT 2207-2215.)

Vaginal swabs from Ms. P. were subjected to RFLP DNA testing years afterwards and yielded DNA that matched Parker's profile. The probability of a random match with the general population was 1 in 2 billion, and 1 in 1.4 billion among African-Americans. (10 RT 2203-2206.)

Ms. P. remained in a coma for about four weeks. Her skull had been fractured and she required a permanent tracheotomy. She had difficulty breathing as a result, and could no longer swim or exercise. Nearly 19 years later, at the time she testified, she experienced difficulty chewing because of the nerve damage from having been strangled. It was sometimes difficult for her to form words. (10 RT 2196-2198.)

b. 1980 Robbery of Aida Demirjian

On February 2, 1980, Aida Demirjian lived in an apartment located at 1033 East Cordova Street in the city of Pasadena. (10 RT 2112.) She returned home at about 10:00 p.m. and parked in the underground parking structure at her apartment complex. (10 RT 2112-2113.) She was locking the door to her car when she felt a blow to her head. Parker hit her in the head two or three times before she fell to the ground. (10 RT 2114-2115, 2119.) She pretended she was unconscious so he would take her purse and leave but Parker kept hitting her over and over. She could see blood everyhere and thought that Parker would kill her if he continued hitting her. She got up and started running while yelling for help. Parker came after her and grabbed her. (10 RT 2115.) Ms. Demirjian was protecting her head with her hands, so when Parker began hitting her again, she was being hit on her hands. At this point in the attack, she could see that Parker was wielding an iron rod. Ms. Demirjian fell to the ground a second time. (10 RT 2116.) Parker dragged her a few yards and pulled her necklace off from around her neck. (10 RT 2116-2117.) She again pretended to be

unconscious while lying on the ground in the hope he would take her purse and leave. Parker stood at her feet, looking through her purse. (10 RT 2117-2118.) Parker then lifted up Ms. Demirjian's skirt. She immediately got up and started running and calling for help. (10 RT 2118.) She never looked back and ran to the first floor and banged on the apartment manager's door. She does not remember anything after the door to the manager's apartment opening. (10 RT 2118.)

Donald Barra lived across the street from the apartment complex where Ms. Demirjian lived. (10 RT 2120.) At about 10:00 p.m. on February 2, 1980, he heard a "blood curdling moaning kind of scream." (10 RT 2120-2121.) He left his apartment to try and find the source of the noise. He crossed Cordova Street, which was a four lane street and realized the noise was coming from a lower parking structure. Mr. Barra entered the parking structure and initially could not see because of the darkness. He eventually saw Parker standing over Ms. Demirjian as she was lying on the ground. (10 RT 2121, 2123; 10 CT 3180.) He assumed she was injured based on the noises she was making. He could see a weapon in Parker's hand. He yelled at Parker to stop. Parker stopped for a second and then turned around and looked at Mr. Barra. When Mr. Barra told him to stop and stay where he was, Parker "took off like a rabbit." (10 RT 2122.)

Mr. Barra subsequently was able to observe Ms. Demirjian's condition. Her hair was matted with blood and her right hand was severely injured. Paramedics had to cut her rings off to save her fingers because they were so swollen. Mr. Barra recalled her fingers looked like "ball park franks." (10 RT 2124.)

A uniformed officer dispatched to the area of East Cordova and Catalina Boulevard regarding a report of a woman screaming for help, was about a half a block from Ms. Demirjian's apartment complex when Parker crossed in front of the marked police unit. (10 RT 2125-2126, 2128.) The

officer noticed that Parker's pants were scuffed up and appeared to be stained. He exited the patrol car and approached Parker. (10 RT 2126.) He then noticed that Parker had blood stains on his shirt and pants and blood on his hands. (10 RT 2126-2127.) The officer detained Parker and requested his identification. Parker provided him with identification showing he was a staff sergeant in the Marine Corps. The officer remained with Parker until Mr. Barra was brought to their location. (10 RT 2127.) Mr. Barra was asked if he could identify Parker and he indicated that Parker looked similar to the man he saw in the parking garage based on his clothing and general appearance. (10 RT 2123.) Parker was then taken into custody. (10 RT 2127.) The officer did not notice anything to indicate that Parker was intoxicated. He had no difficulty communicating with him, and Parker was calm, cooperative and compliant while the officer was with him. (10 RT 2128.)

Another officer located a metal pipe, eight inches long and three inches in diameter, with what appeared to be blood on it, near one of three puddles of blood on the floor of the parking structure. Three parking spaces away from the location of the metal pipe, the officer located a gold and pearl necklace. (11 RT 2271.)

Ms. Demirjian was hospitalized for a few days and treated for a skull fracture. Her fingers were broken and required surgery and therapy. Her fingers were permanently injured in the attack. (10 RT 2116, 2119-2120.)

On October 2, 1980, Parker was convicted in Los Angeles County Superior Court, pursuant to his plea of guilty, of robbing Ms. Demirjian, and inflicting great bodily injury upon her during the commission of the robbery. (10 CT 3180; 10 RT 2170, 2254.)

c. 1980 Rape of Paula S.

On February 15, 1980, 13-year-old Paula S. had attended the funeral for her father. At about 3:30 p.m. she was walking home from the Thrifty Drug Store in the city of Tustin where she had bought her mother a greeting card and a belated birthday gift. As she walked along Nisson Street she saw a black van drive past her and then pull over. She saw Parker exit the driver's seat of the van and open the side door of the van. She watched as he walked around the back of the van and appeared to be checking the tire of the van. As Paula walked past the van, Parker grabbed her by her sweater, punched her in the face and threw her into the van. (10 RT 2080-2083, 2098-2101.)

Parker drove off with Paula. Parker looked in the rearview mirror as he drove, and told Paula to stay down or he would kill her. Paula noticed that Parker was wearing a white T-shirt and green pants and there was a tan military shirt with three insignias or chevrons hanging behind the driver's seat. Parker drove around for about 20 or 25 minutes. Paula was very scared. She was looking at street signs and realized Parker was headed toward the city of Westminster. Parker stopped the van in the parking lot of a shopping center. Parker climbed into the back of the van, and closed the curtain that separated the driver's compartment from the cargo area. He asked Paula if she had ever been raped. Paula, who had no prior sexual experience, told him no. Parker replied, "Well, this is what it is like." (10 RT 2084-2088.)

Parker told Paula to take her clothes off. When she refused, he removed a towel from under the driver's seat. Parker ripped the towel into strips, using his mouth. Parker put some strips of the towel into her mouth, one around her head, and then tied her hands together using the strips of towel. He asked if she could breathe. When she said no, he took a strip of towel off her face. Parker then told her "take your clothes off or I'll kill

you." She then removed her clothes because she was very afraid of Parker. As Paula was lying on her back in the cargo area of the van, Parker climbed on top of her and his penis penetrated her vagina, and he engaged in sexual intercourse for a period of about five or ten minutes. When Parker got off of Paula, he permitted her to put her clothes on. When she got up she felt fluid running down her leg from her genital area. (10 RT 2088-2091.)

Parker put his clothes on and asked Paula what was in the bag she was carrying. She told Parker it was a birthday present for her mother. He asked to see it and Paula handed him the gift for her mother. Parker asked her how old she was and her name. Paula told him her true name but said that she was 10 years old, thinking he might not hurt her if he believed she was younger than her actual age of 13. She told Parker about her father's death and that she had just been to his funeral. (10 RT 2092.)

Parker sat in the van smoking and told Paula he would take her back after dark. He asked Paula if she would tell her mother or the police what happened when she got home. Paula told Parker she would not tell. He then asked her if she would identify him in a police line up and Paula said she would not identify him. Parker drove onto the freeway and asked Paula where she lived. Paula tried to remember details as Parker drove the van. She noted the van was black and had bubbled tinted windows on the sides and in the back. The interior of the van was grey and there were two bucket seats in the front. Parker exited the freeway in Tustin and pulled into an alley. Parker told Paula "If you tell anybody, I'll come back and kill you." As Parker drove away, Paula saw the word "Dodge" on the van and noticed it did not have a license plate. As she walked home, she ran into her brother who was out looking for her. When Paula got home she told her mother what happened and the police were called. (10 RT 2092-2096.)

Three days later, an investigator from the Orange County Sheriff's Department contacted military police at El Toro Air station. Parker was

identified as the owner of a black 1979 Dodge van and asked to come to the Sheriff's Department for questioning. (10 RT 2096-2098.) After being advised of his *Miranda* rights, Parker waived his rights. An investigator was going to show Parker a photograph of Paula when Parker said, "I did it. I'm guilty." He told the investigator he was returning from the mechanic when he saw Paula walking down the street. Parker parked his van in front of her and opened the side doors before going over to the right rear tire. He grabbed her as she approached the van and threw her into his van. He drove around and ended up somewhere in Westminster. He parked, ordered her to take off her clothes and then raped her. (10 RT 2098-2101.)

When Parker was interviewed by detectives at Avenal State Prison on June 14, 1996, he discussed his rape of Paula in 1980.[25] He said that it probably saved her life that she was so young. He recalled driving her back and letting her out down the street from where she lived. (10 CT 3171.) Parker discussed his rape of Paula again during a videotaped interview at Corcoran State Prison on June 17, 1996.[26] Parker said he never wore his military uniform or fatigues during any of his assaults except when he raped Paula. He admitted that if Paula had been older he probably would have killed her. (10 RT 2102-2103.)

On May 13, 1980, Parker was convicted in Orange County Superior Court, pursuant to his plea of guilty, of kidnapping and raping Paula. (10 CT 3176-3189; 10 RT 2170, 2254.)

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[25] The tape-recording (People's Exh. No. 117) was played to the jury, and a transcript of the tape-recording was provided to jurors (People's Exh. No. 115). (10 CT 3169-3171.)

[26] The videotape was played for the jury (People's Exh. No. 118), and a transcript of the interview was provided to the jury (People's Exh. No. 115). (10 CT 3169-3171; 10 RT 2101.)

d. Assault on Inmate David Feurtadot

On February 13, 1984, Parker shared a room with David Feurtadot at a correctional facility in Tehachapi. Feurtadot was in custody for burglary. Feurtadot was asleep when Parker returned to their room one night. He awakened to Parker beating him. Parker was striking him in the back of the head. The pain was excruciating and Feurtadot was bleeding profusely. He chased Parker out of the room and into the hallway. He was unable to pursue Parker because he had to sit down due to the pain. He felt he was about to lose consciousness. He asked Parker why he attacked him. Parker said nothing and walked away – calmly. Feurtadot was taken to the hospital where he received stitches for a three or four-inch gash in his head. He was hospitalized for a week as a result of Parker attacking him. At the time he testified in the penalty phase, Feurtadot still suffered headaches as a result of Parker striking him in the head 14 years earlier. (10 RT 2147-2152.)

A correctional officer found a curved piece of steel, splattered with blood on the floor of the room that Parker and Feurtadot shared. It was a little over 24 inches long and about 1/2 inch in diameter with a circular-shaped ball at one end. While inmates had access to such items in the facility, they were not permitted to bring those items into the living area. The correctional officer did not believe that Parker was taking antipsychotic medication at the time, nor did he investigate whether Feurtadot had stolen anything from Parker at the time. (10 RT 2159-2170.)

On June 1, 1984, Parker was convicted in Kern County Superior Court, pursuant to his plea of guilty, of assaulting Feurtadot with a deadly weapon. (10 CT 3182; 10 RT 2170, 2254.)

e. Victim-Impact Evidence

Judith Brown testified about the loss of her younger sister, Sandra Fry, and how the news of her murder – after she had moved out of the family home just three days earlier – devastated their family. (10 RT 2106-2110.) Cheryl Rawlins testified about the loss of her younger sister, Kimberly Rawlins, who had just moved out of the apartment she shared with her. (10 RT 2141-2146.) Joseph Lee[27] testified about the loss of his mother and being nine years old when he heard his mother, Marolyn Carleton, scream out one night. When he entered her bedroom that night he found his mother lying on the floor propped against her nightstand, incoherent and bleeding. (10 RT 2171-2174.) Mary Lee, testified about the loss of her sister, not through illness, accident, or old age, but by a "cruel and senseless act of violence." Marolyn's mother died of cancer the year before Parker's trial, so Ms. Lee read a poem written by her mother in 1988 about the loss of her daughter entitled "what if." (10 RT 2180-2184.) Sandra Kennedy recalled the loss of her aunt, Debora Kennedy and how her murder devastated their family. She mentioned that Debora's sister who found her body looked 20 years older than her twin sister at the time of Parker's trial. (10 RT 2184-2188.) Jackie Bissonnette recalled the loss of her younger sister Debra Senior. Debra was planning on moving home a few weeks before she was murdered in order to attend Orange Coast College. (10 RT 2132-2140.) Jackie read a statement for her mother that related her belief that her husband died three years after Debra's murder of a broken heart, and she read two poems written by Debra that her mother had saved. (10 RT 2132-2140.)

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[27] At the time of her murder, Ms. Carleton's son's surname was Carleton. (7 RT 1408.)

2. Evidence in Mitigation

Parker's penalty phase defense consisted of Parker testifying in his own behalf, the testimony of a former friend who roomed with Parker while they served in the Marine Corps, and the expert opinion of a forensic psychiatrist.

Albert Garcia testified that he was a fellow Marine whom Parker roomed with between 1974 and 1977 while they were based at the Marine station in Tustin. He described Parker as intelligent, quiet, and "always mellow." He never saw Parker fight anyone and opined that he had good control over his temper and would always walk away from a fight. Garcia did not believe that Parker had an alcohol problem and he had never seen him be violent after using alcohol or PCP. The friendship between the two men deteriorated in 1980 as each went their separate way. Garcia was surprised when he learned that Parker had been convicted of rape. He tried to contact Parker, but Parker did not want to be friends with Garcia any more. Garcia had never seen Parker be inappropriate around a female and considered him to be a model Marine who was promoted to staff sergeant within five years. (11 RT 2272-2285.)

Parker testified in his own behalf. (11 RT 2316-2348.) Parker said he was first prescribed antipsychotic medication in 1984 when he was incarcerated at the California Men's Institution in Chino, and the medication made him "calm" so that he was not "out of control or nervous" when he was around people. (11 RT 2316.) He said he did not take medication once he was released from prison until he was incarcerated again. (11 RT 2316-2317.) Parker said he did not want to stop taking the medication when he testified because he was concerned he was under too much stress to be unmedicated. (11 RT 2317.) Parker then said that he understood that he caused the families and friends of his victims "quite a bit of pain" over the last 19 or 20 years, and he accepted "full responsibility for

that." He stated that "if my life is what it takes for them to feel that their family members have been vindicated, then that is what I believe should be done, the taking of my life should be taken away from me." (11 RT 2318.)

On cross-examination, Parker admitted that he indicated he was out of control and had no doubt he could murder someone in February 1996 while he was in custody at the Orange County Jail even though he was being administered psychotropic drugs at the time. (11 RT 2319.) He also admitted feeling the urge to hurt people in July 1999 while at the Orange County Jail notwithstanding receiving psychotropic drugs. Parker also acknowledged he was fearful in January of 1998 of losing control and becoming violent in court even though he was receiving psychotropic drugs at the time. (11 RT 2320.)

Parker said he believes Sandra Fry was the first person he murdered. He was not sure "exactly how he felt" after he attacked Ms. Fry and acknowledged he just went about his business as usual afterwards. (11 RT 2321-2322.) He was not able to say whether or not it ever crossed his mind what he had done to Ms. Fry before he murdered Ms. Rawlins. (11 RT 2321.) Parker claimed he felt sorry for Ms. Rawlins "right after I did it" but acknowledged he killed Ms. Carleton two months later. (11 RT 2323.) Parker admitted that he knew he was sexually assaulting and killing his victims, knew that it was wrong to do so, and acted of his own free will. (11 RT 2324.)

Parker could not explain why he attacked Ms. Fry, Ms. Rawlins, and Ms. Carleton in order to rape them, did not achieve sexual intercourse with any of them, yet continued killing. Parker denied enjoying killing people. (11 RT 2325.) While Parker said he was sorry for killing Joey Carleton's mother, he acknowledged he kept attacking and killing afterwards. (11 RT 2326.) Parker admitted attacking Ms. P. after Ms. Carleton.

He acknowledged describing Ms. P. as having "fought for her life." (11 RT 2327-2328.)

Parker admitted it never gave him pause before attacking and raping Mrs. Green even though he knew she was the pregnant wife of a fellow Marine. (11 RT 2325-2326.) Parker acknowledged he engaged in sexual intercourse with Mrs. Green and denied that it was sexually gratifying – yet he kept killing afterwards. (11 RT 2327.) Parker testified that he thought about stopping but explained that he would put those thoughts out of his mind. (11 RT 2329.)

Parker admitted using an iron mallet to kill Ms. Kennedy. (11 RT 2329.) Parker denied knowing that striking Ms. Kennedy in the head three times with an iron mallet would kill her. (11 RT 2330.) Parker acknowledged being on top of Ms. Kennedy raping her with blood coming out of at least three holes in her head, but claimed that he did not know she was dying. (11 RT 2330-2332.) Parker said he did not feel sexually gratified after raping Ms. Kennedy. (11 RT 2330.) Parker admitted he kept on killing but denied that it was because he liked to kill women or was angry. (11 RT 2331.)

Parker used the "same thing I had used on the other ones" to hit Ms. Senior, *i.e.*, a two-by-four, but then described it as a piece of firewood. He claimed he "was about to leave" when Ms. Senior "just happened to come home while" he was still inside her home. He denied knowing she lived there and waiting for her to come home. (11 RT 2332-2333.) Parker could not explain how he felt after raping and killing Ms. Senior because "it's been so long" but admitted knowing "I had done wrong." (11 RT 2334.) Parker said he had feelings of remorse but never thought about getting any medical assistance for Ms. Senior. (11 RT 2335.)

Parker acknowledged that after attacking seven women, killing five and an unborn child, achieving an act of sexual intercourse three times –

none of which were sexually gratifying, he then kidnapped and raped a 13-year-old child. (11 RT 2335.) Parker testified he "had no idea" how or why he kidnapped and raped a 13-year old girl. (11 RT 2336-2337.) While he did not ask Paula S. how old she was until after he raped her, he admitted knowing she was a child when he raped her. Parker could not recall Paula telling him that she had been to her father's funeral the day he raped her. (11 RT 2337.) Parker could not explain why he told police he probably would have killed Paula if she had not been "so young." (11 RT 2336.) Parker said he "felt bad" and "felt" he had "done something wrong" after raping Paula. (11 RT 2341.)

Parker testified he told investigators the truth when they interviewed him in 1996 because he did not have any reason to lie anymore. (11 RT 2344-2345.) Parker said he did not know his victims died until later but he knew by the time he raped Paula S. (11 RT 2345-2347.) Parker said he "had no idea" whether he would have kept on raping and murdering if he had not been arrested for the rape of Paula a few days after assaulting her – but then admitted there was nothing that was going to stop him from raping and murdering women had he not been incarcerated. (11 RT 2341-2342.)

Parker admitted attacking Ms. Demirjian with a metal pipe while visiting his brother in Pasadena. (11 RT 2337-2340.) Parker said he needed money even though he was in the Marine Corps making a fairly decent living and had no overhead since he was living on base at the time. (11 RT 2339.) Parker denied thinking about raping Ms. Demirjian. (11 RT 2341.) Parker also admitted striking his cellmate in the head with a pipe and explained he attacked him because he had been stealing from him. (11 RT 2348.)

Parker acknowledged he had been in and out of custody since 1987. (11 RT 2343.) He admitted he was arrested for assaulting a woman on a

street in Garden Grove in November of 1988 with a switchblade and demanding that she orally copulate him. (11 RT 2343-2344.)

Parker insisted he felt sorry for his victims before the police told him in 1996 that he had been connected to four murders by DNA - he just never told anyone.[28] (11 RT 2343.)

Paul Blair, a forensic psychiatrist, testified for the defense. (11 RT 2354-2453.) His assessment of Parker included interviewing Parker on October 22, 1998, and October 31, 1998, for a total of about three hours. Dr. Blair also reviewed the tapes of Parker's statements to police and the Orange County jail psychiatric team's notes from June 4, 1996, to October 29, 1998. (11 RT 2363.) Dr. Blair found no significant differences in Parker's mental status examination and the jail psychiatric team's diagnosis of Parker as organic mental syndrome, unspecified psychotic disorder, chronic alcohol abuse, and major depression.[29] (11 RT 2364, 2379-2380.)

During his interview with Dr. Blair, Parker said he heard voices, those of a male and female psychiatrist. He could not identify the voices, but said the female voice at times seemed to be his grandmother. The voices did not

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[28] In closing argument, defense counsel anticipated that the jury might wonder why Parker did not cry during his testimony expressing remorse for his crimes and explained it was attributable to his personality and cited to his being a staff sergeant in the Marine Corps. (12 RT 2559.)

[29] Even though Parker had basically spent his entire adolescence and adult life in three institutions: Boys Republic, the Marine Corps, and the California Department of Corrections, Dr. Blair was not aware that Parker had been at Boys Republic (and evaluated by two psychiatrists before being sent to Boys Republic); and he had not reviewed any records from the Marine Corps or Parker's "C-file" from the Department of Corrections. (11 RT 2393, 2397, 2402.) Dr. Blair had not received any of the police or coroner reports pertaining to the murders of Parker's victims. (11 RT 2397.)

command him to do anything. (11 RT 2366.) Dr. Blair explained that Parker was reporting a series of unusual delusions: he believed that people he did not know were talking about him, when in fact they were not doing so; and he also believed that thoughts could be physically put into, as well as removed from, his head. (11 RT 2368.)

Parker told Dr. Blair he began using marijuana at age 11. (11 RT 2376.) Parker also claimed to have used PCP and LSD. (11 RT 2375.) Parker claimed an extremely high number of "acid trips" – at least 1,000. (11 RT 2376-2377.) Dr. Blair is uncertain of anyone taking that many "trips" who had "a brain left" afterwards. (11 RT 2377.) Parker told Dr. Blair that he had used a combination of heroin and cocaine intravenously (speedballs), which Dr. Blair explained also affects the brain. (11 RT 2377.) Parker also claimed to have regularly inhaled glue, paint, and paint thinner between the ages of 7 and 15, which would cause significant liver and brain damage. (11 RT 2377-2378.) Parker also told Dr. Blair that he drank a case of beer and half of a fifth of vodka every day for a 10- to 11-year period. (11 RT 2378.) Parker also claimed five head injuries, three of which produced unconsciousness. (11 RT 2380.)

Dr. Blair indicated that Parker's psychiatric history began 14 years before he interviewed him. (11 RT 2369.) Parker was treated at Vacaville State Prison without medication, but was treated with psychiatric medication while confined at the California Institution for Men at Chino. (11 RT 2370.) Parker was also given antipsychotic medication while in jail to assist him with aggression and confusion and to reduce disorganized thinking. The medication is to reduce if not eliminate psychosis. (11 RT 2370-2374.)

Dr. Blair opined that Parker would present a danger to others if he were out of custody, and it was "probably true" that if Parker were treated with psychotropic drugs and in a controlled environment in prison he would

not be a danger to others. (11 RT 2382-2383.) After his interviews of Parker, and reviewing the tapes of his statements to police, Dr. Blair considered Parker to be his "patient" and believed the appropriate punishment for Parker would be to receive psychiatric treatment for the remainder of his life as a result of a conservatorship and civil commitment. (11 RT 2388-2389.)

3. Prosecution's Rebuttal

Forensic psychiatrist Parke Dietz testified on rebuttal for the prosecution. (11 RT 2461- 2485.) Dr. Dietz reviewed extensive materials relating to Parker and his crimes.[30] (11 RT 2465-2467.) Dr. Dietz explained that while his opinions were limited because he did not personally interview Parker he nevertheless was able to obtain most of the information he would obtain from a mental status examination by reviewing the videotapes of police interviews of Parker in 1996. (11 RT 2468-2469.) Dr. Dietz opined that on the date Parker made his statements to police, "his mind was functioning perfectly adequately" and he was

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[30] Dr. Dietz reviewed about 8,000 pages of material relating to Parker including his records from the Boys Republic, the Marine Corps, California Department of Corrections, Orange County Department of Health, and Orange County Jail. (11 RT 2465-2467.) He also reviewed Kern and Orange County probation and sentencing reports relating to Parker. Additionally, Dr. Dietz reviewed reports pertaining to Parker's kidnapping and rape of Paula S., his assault of Aide Demirjian, rape of Jane P., assault of Mr. Feurtadot, and attack on Toblynn O'Hare. Dr. Dietz also reviewed the transcripts of interviews of Parker's family members and Albert Garcia. (11 RT 2466.) He reviewed the reports by Drs. Sharma, Anderson, Spiehler as well as Dr. Spiehler's testimony. (11 RT 2466-2467.) Dr. Dietz reviewed the police and probation reports pertaining to Parker's capital crimes, as well as interviews of Parker by the Naval Criminal Investigative Services on June 21, 1996, Anaheim Police Department on June 14 and 16, 1996, by Costa Mesa Police Department and Tustin Police Department on June 14, 1996. (11 RT 2467.)

logical, coherent, rational and understandable. (11 RT 2469.) Based on the behavior Parker exhibited during his 1996 interviews with police, Dr. Dietz observed no evidence whatsoever of any psychotic disorder or organic brain damage. (11 RT 2470.) Brain damage that occurs at one point in time does not fully recover at a later point, such that Dr. Dietz was confident that Parker's mind worked "at least as well" in 1978 and 1979 at the time he raped and murdered his victims, and no brain damage affected his culpability for his crimes. (11 RT 2469.)

The only difference in terms of what is evident on the videotape of the 1996 police interviews of Parker and what might have occurred at the time of the rape/murders is whether Parker was intoxicated with alcohol or drugs. (11 RT 2469-2470.) Beyond Albert Garcia's testimony he observed Parker using drugs and Parker's own unconfirmed reports that he was heavily into street drugs, *i.e.*, cocaine, heroin, PCP, LSD and alcohol, Dr. Dietz was unaware of any other evidence of Parker's drug use. (11 RT 24832484.) In assessing Parker, Dr. Dietz placed more emphasis on what Parker did than what he said. (11 RT 2481.)

Dr. Dietz opined that Parker has an antisocial personality disorder (also known as being a sociopath or psychopath). (11 RT 2471-2475.) Parker's running away, stealing, and breaking and entering satisfied the antisocial personality disorder criteria of a conduct disorder as a child. (11 RT 2473.) Moreover, he satisfied the criteria for an adult antisocial personality disorder because after age 16 he exhibited aggressive behavior, repeatedly engaged in behavior that could be grounds for arrest, exhibited reckless disregard for the safety of others and himself, a lack of remorse, was deceitful, and constantly engaged in irresponsible behavior. (11 RT 2473-2475.) Dr. Dietz explained that persons with antisocial personality disorders want to do anything they think will make them happy. (11 RT 2480.)

In terms of Parker joining the Marine Corps and progressing from private to sergeant, Dr. Dietz explained Parker was responding to structure: "... He learned how to play that system. At the same time he is being a functional Marine doing a good job with procurement, running six miles a day, being physically fit, passing each physical very well, what he is doing at night is patrolling for victims. That's his secret life." (11 RT 2482.)

The prosecution also presented testimony regarding Parker's stellar job performance in a demanding position and lack of indication of any drug or alcohol abuse from Parker's commanding officer during the time he raped and murdered Sandra Fry and Kimberly Rawlins. Lt. Colonel Larry Kuester was the commanding officer of a CH-53 Sikorsky heavy transport helicopter squadron, the 361st Squadron, at Tustin Marine Station from February 1978 to January of 1980, and Parker was a staff sergeant assigned to his command in 1978 through May 1979. (11 RT 2486-2487.) A staff sergeant is a significant position in the Marine Corps (E-6 out of nine enlisted ranks in the Corps) and considered the "backbone" of the organization. (11 RT 2490.) Parker was the material chief for the squadron which involved obtaining the parts necessary to support the maintenance of the aircraft which was a "very critical function" relating to the flight readiness of the squadron. (11 RT 2487-2488.) Parker performed his duties in an outstanding manner and had the honor of being recommended for Warrant Officers School. (11 RT 2488-2489.)

Parker's commander saw him on at least a weekly basis and never observed him to be intoxicated or hung-over, and his evaluation reports indicated an appearance and a job performance that contradicted Parker having an alcohol or drug problem. (11 RT 2488-2490.) The command had a zero tolerance toward intoxication or the use of alcohol while on duty – and that was certainly true for the aviation units as lives were on the line. (11 RT 2493.) Lt. Colonel Kuester did not believe it would be possible for

someone who is intoxicated on alcohol or drugs to perform the duties of a parts chief for the squadron. (11 RT 2491.) Parker's position was not one where he could simply delegate and take off. (11 RT 2492.) Parker was subject to random drug testing and did not test positive. He underwent a mandatory extensive physical every year. (11 RT 2493-2494.) There was never any indication of Parker having an alcohol or drug problem. (11 RT 2493, 2495.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED PARKER'S *WHEELER* MOTION FOR FAILURE TO MAKE A PRIMA FACIE CASE OF DISCRIMINATION

Parker claims he was denied his state and federal constitutional rights when the trial court denied his motion claiming the prosecutor improperly exercised peremptory challenges against two African-American jurors. (AOB 105-170.) The trial court properly found a prima facie case of discrimination had not been made because Parker had failed to make the requisite prima facie showing below.

The use of peremptory challenges to strike prospective jurors on the basis of bias against an identifiable group of people, distinguished on racial, religious, ethnic or similar grounds, violates the right of a criminal defendant to be tried by a jury drawn from a representative cross-section of the community under Article I, section 16, of the California Constitution, and the right to equal protection under the United States Constitution. (*People v. Mills* (2010) 48 Cal.4th 158, 173; *People v. Hamilton* (2009) 45 Cal.4th 863, 898, citing *People v.Wheeler* (1978) 22 Cal.3d 258, 276-277, overruled in part in *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129]; *Batson v. Kentucky* (1986) 476 U.S. 79, 88 [106 S.Ct. 1712, 90 L.Ed.2d 69], overruled in part, *Powers v. Ohio*

(1991) 499 U.S. 400 [111 S.Ct. 1364, 113 L.Ed.2d 411]; *People v. Davis* (2009) 46 Cal.4th 539.) When a defendant believes the prosecutor's reason for exercising a peremptory challenge is based upon such discrimination, a timely *Batson/Wheeler* motion must be made. (*People v. Young* (2005) 34 Cal.4th 1149, 1172.)

There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination. (*People v. Mills*, *supra*, 48 Cal.4th at p. 184; *People v. Bonilla* (2007) 41 Cal.4th 313, 343.) Accordingly, the defendant carries the burden of establishing the prosecutor exercised a peremptory challenge based on group bias. (*Rice v. Collins* (2006) 546 U.S. 333, 338 [126 S.Ct. 969, 973-974, 163 L.Ed.2d 824]; *Purkett v. Elem* (1995) 514 U.S. 765, 767-768 [115 S.Ct. 1769, 131 L.Ed.2d 834].)

"'The United States Supreme Court has recently reaffirmed that *Batson* states the procedure and standard trial courts should use when handling motions challenging peremptory strikes. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]"'" (*People v. Hawthorne* (2009) 46 Cal.4th 67, 78, quoting *People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1008-1009, quoting *Johnson v. California*, *supra*, 545 U.S. at p. 168; see also *Snyder v. Louisiana* (2008) 552 U.S. 472, 476-477 [128 S.Ct. 1203, 1208, 170 L.Ed.2d 175].) Excluding even a single juror for impermissible reasons requires reversal. (*People v. Huggins* (2006) 38 Cal.4th 175, 227.)

A defendant satisfies his burden of making a prima facie showing " 'by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.'" (*People v. Taylor* (2010) 48 Cal.4th 574, ___ [2010 Cal. LEXIS 2818, *69], quoting *Johnson v. California*, *supra*, 545 U.S. at p. 170.) The defendant "must show under the totality of the circumstances it is reasonable to infer discriminatory intent." (*People v. Kelly* (2007) 42 Cal.4th 763, 779; see also *People v. Bonilla*, *supra*, 41 Cal.4th at p. 341 [defendant must show inference of discrimination in exercise of peremptory challenges from totality of relevant facts].) " 'The defendant should make as complete a record of the circumstances as feasible.'" (*People v. Taylor*, *supra*, 48 Cal.4th at p. ___, [2010 Cal. LEXIS at p. *69], quoting *People v. Wheeler*, *supra*, 22 Cal.3d at p. 280.)

The trial court did not articulate the standard being applied when it denied Parker's two *Batson/Wheeler* motions for failure to make a prima facie case. The standard being utilized in California at the time of Parker's trial was the "strong likelihood" standard. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 280.) That standard was subsequently disapproved by the high court. (*Johnson v. California*, *supra*, 545 U.S. at pp. 166-168.) Accordingly, since this Court cannot be certain the trial court used the correct "reasonable inference" standard as later established by *Johnson*, it does not apply the substantial evidence test that would otherwise apply in reviewing the denial of a *Batson/Wheeler* motion. Instead, this Court reviews the record "independently (applying the high court's standard) to resolve the *legal* question whether the record supports an inference that the prosecutor excused a juror on the basis of race." (*People v. Hawthorne*, *supra*, 46 Cal.4th at p. 79, emphasis in original; *People v. Davis*, *supra*, 46 Cal.4th at p. 582; *People v. Hamilton*, *supra*, 45 Cal.4th at pp. 898-899;

People v. Howard (2008) 42 Cal.4th 1000, 1016-1017; *People v. Bonilla, supra*, 41 Cal.4th at p. 343.)

A. Voir Dire Proceedings

After hardship screening, 136 prospective jurors remained for voir dire in Parker's case. (5 RT 760-761; 10 CT 3113.) Voir dire began on September 29, 1998. (5 RT 757.) A jury was selected after 71 potential jurors were questioned on voir dire. During voir dire, 17 prospective jurors were excused for cause and or for hardship without objection. (5 RT 858-86-; 873-875, 980-981, 993-994; 6 RT 1019-1022, 1065-1067, 1070-1076, 1126-1133, 1144-1145, 1155-1158, 1164-1172.) In selecting the jury, the prosecutor exercised 19 peremptory challenges. (5 RT 903, 919, 944, 955, 964, 971-972, 987, 997; 6 RT 1009, 1031, 1034, 1039, 1044, 1055, 1070, 1096, 1099, 1109, 1123; 10 CT 3113-3115.) The prosecutor exercised three peremptory challenges in selecting alternate jurors. (6 RT 1154, 1164, 1176; 10 CT 3115.) The defense challenged 14 prospective jurors (5 RT 910, 937, 951, 961, 964, 980, 992; 6 RT 1019, 1049, 1065, 1092, 1105, 1121, 1126; 10 CT 3113-3115) and two alternate jurors (6 RT 1181, 1185; 10 CT 3115.)

The prosecutor's fourth challenge excused an African-American woman. (5 RT 929, 955; 10 CT 3113.) The defense objected on *Wheeler* grounds. (5 RT 931, 934.) The trial court found no prima facie case of discrimination had been made. (5 RT 936.) When the prosecutor exercised its 17th peremptory challenge to excuse an African-American man, the defense again objected on *Wheeler* grounds.[31] (6 RT 1099, 1116-1117.)

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[31] While Parker raises a *Batson* claim on appeal without having referenced *Batson* in objecting below, his objection at trial referencing only Wheeler is considered sufficient to preserve a *Batson* claim for the first

(continued...)

The trial court found that the defense had failed to make a prima facie showing of discriminatory exercise of peremptory challenges. (6 RT 1119.)

1. Prospective Juror No. 719

Prospective Juror No. 719 was an African-American woman. (5 RT 929.) On her questionnaire, Prospective Juror No. 719 did not respond to all the questions regarding her views on the death penalty. (See 6 CTJQ[32] 1884-1885.) In response to the question: "What are your GENERAL FEELINGS regarding the death penalty?," Prospective Juror No. 719 wrote: "I don't like it!" (VI CTJQ 1885, upper case in original.) Prospective Juror No. 719 answered affirmatively to the question regarding whether "religious beliefs which would impair your ability to serve as a juror on this type of case" and in the place where prospective jurors were asked to "please explain" their answer to the question, she wrote: "death." (VI CTJQ 1886.)

In voir dire, Prospective Juror No. 719 indicated she was a 51-year-old widow with no prior jury service. (5 RT 919-920.) She was a high-school graduate who was unable to work due to a disability. She indicated that she had difficulty sitting for long periods of time because she had a

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(...continued)
time on appeal. (*People v. Howard, supra*, 42 Cal.4th at p. 1017, fn. 9; *People v. Cornwell* (2005) 37 Cal.4th 50, 66, fn. 3, overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, & fn. 22.)

[32] Respondent has utilized the same abbreviations for the Clerk's Transcript that are used in Appellant's Opening Brief. Accordingly, "CTJQ" references the Clerk's Transcript containing the jury questionnaires.

"bad lower back."[33] (5 RT 920.) After the defense passed for cause, the prosecutor inquired of Prospective Juror No. 719:

> Q. ... from your answers to the questionnaire, would it be correct to say that for religious reasons have you a problem with the death penalty?
>
> A. That is correct.
>
> Q. Okay.
>
> And would it also be fair to say that because of those religious beliefs, your personal beliefs, you'd have difficult [*sic*] imposing the death penalty?
>
> A. That is correct.
>
> Q. And if given the chance to vote for life without possibility of parole, versus death, you'd probably always select life without possibility of parole over death.
>
> Is that a correct statement?
>
> A. That is a correct statement.

(5 RT 923-924.)

The prosecutor then challenged Prospective Juror No. 719 for cause. (5 RT 924.) Prospective Juror No. 719 was then questioned by the court and the parties in chambers. (5 RT 924-929.) The court began by explaining to Prospective Juror No. 719 that the court "wanted to clarify

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[33] In the questionnaire signed on September 22, 1998, in response to the Question: "Do you have specific health, hearing, or vision problems of a serious nature that might make it difficult for you to sit as a juror in this case?," Prospective Juror No. 719 indicated "1. Lower back problems" and "2. Sitting for a long time." (VI CTJQ 1876, 1888.) On September 29, 1998, Prospective Juror No. 719 completed a declaration requesting to be excused due to hardship based on experiencing lower back pain from sitting. (1 CTHS 140.) The court inquired and she indicated she had "a lower-back problem" and "it's painful" when she walks for a "long distance" or sits for a "long period of time." (6 RT 927.)

some of your last answers to see what your feelings were." The court asked Prospective Juror No. 719: "Are you telling the court and the parties that under no circumstances would you ever vote for the death penalty?" Prospective Juror No. 719 answered: "I just don't believe in it. I'm being honest ... I'm just being honest." (5 RT 924.) The court then asked Prospective Juror No. 719 if her feelings were so strong, that she would not under any circumstances vote for the death penalty no matter what the evidence. Prospective Juror No. 719 replied: "I won't say that. It depends on the evidence also, I'd take that in consideration. But I just don't believe in it because we can't give life. And that's one reason. And I just don't believe in taking life." The court clarified that her belief was based on her religious beliefs. (5 RT 925.) The court asked whether, if the other jurors convinced her that death was the appropriate penalty, she could see herself voting for death, and Prospective Juror No. 719 responded: "I can't give you that answer." She indicated she would be willing to listen to the evidence before making a decision. (5 RT 926.)

The prosecutor asked Prospective Juror No. 719 if she had certain religious and personal beliefs against the death penalty and she answered, "Oh yes, that's correct." When asked if it "would be fair to say because of those religious beliefs it would be very difficult for you to vote to put someone to death; is that correct?," Prospective Juror No. 719 replied: "Oh, yes, definitely." When asked if she would be biased against voting for the death penalty because of her religious beliefs, Prospective Juror No. 719 said she would not agree that she was biased "because she would have to look at the evidence." Prospective Juror No. 719 then agreed that her feelings against the death penalty would make it difficult for her to impose death. (5 RT 928.)

2. First *Wheeler* Motion

The trial court indicated it was going to disallow the challenge for cause and asked if there was going to be a *Wheeler* motion if the prosecutor exercised a peremptory challenge to Prospective Juror No. 719. (5 RT 929.) Parker's counsel responded "I feel that you've made the record that [the prosecutor] probably would not get – not be in a *Wheeler* situation because of her answers. I think that she gave answers that would probably give him reason to use his peremptory in a nonracial manner." (5 RT 929.)

The prosecutor then indicated to the trial court that Prospective Juror No. 719 was clearly impaired and the challenge for cause would be valid under the standard articulated in *Wainwright v. Witt* (1985) 469 U.S. 412, 425 [105 S.Ct. 844, 83 L.Ed.2d 841], which requires excusing a juror for cause based on his or her views on capital punishment when the "juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with instructions and his oath.'" (5 RT 930.) The prosecutor argued that the questions posed by the court to Prospective Juror No. 719 related to whether under any circumstances the juror could vote for death, which would be consistent with the standard enunciated in *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776]. The court acknowledged it was inquiring of Prospective Juror No. 719 using the Witherspoon standard but believed that her demeanor and the manner in which she answered the questions evidenced substantial compliance under the *Witt* standard. (5 RT 930.) The court added that it was uncertain whether Prospective Juror No. 719 appreciated "the magnitude of the questions" because it was the first time they had "gotten into this area in front of other jurors." (6 RT 930-931.) The court then stated: "So I am disallowing the challenge for cause under *Witherspoon*, under *Witt*." (5 RT 931.) The prosecutor then stated: "I still think when someone says because of my religious beliefs I'm going to have difficulty

imposing the death penalty and I don't believe in it, that's got to be *Witt*. Yes, she will look at the evidence, okay? Yes, she has to wait till [*sic*] the evidence to be certain. But there's no question she has said 'I don't like it' in her questionnaire, and she says I'm going to have difficulty imposing it." (5 RT 931.)

Defense counsel then indicated, "One more comment, and I'll come back in on *Wheeler*." (5 RT 931.) The prosecutor interrupted and explained his discussion about how the Witt standard should be applied was due to anticipating that the subject will invariably come up again in the course of voir dire. The trial court then explained:

> Just because a person in my mind says "I have religious difficulties with it and I would have difficulty applying that," it's anticipated that all jurors coming in will have difficulty applying this provision of law if they get to it.
>
> And so that, to me, doesn't mean that they're excluded from being one of the available jurors.
>
> If they say to me "I will not listen to the evidence or will – I won't give it any major consideration," or something along that line, I think we have a *Witt* application.

(5 RT 932.)

The prosecutor told the court that the situation being described was the previously applicable *Witherspoon* standard – where a juror would not under any circumstance consider imposing the death penalty. (5 RT 932.) The court then agreed with the prosecutor that *Witt* called upon the court to make a determination on an individual by individual basis, and it had done so with respect to Prospective Juror No. 719. (5 RT 933.)

Following the prosecutor's argument regarding the proper application of *Witt*, defense counsel stated that the prosecutor's "adamant position with the court's fine ruling and the situation leads me to believe that we may very well be getting into a *Wheeler* situation." (5 RT 934.) Defense

counsel David Zimmerman observed: "There's only three blacks in the whole room," and defense counsel James Enright stated: "There's only three blacks out there." (5 RT 934.) Defense counsel then stated: "Given the limited reservoir pool of potential black jurors, kicking any one off puts us in *Wheeler*." (5 RT 934.) The prosecutor advised the court that for purposes of the *Wheeler* discussion, it could be assumed that he would be using a challenge sometime that day as to Prospective Juror No. 719 and no prima facie showing had been made. (5 RT 934.)

The prosecution's fourth peremptory challenge was exercised against Prospective Juror No. 719. (5 RT 955; 10 CT 3113.) In overruling the defense *Wheeler* objection, the trial court noted that defense counsel himself had acknowledged that the prospective juror's responses provided a race-neutral basis for a prosecutor to exercise a peremptory challenge. The trial court found no prima facie case of discrimination by the prosecutor based on "the likelihood that a good prosecutor would challenge" a juror who had responded in the same manner as Prospective Juror No. 719. (5 RT 936.)

3. Prospective Juror No. 213

Prospective Juror No. 213 was an African-American man. (6 RT 1117.) Prospective Juror No. 213 was the first juror to pick up a hardship application from the bailiff. (6 RT 1118.) Prospective Juror No. 213 filled out the hardship application and wrote that he could not serve as a juror in Parker's trial for the following reasons:

> They [*sic*] are time/date problems:
>
> Dates: Oct 1 – Doctors [*sic*] appt 2:00 pm
>
> [Oct 14th] – Doctors [*sic*] Appt 2:00 pm

> Important * Oct 5 – School Department Meeting 8:00 am to 2:30 pm
>
> Nov 16-17 – out of town
>
> And last but not least I'm Head Basketball Coach → and Basketball Season starts Dec 1st! Our schedule could (during that month) coincide with the trial, and I Must be on the bus or at the games.

(1 CTHS[34] 122.)

When Prospective Juror No. 213 was told by the judge to take a seat, which indicated to the prospective juror that there had not been a stipulation as to his hardship application, the judge heard Prospective Juror No. 213 audibly groan and make a facial expression consistent with that groan. (6 RT 1118.)

Prospective Juror No. 213 was questioned on voir dire initially in chambers. (6 RT 1082.) The court read the portion of his hardship application regarding the conflict with his coaching basketball. (6 RT 1083.) Prospective Juror No. 213 explained the "biggest problem" would be near Christmas because of tournaments and that "[w]hen you have tournaments, which you already know they could be at nine in the morning until night, and I cannot change those." (6 RT 1083-1084.) The prosecutor noted that the case should be completed by December 11th. Prospective Juror No. 213 indicated he had not received the schedule yet, but they should have no more than three or four games before December 11th. (6 RT 1084.) The prosecutor then clarified with Prospective Juror No. 213 that the basketball team's first game would be on December 1st. He then noted that court usually ran until 4:30 p.m. and asked if that would prevent Prospective Juror No. 213 from practicing with his team the entire time that

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[34] As used herein, "CTHS" references the volume of the Clerk's Transcript containing Exhibits 1-9 (hardship applications).

he was serving on the jury. (6 RT 1084-1085.) Prospective Juror No. 213 indicated he had not yet been able to talk to the coach of the girls' team in order to coordinate in scheduling practice times for the boys' team he would be coaching. (6 RT 1085.) The prosecutor asked if it would be tough on the players if practices were at night, and Prospective Juror No. 213 explained that the players were freshmen and the parents would prefer to have them home by six. (6 RT 1085.)

Prospective Juror No. 213 then indicated that he wanted to apologize regarding "the one portion when they asked me what television program, I said 'You've got to be kidding.' I was punchy by that time and very hungry." The prosecutor responded, "People have said a lot worse. Don't feel bad." (6 RT 1086.) The court then asked about the medical appointments on Prospective Juror No. 213's hardship application, and it was clarified that the appointment on the December 7th was not until December14th, and while he could move the appointment on December 14th up to 8:00 a.m. and be in court by 9:30 a.m., he had to see his doctor on December 14th. (6 RT 1086.)

After Prospective Juror No. 213 had left chambers, the defense advised the court "[w]e want him." The prosecutor was willing to stipulate that it would be a hardship for Prospective Juror No. 213 to serve on the jury. (6 RT 1086.)

The trial court then asked if either party wished to question Prospective Juror No. 213 further following the sequestered voir dire regarding the hardship application. (6 RT 1088.) The defense had no questions, but the prosecutor inquired further. He first asked about Prospective Juror No. 213's prior jury service. (6 RT 1089.) He then asked about Prospective Juror No. 213 testifying for the defense as a character witness for a friend who was accused of murdering his father. (6 RT 1090.) He also inquired about psychological counseling that Prospective Juror

No. 213 had received in high school which the prospective juror responded by describing as "basic counseling" about a "girlfriend thing." (6 RT 1091.) The prosecutor then asked about the difficulty that serving on the jury would create in terms of his being the head coach of the freshman boys basketball team at Los Amigos High School. (6 RT 1091.) The prosecutor then inquired about Prospective Juror No. 213's attitude toward jury service:

> [Prosecutor]: I take from it some things you said and the way you walked to the jury box, you're not thrilled; is that a bad way to state it?
>
> [Prospective Juror No. 213]: That's a bad way to state it.
>
> [Prosecutor]: Well, you put it in your words then.
>
> [Prospective Juror No. 213]: Okay, I had – honestly, honestly, when I first came I knew I would be a good juror. I knew that. I wasn't even worried about it. And I listened in the courtroom all yesterday and I still knew I would be a good juror. But, my problem was it's just a matter of this trial is very, very important. The person's life is at stake. And that is very important. And I'm dealing with high school kids who everything they do is way more important than everything else in your life. So, I'm trying – I'd have to deal –
>
> [Prosecutor]: So you're torn?
>
> [Prospective Juror No. 213]: Yeah.
>
> [Prosecutor]: You have a responsibility to the high school players, and you realize the responsibility here; is that what you're trying to say?
>
> [Prospective Juror No. 213]: Yes, this is a very big responsibility, as much as that is a big responsibility, too. If we can work out [*sic*], if I can get it so they're both on different keels, it's fine with me. Because I don't have to worry about anything. I don't have to worry until I get to the game. Then I worry about that.

(6 RT 1092-1093.)

The prosecutor then asked Prospective Juror No. 213 about his views on the death penalty. Prospective Juror No. 213 said he had "mixed feelings" about the death penalty but indicated it was appropriate in some instances and that he could impose it if warranted by the evidence. (6 RT 1093-1096.) The prosecutor then passed for cause as to Prospective Juror No. 213. (6 RT 1096.) The prosecutor subsequently exercised his next peremptory challenge to excuse Prospective Juror No. 213. (6 RT 1099.) The peremptory challenge was the 17th exercised by the prosecutor. (10 CT 3115.) The defense objected on *Wheeler* grounds following the peremptory challenge of Prospective Juror No. 213. (6 RT 1116.)

The trial court asked defense counsel to explain the basis for claiming misconduct by the prosecutor in exercising a peremptory challenge against Prospective Juror No. 213. Defense counsel Zimmerman responded: "We only had three black individuals, three African Americans in the whole room, and two of them have been excused by peremptory challenge by the People. I'm just making my record in that regard." (6 RT 1116.) The trial court questioned the representation regarding the racial composition of the jury pool: "[Court]: Well, I'm hesitant to accept the conclusion that you folks have put on the record that there's only three African Americans in the prospective jury pool." (6 RT 1116.)

> [Defense Counsel Enright]: I don't think there's three, I think there's two.
>
> [Court]: Well, and that's an interesting observation, but, the Court is not accepting that. So, from my perspective there might be more. But beyond that, other than that conclusion that you stated, which I take it is based on you looked at the jury pool that's out there and you saw two or three people that you thought were African American, is there another reason that you're putting forward to the Court as, you know, you need to show prima facie why there's been misconduct?

[Defense Counsel Zimmerman]: Yes, because [Prospective Juror No. 719] was excused yesterday. She was African American descent, also. So we're contending that that establishes a systematic exclusion of the African American potential jurors.

One thing, your Honor, we haven't acknowledged [Prospective Juror No. 213] is of African American descent.

[Court]: I will accept that representation based on my contact with [Prospective Juror No. 213]. The only thing I was quibbling about, you folks keep saying there's only three out there. And I don't know that that's the case. However, if there is anything else, other than –

[Defense Counsel Zimmerman]: No, that's my objection.

(6 RT 1116-1117.)

The trial court then denied the *Wheeler* challenge, finding no basis for concluding that "the district attorney is engaging in misconduct, that he systematically is excluding all Afro-Americans from serving as jurors on this case or is systematically excluding any other minority group from serving on this particular case." (6 RT 1117.) The trial court made express findings regarding Prospective Juror No. 213's demeanor:

[Prospective Juror No. 213] did submit a request to be excused for hardship, and we have that on the record, we'll keep it. In our discussion in chambers he indicated his reticence about serving, although he did opine that if actually selected, he will find a way to make his job work consistent with the nature of the jury duty.

But, just watching his expression, and I have to put two things on the record: Yesterday when we broke in the evening one of the first prospective jurors to come up to the bailiff to get a hardship form was [Prospective Juror No. 213]. As you know, I emptied the courtroom so nobody could return anything at that time, so we got [Prospective Juror No. 213's] request today. And then I had (Prospective Juror No. 213) step out into the courtroom waiting whether there was going to be a stipulation or not.

> So, when I came back out and advised him what, that he needed to go take the jury seat, there was an audible groan and facial expression consistent with that as he moved from the clerk's area over to the chair.
>
> And just watching his demeanor, his facial expressions when he was inquired about his availability, I thought he was indicating that it's going to be extremely difficult. Plus some of the other information that was disclosed to the deputy district attorney upon further inquiry.
>
> So, I think we have to be careful, when you make a challenge of this nature, that the Court give a legitimate consideration. And I don't mean to make less of the challenge. *If I thought it was even close, I would make the deputy district attorney state on the record his feeling as to why he was excusing this juror*, [Prospective Juror No. 719 [*sic*]], but, there was ample reason to excuse both of those, other than dealing with race.

(6 RT 1117-1119, emphasis added.)

B. The Record Does Not Support an Inference of Discrimination

Parker contends that he met his burden of showing a prima facie case of discrimination because: (1) no other members of the venire appeared to be African-American (AOB 136-137); (2) the two African-American prospective jurors that were challenged were as heterogeneous as the community as a whole other than their race and age (AOB 138-140); (3) the exclusion of two African-American jurors is sufficient to demonstrate a pattern of systematic exclusion (AOB 140-143); (4) the statistical disparity between the percentage of African-American jurors versus the non African-American jurors challenged by the prosecution is sufficient standing alone to make a prima facie case of discriminatory intent (AOB 143-147); and (5) the manner of questioning the two African-American jurors supports an inference of discriminatory intent (AOB 147-

148). To the contrary, the record does not support an inference of discriminatory intent. Even assuming arguendo that all of the African-American prospective jurors were excused when the prosecutor challenged the two African-American prospective jurors, the exclusion of two jurors does not suggest a pattern of impermissible exclusion, nor show a disproportionate number of challenges toward African-American prospective jurors. Further, both the manner of questioning and the statements by the prospective African-American jurors serve only to refute any suggestion of discriminatory intent. Accordingly, Parker did not make a prima facie showing below.

1. The Exclusion of Two Jurors Is Not Sufficient to Support an Inference of Discrimination Under the Totality of the Circumstances

Parker contends that he established below that the prosecutor challenged the only members of the venire that appeared to be African-Americans. (AOB 136.) However, the record does not show that there were only two African-American prospective jurors among the venire. Parker argues that the trial court's "own observations establish that the prosecutor challenged everyone in the venire who appeared to be" African-American. (AOB 137.) The record is not clear that the trial court's observations were consistent with Parker's counsel's representations. When the trial court expressly refused to accept the defense representation that there were only two or three African-American jurors, the record is not clear that the trial court's refusal was based on distinguishing those jurors who appeared to be African-American from those who might also be of African-American heritage. (See 6 RT 6117-6118.) Parker contends that his representation is sufficient because the prosecution should be deemed to have admitted the truth of the defense characterization of the venire based

on the absence of any objection. (AOB 136.) Since the trial court expressly disputed the reference, the lack of any objection to the representation is readily attributable to the trial court's indication that it was not accepting the representation. In any event, even assuming that the two challenged African-American prospective jurors were the only African-American prospective jurors, the record does not support an inference of discrimination based on a statistical analysis.

Parker contends that he made a prima facie showing of discrimination based solely on the statistical disparity from the prosecutor exercising 2 of 19 peremptory challenges against African American potential jurors. (AOB 143-147.) In terms of whether the prosecutor struck most or all of the members of a particular group, or used a disproportionate number of challenges against the group, it has been repeatedly held that it is impossible to draw an inference of discrimination from the challenge of one potential juror. (*People v. Taylor*, *supra*, 48 Cal.4th at p. ___ [2010 Cal. LEXIS at p. *70]; *People v. Cornwell*, *supra*, 37 Cal.4th at pp. 69-70; *People v. Hamilton*, *supra*, 45 Cal.4th at p. 899; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 343, fn. 10; *People v. Howard*, *supra*, 42 Cal.4th at p. 1018, fn. 10.) Moreover, as this Court has observed, as a practical matter, the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion. (*People v. Bell* (2007) 40 Cal.4th 582, 597.) Further, exercising only 2 of 19 peremptory challenges against the group that is the subject of a *Batson/Wheeler* challenge does not entail the exercise of a disproportionate number of challenges against the group. (*Ibid.* [2 of 16 challenges against African-American women not disproportionate use of peremptory challenges against that group].)

Parker's reliance on *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, is misplaced because in that case the court concluded that the bare statistical facts from the prosecutor using three of his first four peremptory

challenges to remove African-American prospective jurors was sufficient for a prima facie showing based on statistical disparity alone. (*Id.* at p. 1107.) Here, the prosecutor did not challenge an African-American prospective juror until exercising his fourth peremptory challenge. Moreover, in the context of the challenge for cause that was denied prior to the exercise of the peremptory challenge, the race neutral reason for the challenge was so obvious that even the defense credited it on the record. Another challenge to an African-American potential juror in this case did not occur until the prosecutor's 17th challenge.

None of the cases relied upon by Parker as stating a prima facie case based on statistical disparity alone reflect the mere exercise of two challenges separated by other challenges as occurred in this case. (AOB 143-144, citing *Williams v. Runnels*, *supra*, 432 F.3d at p. 1107; *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1091 [inference of bias based on five out of six peremptory challenges to strike African-American jurors].) Indeed, as the Ninth Circuit noted in *Williams v. Runnels*, when a prosecutor exercises the first peremptory challenge against an African-American prospective juror, and that individual is the first person called and struck, the timing of the challenge results in a higher percentage of jurors from the challenge group being stricken than if the same juror were called and struck at the end of voir dire. Moreover, the timing of the objection is one of the relevant circumstances that can refute an inference of discriminatory purpose based on statistical disparity. (*Williams v. Runnels*, *supra*, 432 F.3d at p. 1108, & fn. 9.) The placement of the challenges in this case (4th and 17th) serve to refute the statistical showing Parker is depending upon to support his second *Wheeler* motion.

Additionally, the cases based on statistical disparity relied upon by Parker do not involve striking as few minority jurors as occurred in this case. (AOB 143-144, citing *Williams v. Runnels*, *supra*, 432 F.3d at

p. 1103 [3 out of 4 African-American prospective jurors]; *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1077-1080 [4 out of 7 Hispanic and 2 African-American prospective jurors]; *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 812, overruled on other grounds, *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677, 681 [5 out of 9 African-American prospective jurors]; *United States v. Alvarado* (2d Cir. 1991) 923 F.2d 253, 255 [4 out of 7 African-American prospective jurors]; *United States v. Hughes* (8th Cir. 1989) 880 F.2d 101, 103 [3 out of 6 African-American prospective jurors]; *United States v. Battle* (8th Cir. 1987) 836 F.2d 1084, 1085-1086 [5 out of 7 African-American prospective jurors].) Even assuming there were no other African-American potential jurors other than Prospective Jurors Nos. 719 and 213, two jurors is too small of a number from which to draw an inference of discrimination.

2. The Prosecutor's Questioning of Prospective Jurors Did Not Support an Inference of Discriminatory Exercise of Peremptory Challenges

Parker complains for the first time on appeal that the prosecutor's voir dire of Juror No. 719 was desultory. (AOB 147.) Given the obvious reason for the prosecutor's exercise of a peremptory challenge after his challenge for cause was denied, there was no adverse inference to be drawn.

Parker suggested below the discussion by the prosecutor about the trial court's denial of the challenge for cause to Prospective Juror No. 719 supported a showing of discriminatory intent. (5 RT 931, 934.) The trial court's denial of the prosecutor's challenge for cause as to Prospective Juror No. 719 in no way supports an inference of discrimination when a peremptory challenge is then exercised. (See *People v. Salcido* (2008) 44 Cal.4th 93, 139-140; *People v. Cornwell*, *supra*, 37 Cal.4th at p. 70.) Parker apparently concedes this point on appeal by not reiterating the

rationale relied upon by defense counsel below. Moreover, the circumstances relating to the challenge for cause refute any inference of discriminatory intent.

The prosecutor explained the reason for questioning the basis for the trial court's denial of the challenge for cause to Prospective Juror No. 719 was because the subject of the proper application of the Witt standard would no doubt come up again in the course of voir dire. (5 RT 932.) The trial court impliedly credited the prosecutor's explanation, and certainly did not perceive anything supporting an inference of discrimination based on the prosecutor's argument regarding the proper application of the Witt standard. (See 5 RT 932.)

Parker concedes that the prosecutor's questioning of Prospective Juror No. 213 was not desultory but argues it nonetheless raises an inference of discriminatory purpose. (AOB 147.) To the contrary, the obvious race-neutral reasons for challenging Prospective Juror No. 213 are evident from the record and clearly refute any inference of discrimination in this case. The record clearly evidences Prospective Juror No. 213's reluctance to serve on the jury. The trial court made express factual findings regarding Prospective Juror No. 213's demeanor. (6 RT 1119.) Parker argues that the findings by the trial court reflect what the trial court observed and do not refute a discriminatory intent by the prosecutor because the prosecutor may not have even observed the behavior the trial court described. (AOB 155.) Parker's point is unpersuasive since the prosecutor's own questioning referenced Prospective Juror No. 213's demeanor when the prosecutor stated: "I take from it some things you said and the way you walked to the jury box, you're not thrilled." (6 RT 1093.) Beyond the demeanor evidencing displeasure at serving on the jury, the record evidences other obvious race-neutral grounds for the prosecutor's challenge of Prospective Juror No. 213. Consistent with the prosecutor's voir dire of

Prospective Juror No. 213, another obvious race-neutral ground for excusing Prospective Juror No. 213 was the fact that he had testified for the defense as a character witness for a friend who was accused of murder. (6 RT 1090.) A prosecutor could also be concerned over a juror who had received psychological counseling as a young man over a "girl friend thing." (6 RT 1091.) Given the obvious race-neutral reasons for exercising peremptory challenges against two African-American jurors, Parker clearly failed to make a prima facie showing below. (See *People v. Davis*, *supra*, 46 Cal.4th at p. 582.)

3. Comparative Analysis Does Not Support an Inference of Discrimination

Parker contends that the voir dire of Prospective Juror No. 213 raised an inference of discriminatory purpose because the prosecutor questioned Prospective Juror No. 213 at length about matters that he failed to question similarly situated non African-American jurors about. (AOB 147.) The purpose of conducting comparative analysis is generally not served in a first stage case, *i.e.*, where the trial court finds no prima facie case of discrimination has been made. (*People v. Howard*, *supra*, 42 Cal.4th at p. 1020.) As this Court has concluded "evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 903; *People v. Cruz* (2008) 44 Cal.4th 636, 658, quoting *People v. Lenix* (2008) 44 Cal.4th 602, 622.) "'[R]eviewing courts must consider all evidence bearing on the trial court's factual finding regarding discriminatory intent.'" (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 903, quoting *People v. Lenix*, *supra*, 44 Cal.4th at p. 607.)

However,

> [i]n a "first-stage *Wheeler-Batson* case, comparative juror analysis would make little sense. In determining whether defendant has made a prima facie case, the trial court did not ask the prosecutor to give reasons for his challenges, the prosecutor did not volunteer any, and the court did not hypothesize any. Nor, obviously, did the trial court compare the challenged and accepted jurors to determine the plausibility of any asserted or hypothesized reasons. Where, as here, no reasons for the prosecutor's challenges were accepted or posited by either the trial court or this court, there is no fit subject for comparison." (*Bell, supra*, 40 Cal.4th 582, 600–601.) "Whatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales, and we [may properly] decline to engage in a comparative analysis" in a first-stage case. (*Bonilla, supra*, 41 Cal.4th 313, 350.)

(*People v. Carasi* (2008) 44 Cal.4th 1263, 1295-1296; see also *People v. Lenix, supra*, 44 Cal.4th at p. 622.)

This Court has warned of the unreliability of comparative analysis without a complete record of such an analysis having been developed in the trial court. (*People v. Cruz, supra*, 44 Cal.4th at pp. 658-659, quoting *People v. Lenix, supra*, 44 Cal.4th at p. 623; *People v. Bell, supra*, 40 Cal.4th 582, 600-601; *People v . Bonilla, supra*, 41 Cal.4th 313; 350.) Comparative juror analysis is most effectively considered in trial courts where an "inclusive record" of the comparisons can be made by the defendant, the prosecutor has an opportunity to respond to the alleged similarities and the court can evaluate counsels' arguments based on what it saw and heard during jury selection. (*People v. Lenix, supra*, 44 Cal.4th at p. 624.) Like the decision in *Snyder*, this Court also recognized the "inherent limitations" of conducting a comparative juror analysis on a cold appellate record. (*Ibid.*) The most troubling aspect of conducting such an analysis on direct appeal is failing to give the prosecutor the "opportunity to

explain the differences he perceived in jurors who seemingly gave similar answers." (*Id.* at p. 623.) This is especially true in light of the fact that experienced advocates may interpret the tone of the same answers in different ways and a prosecutor may be looking for a certain composition of the jury as a whole. (*Id.* at pp. 622-623.)

As this Court has observed:

> There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact.

(*People v. Lenix*, *supra*, 44 Cal.4th at pp. 622-623.)

As further recognized by this Court:

> [A]lthough a written transcript may reflect that two or more prospective jurors gave the same answers to a question on voir dire, "it cannot convey the different ways in which those answers were given. Yet those differences may legitimately impact the prosecutor's decision to strike or retain the prospective juror. When a comparative juror analysis is undertaken for the first time on appeal, the prosecutor is never given the opportunity to explain the differences he perceived in jurors who seemingly gave similar answers." [Citation.] Observing that "[v]oir dire is a process of risk assessment" [citation], we further explained that, "[t]wo panelists [i.e., prospective jurors] might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding."

(*People v. Cruz*, *supra*, 44 Cal.4th at pp. 658-659, quoting *People v. Lenix*, *supra*, 44 Cal.4th at p. 623.)

Parker's comparison fails for precisely the caveats and concerns expressed by this Court regarding comparative analysis for the first time

on appeal. For example, Parker complains that if the prosecutor's interest in the topics he indicates were genuine, then he would have questioned Juror No. 1 about his having seen and been treated by a psychiatrist (AOB 150, citing 1 CTJQ 8) and Juror No. 4's brief hospitalization in a psychiatric facility following his mother's death in 1970. (AOB 151, citing 1 CTJQ 25.) However, neither Jurors Nos. 1 or 4 are actually comparable with Prospective Juror No. 213 in terms of the total circumstances because the obvious race-neutral reasons for challenging Prospective Juror No. 213 are not also present. Accordingly, the mere lack of questioning Jurors Nos. 1 and 4 on the subject of their experiences with a psychiatrist is not a basis for inferring discriminatory intent.

Parker also argues that time problems were an unlikely reason for the challenge to Prospective Juror No. 213 because the prosecutor did not follow up and question Juror No. 7 about her vacation plans. (AOB 151, citing 1 CTJQ 189.) There is nothing in the record to suggest that Juror No. 7's planned vacation presented a concern for the prosecutor that was comparable to the demeanor and comments by Prospective Juror No. 213 conveying his reluctance to serve. Prospective Juror No. 213's demeanor and comments presented an obvious race-neutral reason for exercising a peremptory challenge, which was credited by the trial court's observations and findings.

Parker also notes that it is "unlikely" that the prosecutor was concerned with Prospective Juror No. 213's experience with the criminal justice system because Juror No. 12 had also served on an earlier jury and Juror No. 4 had been a ward of the state as a minor because he ran away from home and was truant from school. (AOB 152, citing 1 CTJQ 21, 23, 93.) Conspicuously absent from Parker's discussion of Prospective Juror No. 213's "experience with the criminal justice system" is the fact that he testified as a character witness on behalf of a friend who murdered his

father, which is an experience of an entirely different nature than those reflected in the questionnaires completed by Jurors Nos. 4 and 12.

C. The Remedy for the Erroneous Denial of a *Wheeler* Motion at the First Stage Is to Remand for Further Proceedings

As this Court has explained, when a trial court erroneously denies a *Batson/Wheeler* motion at the first stage, the appropriate remedy is to remand the matter in order for the trial court to undertake the second and third stage analysis required under *Batson/Wheeler*. If, upon remand, the trial court finds that due to the passage of time, or other reasons, it cannot adequately address or make a reliable determination; or if it finds the prosecutor exercised peremptory challenges improperly, then the matter should be set for a new trial. (*People v. Johnson* (2006) 38 Cal.4th 1096, 1103-1104.)

Parker argues that reversal is the appropriate remedy for the erroneous denial of a *Batson/Wheeler* motion based on failure to make a prima facie showing. (AOB 168-170.) He relies on this Court's refusal to remand for further proceedings in *People v. Snow* (1987) 44 Cal.3d 216, 226, wherein it was noted that it was "unrealistic" to believe that the prosecutor could better recall after the passage of time the reasons for exercising the challenges called into question by the *Wheeler* challenge. (AOB 170.) This Court should decline Parker's invitation to abandon its approach in *Johnson* in favor of the outright reversal that occurred in *Snow*. This Court has already distinguished Snow from *Johnson*. As this Court explained, after its decision in *Snow*, the United States Supreme Court identified a less stringent test for the first stage of *Batson*. The lesser standard for stating a prima facie case may result in more findings of error in cases tried before the high court's decision than in the past. This Court concluded there was

no compelling reason to provide a more favorable remedy for those errors than the federal courts themselves provide, especially when California trial courts did not have the benefit of the high court's decision when conducting the analysis in question. Moreover, this Court noted that the remand procedure "seems to work reasonably well in federal court." (*People v. Johnson, supra*, 38 Cal.4th at p. 1100.) Accordingly, this Court adopted the federal approach of remanding for purposes of conducting the second and third stage analysis required by *Batson* whenever the trial court erred in finding the defendant failed to make the necessary prima facie showing of discrimination. (*People v. Johnson, supra*, 38 Cal.4th at p. 1100.)

Parker argues that this Court "should not waste any more time and resources trying to divine why the prosecutor excused the prospective jurors. That question could and should have been answered over nine years ago." (AOB 163.) Whether or not the question should have been answered at the time of trial is an entirely separate matter than whether an inquiry should be made on remand. Moreover, in terms of the question being answered at the time of trial, the trial court did not ask the prosecutor to provide his reasons for exercising peremptory challenges against two African-American potential jurors. While this Court has held it is proper for a trial court to request and consider the reasons of the trial prosecutor for exercising peremptory challenges against jurors who are the subject of a *Batson/Wheeler* motion even when the court finds that no prima facie case has been made (*People v. Taylor, supra*, 48 Cal.4th at p. ___ [2010 Cal. LEXIS at p. *74], it was only subsequent to Parker's trial that this Court has encouraged trial courts to do so. (*People v. Taylor, supra*, at *74; *People v. Bonilla, supra*, 41 Cal.4th at p. 343, fn. 13; *People v. Mayfield* (1997) 14 Cal.4th 668, 723-724.) Moreover, the law remains the same – a trial court is not required to inquire regarding the prosecutor's reasons in a first stage *Batson/Wheeler* analysis when it finds no prima facie case

of discrimination has been made. (*Ibid.*) Under circumstances such as Parker's case, where the trial predated the preferred practice of making a record of the prosecutor's reasons even when the trial court finds no prima facie showing of discrimination has been made, and where the prosecutor was not invited to make a record of reasons, Parker's point is particularly unavailing.

Parker notes that the remedy in *Johnson* related to a *Batson* violation, and argues that this Court's remand in *Johnson* did not implicate the rule of automatic reversal for violations of state constitutional error under *Wheeler*. (AOB 169, citing *People v. Johnson*, *supra*, 38 Cal.4th at p. 1105, conc. op. of Werdegar, J.) As was noted in *Johnson*, numerous Courts of Appeal have remanded cases for further proceedings after finding *Wheeler* error. (*Id.* at p. 1105, fn. 3 & cases cited therein.) The fact that this Court left the correctness of those decisions for another day when it decided *Johnson* does not mean that outright reversal would be appropriate in this case should the Court find the trial court erroneously determined that a prima facie case of discrimination had not been made.

Parker argues that no reliable determination could be made on remand because of faded memories due to the passage of time, and the inability to consider the observations, recollection, and argument of one of his two trial counsel, because he has died. (AOB 170.) While defense counsel can be of assistance in pointing out improprieties in the prosecutor's reasons, whether pretextual or illegal, and could note for the record any crucial facts pertinent to the judge's ruling that might benefit a reviewing court (See *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1260-1261), Parker's assertion that a reliable determination is not feasible on remand because one of his two trial counsel is deceased overstates the role of defense counsel in a trial court's *Batson/Wheeler* analysis. (See *People v. Ayala* (2000) 24 Cal.4th 243, 261-262 [exclusion of defense counsel and

defendant from prosecutor's statement of reasons harmless error]; *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 831 & fn. 27 [no clearly established law requiring court to allow defense counsel to argue in context of court's *Batson* analysis]; *United States v. Tucker* (7th Cir. 1980) 836 F.2d 334, 340 [*Batson* does not require an adversarial hearing].)

Moreover, the mere passage of time does not foreclose successfully undertaking *Batson* analysis following a remand many years after trial. (See *People v. Rodriguez* (1996) 50 Cal.App.4th 1013, 1024 [noting two cases wherein court able to fulfill its constitutional obligations under *Wheeler* following remand years after trial].)[35] In a capital case, "it is likely counsel and the court paid close attention to the voir dire questions and the jurors' responses." (*Id.*) Given the extensive questionnaires and voir dire transcript in the case that could be reviewed upon remand, there is no reason to believe that the trial court would be unable to discharge its obligations on remand in this case should this Court find error in the denial of Parker's *Batson/Wheeler* motion. (*Ibid.*)

In any event, as detailed herein, the record does not support an inference of discrimination from the peremptory challenges of Prospective Juror Nos. 719 and 213. Accordingly, the trial court did not err in finding Parker had failed to make a prima facie case of discriminatory exercise of peremptory challenges.

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[35] Parker has requested judicial notice of the post-remand proceedings in *Johnson* (AOB 162, fn. 40) in an apparent effort to show that recollections had faded and it could not be established on remand that the prosecutor's peremptory challenges were based on race-neutral reasons. The outcome in *Johnson* following remand does not alter the appropriateness of the remedy ordered in the case. This is particularly true when, as noted in the cases cited above, remands have permitted the prosecution to make a record that refutes any inference of race based peremptory challenges. (See *People v. Johnson*, *supra*, 38 Cal.4th at p. 1100; *People v. Rodriguez*, *supra*, 50 Cal.App.4th at p. 1024.)

II. PARKER'S RIGHTS WERE NOT VIOLATED DURING CUSTODIAL INTERROGATIONS

Parker contends his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, section 15, of the California Constitution, and Evidence Code section 1204[36] were violated when his statements to police were admitted into evidence against him. (AOB 171.) Parker claims he did not waive his rights to remain silent and to counsel after being advised of his *Miranda*[37] rights by Costa Mesa Police Detectives Lynda Gielser and William Redmond; and even if he impliedly waived those rights at the outset of the interview regarding the crimes he committed in Costa Mesa, he alleges he repeatedly invoked his right to silence while speaking with the two detectives. (AOB 179-184.) Parker argues that all of the statements in his subsequent interviews with police investigators from the cities of Anaheim, Costa Mesa, and Tustin should have been excluded from the guilt phase of his trial because they were obtained in violation of his invocation of his right to remain silent. (AOB 184-188.) Parker contends he was prejudiced by the denial of his motion to suppress his statements to police in the guilt phase of trial. (AOB 188-191.) Parker's constitutional and statutory rights were not violated as Parker understood and impliedly waived his *Miranda* rights before speaking with Detectives Giesler and Redmond. Moreover, Parker never invoked his right to counsel or to silence during the low key and non-

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[36] Evidence Code section 1204 provides: "A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California."

[37] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

coercive custodial interviews with investigators from three Orange County cities investigating multiple homicides in their respective jurisdictions. Further, even assuming the erroneous admission of his statements, he was not prejudiced.

Parker was in custody at a state prison when interviewed by police. Under *Miranda* and its progeny, a suspect cannot be subjected to custodial interrogation absent a knowing and intelligent waiver of the rights to remain silent, to the presence of an attorney, and for indigent suspects, to the appointment of counsel. Interrogation of a suspect by police must cease "once the defendant, by words or conduct, demonstrates a desire to invoke his right to remain silent, or to consult with an attorney." (*People v. Davis*, *supra*, 46 Cal.4th at p. 585, citing *People v. Johnson* (1993) 6 Cal.4th 1, 25-26, overruled on other grounds, *People v. Gonzalez* (2003) 31 Cal.4th 745; *Dickerson v. United States* (2000) 530 U.S. 428, 435-443 [120 S.Ct. 2325, 147 L.Ed.2d 405].)

As this Court has observed: "[n]o particular form of *Miranda* waiver is required, and a waiver may be implied from a defendant's words and actions." (*People v. Davis*, *supra*, 46 Cal.4th at p. 585, citing *North Carolina v. Butler* (1979) 441 U.S. 369, 373-375 [99 S.Ct. 1755, 60 L.Ed.2d 286]; *People v. Whitson* (1998) 17 Cal.4th 229, 246-250.) "In determining the validity of a *Miranda* waiver, courts look to whether it was free from coercion or deception, and whether it was 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" (*People v. Davis*, *supra*, 46 Cal.4th at p. 585, quoting *Moran v. Burnine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135, 89 L.Ed. 2d 410].) "Both aspects are tested against the totality of circumstances in each case, keeping in mind the particular background, experience and conduct of the accused." (*People v. Davis*,

supra, 46 Cal.4th at p. 585, citing *North Carolina v. Butler*, *supra*, 441 U.S. at pp. 374-375.)

As this Court has held: "[T]he rule that interrogation must cease because the suspect requested counsel does not apply if the request is equivocal; rather, the suspect must unambiguously request counsel." (*People v. Davis*, *supra*, 46 Cal.4th at p. 587, internal quotations omitted.) The bright-line rule that requires a suspect to unambiguously request counsel applies equally to invocations of the right to remain silent. (*People v. Rundle* (2008) 43 Cal.4th 76, 116, overruled on other grounds, *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 11.)

Parker filed a motion seeking to exclude all of his statements to police in the guilt phase of his trial.[38] (3 CT 925.) Parker contended in his motion to suppress that he had invoked his right to remain silent at the outset of the initial interview by Detectives Giesler and Redmond, and at numerous times during the interview, as well as at the outset of the subsequent interview by Investigator Tarpley. (3 CT 928-945.) He also contended that Investigator Tarpley's request for a *Miranda* waiver was improper since he allegedly invoked his right to remain silent during the interview with Detectives Giesler and Redmond. (3 CT 943-945.) Parker also alleged that his statements to police were not free and voluntary but were instead the result of outrageous police behavior. (3 CT 930-932, 937-940.)

Parker's motion to suppress his statements to police was heard on April 21, 23, and 28, and May 11 and 22, 1998. (1 RT 128-224; 2 RT 225-

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[38] In the penalty phase, it was Parker who introduced the entire interviews by Detectives Giesler and Redmond on June 14th (Penalty Phase Defense Exh. B; see 11 CT 3241-3331 [80-page transcript]), Detectives Tarpley, Giesler and Redmond on June 14th (Penalty Phase Defense Exh. C; see 10 CT 3190-3222 [172-page transcript]), and Detectives Giesler and Redmond and Sergeant Boyland on June 18th (Penalty Phase Defense Exh. D; see 11 CT 3506-3738 [231-page transcript].)

265.) The motion was denied without comment on May 22, 1998. (2 RT 268.)

While this Court independently determines on appeal whether Parker's statements to police were obtained in violation of *Miranda*, it accepts the determination of the trial court as to disputed issues of fact where that determination is supported by substantial evidence (*People v. Davis*, *supra*, 46 Cal.4th at p. 586) and gives "great weight" to the "considered conclusions of a lower court that has previously reviewed the same evidence" (*People v. Wash* (1993) 6 Cal.4th 215, 236, internal quotations omitted). Before denying Parker's motion to suppress, the trial court heard testimony from investigators present during the interviews and a pharmacology expert. (1 RT 131-215; 2 RT 229-241.) The court also listened to five audiotapes and viewed three videotapes of interviews of Parker which contained the statements Parker was seeking to exclude. (1 RT 140, 151-152, 158, 216; People's Exh. Nos. 2, 4-5, 7-9, 11, and 13.)

A. Custodial Interviews of Parker

On June 14, 1996, Tustin Police Investigator Thomas Tarpley, and Costa Mesa Police Detectives Lynda Giesler[39] and William Redmond left Orange County at about 5:30 in the morning and drove north of Fresno in order to serve a search warrant for physical evidence on Parker at Avenal State Prison where he was incarcerated. The search warrant had been obtained on June 13, 1996. In addition to serving the warrant, detectives

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[39] Detective Giesler retired from the Costa Mesa Police Department after 32 years of service in December of 1995. (1 RT 179; 7 RT 1520.) She was hired in January 1996 on a part-time basis to assist with investigating unsolved homicides. (1 RT 180; 7 RT 1520.) Detective Giesler was involved in the investigation of the Rawlins homicide in 1979. (7 RT 1520.)

wanted to speak to Parker about homicides in their jurisdictions that had been linked to Parker by DNA evidence. (1 RT 132-133, 145, 168, 181, 194.) The investigators arrived at the prison around 10:30 a.m. and Parker first met with the two detectives from the Costa Mesa Police Department in an interview room at the Investigative Division of the prison. (1 RT 133-134.) Detectives Giesler and Redmond were in civilian clothing. (1 RT 173.)

Parker was not aware the detectives wanted to speak with him prior to meeting them in the interview room. (1 RT 173.) They introduced themselves to Parker and showed him their identification. (1 RT 134, 173.) Parker was told the interview would be recorded. (1 RT 134.) The detectives asked Parker if he was aware why they were there to speak to him. When he said he did not know, they told him they were in investigating unsolved homicides that occurred in 1978 and 1979 and they wanted to talk to him about DNA evidence found in those cases and his involvement in the homicides. They also told Parker that since he was in custody at the prison they were going to advise him regarding his rights. (1 RT 135, 174.)

While the detectives intended to have the entire interaction with Parker recorded, the voice activation feature of the tape-recorder they were using had not activated. Detective Giesler noticed the tape-recorder was not running while Detective Redmond was speaking with Parker. (1 RT 136, 172, 174.) After learning the recorder was not running, Detective Redmond then turned the tape-recorder on manually, at a point in the interview after the introductions had occurred but before *Miranda* admonitions were given. (1 RT 136, 174; Mot. to Suppress, People's Exh.

No. 1 [5 CT 2034].) The *Miranda* admonition and subsequent conversation was recorded. (1 RT 138-139; 5 CT 1545-1626.)[40]

Detective Redmond advised Parker as follows:

> Detective Redmond: You have the right to remain silent, do you understand that?
>
> Gerald Parker: Right.
>
> Detective Redmond: Anything you say may be used against you in court, do you understand that?
>
> Gerald Parker: Right.
>
> Detective Redmond: You have the right to an attorney before or during any questioning, do you understand that?
>
> Gerald Parker: Right.
>
> Detective Redmond: If you cannot afford an attorney, one will be appointed for any questioning if you wish, do you understand that?
>
> Gerald Parker: Right.
>
> Detective Redmond: Okay. Do you want to talk to us about ah, anything that might have occurred back, '79, '80.
>
> Gerald Parker: '79, '80, why, why would I want to talk to you about something that occurred back then?

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[40] The 80-page transcript of the taped interview conducted by Costa Mesa Police Detectives Giesler and Redmond on June 14th was marked during the hearing on the motion to suppress as "Admissibility Hearing Exhibit No. 1," and a copy of that exhibit is contained in the Clerk's Transcript at 5 CT 1545-1626. The same 80-page transcript was also submitted as Exhibit 1 in support of the People's Opposition to the Motion to Suppress. (See 4 CT 973-1054.) Respondent will cite to the Admissibility Hearing Exhibit in the Clerk's Transcript in referencing the transcript of the interview.

Detective Redmond: Well, some things have come up and ah, we need to talk to you about them, you can stop talking at any time.

Gerald Parker: I can't, like I said, I, I can't imagine why I would want to talk with the Costa Mesa Police Department.

Detective Redmond: Okay. Um, okay, what had occurred, are you familiar with DNA?

Gerald Parker: Yes, a little bit.

Detective Redmond: When you got of prison the last time, did you have to give them a blood sample?

Gerald Parker: Right.

Detective Redmond: Okay. Ah, the time before that, how many times did you have to give up a blood sample before you left the prison?

Gerald Parker: I don't recall, once, twice.

Detective Redmond: Once or twice, okay. What ah, what that's for, it goes into a main data base computer, okay? What also goes into the computer are robberies, rapes, homicides, etc., okay? Ah, we are going to be just right up front with you, instead of beating around the bush, your DNA came up on a couple of Costa Mesa homicides back in 1979, and ...

Gerald Parker: I never lived in Costa Mesa.

(5 CT 1547-1549.)

Detectives then engaged in a lengthy background discussion with Parker that consumed 57 pages of transcript. (5 CT 1549-1605.) Detectives then changed the topic of discussion to the DNA evidence matching Parker's profile. Detective Giesler then asked Parker:

Detective Giesler: I mean 17 years is long enough, I think it's time to talk about it, don't you?

Gerald Parker: Oh yeah.

Detective Giesler: Why don't you tell us what happened?

> Gerald Parker: The thing is, I will reserve the right to speak at another time, let's say I … this …
>
> Detective Giesler: I'm not going to do anything to violate your rights Gerald, I mean, we read you your rights and, I'm not going to step on your toes….

(5 CT 1610.)

Parker continued with the discussion. Detective Giesler noted that she had waited 17 years, and Parker responded: "Yeah. You and a whole lot of other people." (5 CT 1611.) When Detective Giesler suggested to Parker that he "get the monkey off his back," Parker replied: "Yeah, the day is not today though." Detective Giesler asked him: "Why is today not the day?" Parker explained: "I can't take it." (5 CT 1612.) Parker then attempted to explain his reasons for waiting and engaged in a discussion with detectives about whether it would be better to wait. (5 CT 1612-1616.) Detectives mentioned Parker could explain what happened and "give somebody the reason why," as "everybody's got a reason." Parker responded: "Yeah, but there's also a good reason for wanting to wait too." Parker explained, "this is going to be a long drawn out process, the rest of my life is going out the door…." (5 CT 1615.)

Detective Redmond then asked Parker, "did you expect this day to come?," and Parker replied, "[n]ot really." Parker went on to note that ironically, he had read Joseph Wambaugh's book *The Blooding* when he was "doing time the first go around" and "it snapped my mind quite a bit." (5 CT 1616.) Detective Giesler asked Parker, "can you tell me why?," and he responded, "I don't know." (5 CT 1618.) Detective Giesler then asked Parker if he could try to tell her why, and whether he knew any of these women. Parker answered: "Like I say, think I should wait until later on before…." (5 CT 1618.) Detective Giesler attempted to clarify Parker's statement:

Detective Giesler: "What do you mean by later on? Are you saying, Lynda come back and see me?

Gerald Parker: No, what I am saying is, I'm, once again, I know they're not going to let me leave this prison, they'll transfer me back to the Orange County jail, when my date of release, supposedly date of release comes up.

Detective Giesler: You're probably right.

Gerald Parker: And ah, oh I know the procedure quite well.

Detective Giesler: You probably know it better than I do.

Gerald Parker: And ah...

Detective Giesler: But I don't understand what you're saying to me, are you saying, okay Lynda, when I get to Orange County, come and see me?

Gerald Parker: No, no, what I'm saying.

Detective Giesler: Are you saying, Lynda, I don't want to talk to you? I mean, I'm being blunt with you Gerald, be blunt with me.

Gerald Parker: I'm going to be blunt with you.

Detective Giesler: Be blunt. I can take it. I've got broad shoulders. You want to tell me to go fuck off, I, you know.

Gerald Parker: No, no, this, I, I just need some time to call upon myself, to bring, to draw up on some strength.

Detective Giesler: Okay.

Gerald Parker: To say what I have to say.

(5 CT 1619-1620.)

Detective Giesler told Parker she would leave a card for him, and asked, when he got down to Orange County, if she could come and see him again. Parker responded, "Right, right." Parker then asked: "Can we, to speak to the family, can we kill the tape please?" Detective Giesler told

Parker she would prefer not to turn off the tape-recorder because "[t]he tape keeps us both honest Gerald." (5 CT 1622-1623.) After telling Parker the tape-recorder was for his protection, the detectives asked Parker if they could keep the tape-recorder on, and Parker replied they should wait for when he was in Orange County. (5 CT 1623.) Parker told the detectives "what you should tell the family, is ah, look towards God. That's the only person I have left. Have mercy on my soul." Detective Giesler asked Parker if he had any questions, and he replied that he was "pretty much abreast" of the "situation" and "there's not a whole lot that I can think of now that I can say." (5 CT 1623-1624.)

Parker was then told that the detectives were there to collect physical evidence from him: head hair, pubic hair, and fresh blood, as well as finger and palm prints. Parker indicated that would not be a problem. Detective Giesler then told Parker that while she did not know when, they would talk again, and if he wanted to speak with her when that time came that would be fine, and if he did not, that would be fine too. She concluded the interview at 11:58 a.m., telling Parker: "I'll be fair with you, you be fair with me." (5 CT 1625.)

No promises or threats were made during the interview. (1 RT 137.) Parker appeared alert and coherent, and there was nothing unusual about his appearance or demeanor. The detectives had no difficulty understanding him or communicating with him. (2 RT 225.) The detectives were not aware of anything regarding medications being administered to Parker beyond what he stated to them during the interview. (1 RT 192-193; 2 RT 227.) During the interview, Parker was asked if he had ever experienced violent tendencies while using PCP and he responded: "I'm on psychotropic medication now for, incidents or, that I experience, I've been

experiencing violent tendencies, and, voices for some time.[41] (5 CT 1607.) The detectives did not request, or undertake, to have the prison withhold medication to Parker prior to interviewing him. (1 RT 192-193; 2 RT 227.)

Tustin Police Investigator Tarpley spoke with Parker after the Costa Mesa detectives completed their interview. (1 RT 145-146.) His interview began at 12:09 p.m. (4 CT 1057.) Investigator Tarpley repeated the *Miranda* admonition to Parker before interviewing him regarding the Tustin crimes. (1 RT 146; 6 CT 1630-1631.) After being advised of each particular right, Parker was asked if he understood the right. Parker responded "yes" each time he was asked if he understood. Parker was then asked "[w]ould you like to talk about why I'm here today?" (6 CT 1631.) Parker responded "yes."

No promises or threats were made. (1 RT 146-147.) Parker was alone in the interview room with Investigator Tarpley until guards entered after about five or ten minutes to reposition Parker's hands in front of him, and loosen his handcuffs because he appeared uncomfortable while speaking with Investigator Tarpley and complained about arthritis in his shoulders. (1 RT 141, 148; 6 CT 1640-1641) Other than complaining about the handcuffs, Parker did not appear to be having any difficulties and Investigator Tarpley had no difficulty communicating with him. (1 RT 197.)

Investigator Tarpley spoke with Parker about background information such as where he had lived and his family. (6 CT 1631-1656.) Then Investigator Tarpley showed Parker a photograph of Debora Kennedy. (6 CT 1656.) He asked Parker if he knew why his semen would have been

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[41] Parker also mentioned during his interview with Detective Tarpley on June 14th that he was taking psychotropic drugs. When asked what medication he was taking "right now," Parker responded he was taking Melluril and Benadrine. (5 CT 1653.)

found inside of Ms. Kennedy. (6 CT 1657.) Parker responded that the question had come up with the "other detectives" regarding his DNA matching four cases and it was "hard to believe that it matched four and here's a fifth. I have no idea .... None whatsoever." (6 CT 1658-1659.)

After more background questions, Investigator Tarpley urged Parker to "do the right thing." (6 CT 1684.) When Investigator Tarpley asked Parker if he could do the right thing for him, at about 12:53 p.m., Parker asked, "Is Costa Mesa still here?" (1 RT 142, 197; 6 CT 1684.) When told they were, Parker asked, "Can I use the bathroom and the we can get this over, get this over with." (6 CT 1684.)

Detectives Redmond and Giesler returned to the interview room and when Parker returned from the bathroom, the three detectives discussed the crimes with Parker until ending their interview at 2:34 p.m. (6 CT 1684-1685, 1799.) The entire discussion with Parker was tape-recorded.[42] (1 RT 142-143, 146; Mot. to Suppress, People's Exh. Nos. 3 [transcript of interview], 4, and 5 [audiotapes of interview].)

Parker told the detectives that he believed there was a man on death row because of something that Parker did, and "out of all these murders and crimes that I committed over the years, that was the one that bothered me the most, now don't ask me why..." (6 CT 1685-1686.) Parker explained that while he was in the Orange County Jail for a rape he committed in

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[42] The 172-page transcript of the taped interview conducted by Tustin Police Detective Thomas Tarpley, and Costa Mesa Police Detectives Giesler and Redmond on June 14th was marked during the hearing on the motion to suppress as "Admissibility Hearing Exhibit No. 3," and a copy of that exhibit is contained in the Clerk's Transcript at 6 CT 1627-1799. The same 172-page transcript was also submitted as Exhibit 2 in support of the People's Opposition to the Motion to Suppress. (See 4 CT 1055-1228.) Respondent will cite to the Admissibility Hearing Exhibit in the Clerk's Transcript in referencing the transcript of the interview.

1980, he read the newspaper about a Marine who had been sent to death row for the murder of his wife in Tustin. Parker recalled she was pregnant at the time and the couple were arguing as he stood outside the window of their home. Parker watched as her husband left, got in his car and drove away. While he could not recall her actual face, she [Mrs. Green] looked like the "lady that I killed." (6 CT 1687.) Parker explained he did not know he had committed four murders in Costa Mesa; he thought it was two. (6 CT 1687-1688) Detective Giesler clarified that one of the women he sexually assaulted and bludgeoned had lived. (6 CT 1688.) Parker admitted attacking Ms. Fry, Ms. Rawlins, Ms. Carleton, Mrs. Green, Ms. Kennedy, and Ms. Senior. (See 6 CT 1685-1796.)

Anaheim police were notified that Parker had confessed to the 1978 murder of Sandra Fry during his interview with detectives from the Costa Mesa Police Department. (1 RT 202, 204.) Anaheim Police Detective Richard Raulston and Sergeant Steve Rodig arrived at Corcoran State Prison[43] around 10:00 p.m. on June 14, 1996, to interview Parker. (1 RT 204; 7 CT 2043.) The Anaheim investigators met with Parker in an interview room in the maximum security section of the prison at about 10:30 p.m. (1 RT 205, 211.) Parker's handcuffs were removed inside the interview room. (1 RT 205, 252.) Parker was advised they were there because of information they had received from Costa Mesa police regarding an unsolved homicide in Anaheim. (1 RT 205-206.) Sergeant Rodig advised Parker of his *Miranda* rights by reading directly from a card that contained the advisements. (1 RT 207.) Parker responded to each question regarding whether he understood his rights affirmatively. (1 RT 209.)

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[43] Parker was immediately transferred to Corcoran State Prison because prison policy required he be held in a higher security prison after admitting committing multiple homicides. (1 RT 164, 201-202.)

Parker was asked if he was willing to talk to the investigators and he said yes. (1 RT 209.) Parker then gave a statement admitting killing Sandra Fry. (1 RT 209-210; 7 CT 2046-2060.) No promises or threats were made. (1 RT 210-211.) Investigators recorded the discussion with Parker. (1 RT 206.) Parker was alert, appeared to be in good health, and investigators had no difficulty communicating with him during the interview. (2 RT 253.)

When Detective Raulston returned to the police station at about 4:00 a.m. following the interview he was exhausted. He inadvertently placed the original tape into the copy side of the tape duplicator and the blank tape into the master side which resulted in his erasing a portion of the original tape. (1 RT 206.) The portion of the tape that was erased contained the introductions as well as the *Miranda* admonition.[44] (1 RT 207.)

Detective Raulston returned to interview Parker a second time on June 16, 1996, at about 4:00 p.m. (1 RT 211, 212, 253.) The purpose of the interview was to correct his mistake from erasing a portion of the tape-recorded interview from June 14th. (1 RT 215.) Parker was asked about the first interview with Detective Raulston. He was asked if he remembered being advised of his rights and he responded he did remember. He was then asked if he recalled waiving his rights and agreeing to talk to detectives and Parked answered "yes." (12CT 2079.) Detective Raulston then once again advised Parker of his *Miranda* rights. After each right was explained, Detective Raulston asked Parker if he understood the right, and each time Parker replied "yes." (12 CT 2079-2080.) Parker was then asked

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[44] The 33-page transcript of the remaining portion of the taped interview conducted by Anaheim Police Detective Raulston on June 14th was marked during the hearing on the motion to suppress as "Admissibility Hearing Exhibit No. 10," and a copy of that exhibit is contained in the Clerk's Transcript at 7 CT 2042-2076. Respondent will cite to the Admissibility Hearing Exhibit in the Clerk's Transcript in referencing the transcript of the interview.

if he was willing to discuss two incidents that occurred in Anaheim in 1978 with investigators. Parker responded "yes." (12 CT 2080.)

No threats or promises were made during the interview. (1 RT 213.) The interview was tape-recorded. (See 7 CT 2077-2114.)[45] Parker's appearance was the same as during Detective Raulston's prior interview of him. There were no signs of illness, he was very alert, and Detective Raulston had no difficulty communicating with him. Parker's mood was the same as during the prior interview, *i.e.*, he was very amicable and very friendly. (2 RT 254.)

Detective Raulston interviewed Parker a third time on June 19, 1996, at about 5:45 p.m. (2 RT 255; 7 CT 2135.) The entire interview was tape-recorded. (2 RT 256; 7 CT 2134-2142.)[46] During the third interview, Detective Raulston was accompanied by Sergeant Rodig. (2 RT 255; 7 CT 2135.) Parker was advised of his *Miranda* rights, and after each right was explained he was asked if he understood. Each time, Parker replied "yes." (7 CT 2136.) Parker was advised the investigators wanted to discuss a couple of cases Parker might be involved in, and asked if he would like to discuss those cases. Parker responded yes. (7 CT 2136.)

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[45] The 46-page transcript of the interview conducted by Anaheim Police Detective Raulston on June 16th was marked during the hearing on the motion to suppress as "Admissibility Hearing Exhibit No. 12," and a copy of that exhibit is contained in the Clerk's Transcript. (See 7 CT 2077-2114.) Respondent will cite to the Admissibility Hearing Exhibit in the Clerk's Transcript in referencing the transcript of the interview.

[46] The 7-page transcript of the interview conducted by Anaheim Police Detective Raulston on June 19th was marked during the hearing on the motion to suppress as "Admissibility Hearing Exhibit No. 17," and a copy of that exhibit is contained in the Clerk's Transcript. (See 7 CT 2077-2114.) Respondent will cite to the Admissibility Hearing Exhibit in the Clerk's Transcript in referencing the transcript of the interview.

Parker appeared healthy and Detective Raulston did not notice any differences in his demeanor between the interviews on June 14th, 16th, and 19th. Parker was very alert and very amicable during all three interviews by Detective Raulston. (2 RT 255.) Parker remarked to Detective Raulston during the third interview that after he made statements to the Costa Mesa police detectives, "It was like a load of weights being lifted off my shoulders." (2 RT 257; Mot. to Suppress, People's Exh. No. 17 at p. 5.)

Parker was interviewed again by Detective Redmond on June 18, 1997. (1 RT 164.) Detective Redmond was accompanied by Detective Giesler, Sergeant Tom Boylan and evidence technician Bruce Radomski. (1 RT 165; 7 CT 1802.) After traveling to San Quentin and interviewing Mr. Green, who was serving time for the crime Parker committed against Mrs. Green, Detective Tarpley had requested that Detective Redmond reinterview Parker regarding the Green case. (1 RT 165.) Parker was once again advised of his *Miranda* rights. (1 RT 166; 7 CT 1804.) Parker was asked if he wished to talk to investigators about what happened in Costa Mesa in more detail. (7 CT 1804-1805.) Parker replied, "Yes, I have no problem with that." (7 CT 1805.) The *Miranda* advisement and subsequent interview were video recorded. (1 RT 166.) No promises or threats were made. (1 RT 167.)

At the hearing to suppress Parker's statements to police, the prosecution presented testimony from Dr. Vina Spiehler regarding Parker's medications.[47] Dr. Spiehler reviewed prison medical and pharmacy records pertaining to Parker. (2 RT 234.) She also reviewed audio- and videotapes

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[47] Dr. Spiehler received her Ph.D. in pharmacology and toxicology from the Medical School at University of California at Irvine and is board certified in forensic toxicology. (2 RT 229-230.) Dr. Spiehler's academic and practical training has included researching antipsychotic medications. (2 RT 232.)

pertaining to interviews of Parker on June 14th, 16th, and 18th, 1996, by police. (2 RT 234.)

Parker began receiving an antipsychotic medication named Mellaril, which is the chemical name for Thioridazine, on April 22, 1996. (2 RT 235-237.) Mellaril is administered to reduce symptoms of mental illness. (2 RT 236.) Possible side effects can include slow involuntary movements such as facial twitches or larger involuntary movements or difficulty with movement in general. (2 RT 236-237.) Parker was also receiving four other medications that were not antipsychotic medications: Depakote, Cogentin, Vasotec, and Clonidine. (2 RT 236.) Depakote is an anti-epileptic medication to reduce convulsions and seizures and is prescribed for mania and bipolar disorders. (2 RT 237.) Dr. Spiehler noted that Mellaril is intended to be given along with Cogentin since Cogentin is administered to reduce the side effects from Thioridazine. (2 RT -237-238.) Vasotec is a blood pressure medication that acts in the body, not in the brain so it would not affect the other medications being administered to Parker. (2 RT 237-238.) Clonidine is another blood pressure medication that does have some effects centrally in the brain as it reduces blood pressure by reducing catecholamine system activity. (2 RT 237.) Clonidine can have interaction with the other medications that were administered to Parker but the Physician's Desk Reference indicates it is acceptable to combine the medications. (2 RT 238.)

Both Mellaril and Depakote are typically administered in the evening before bedtime because both produce pronounced drowsiness. (2 RT 238-239.) The prison records indicated that the medications were not to be administered until after Parker was interviewed by police, and the pharmacy records indicated the medications were not administered at all on June 14, 1996. (2 RT 239.) The nurse's notes indicated that Parker was given his standard dosage of 150 milligrams of Mellaril by mouth at 11:41

p.m. on June 14, 1996. (2 RT 240.) Dr. Spiehler opined there would be no effect from delaying a dosage of Mellaril for several hours. (2 RT 240.) A delay of four hours in administering the medication would not impact the effectiveness of the medication in treating mental illness. (2 RT 241.) Dr. Spiehler explained that the lack of any effect from the medication being delayed a few hours is because it takes a number of weeks for the medication to have an effect on a person because it is changing the balance in the brain neurochemicals and receptors for the neurochemicals. (2 RT 240-241.)

Dr. Spiehler opined that Parker sounded alert, oriented and responsive during the interview on June 14, 1996. (2 RT 244-245.) On June 16, 1996, Dr. Spiehler noted that Parker's speech was low, slow, and sounded slurred.[48] (2 RT 245.) She observed that Parker appeared calm, alert, oriented and responsive on the videotapes.[49] (2 RT 246.)

B. Parker Impliedly Waived his *Miranda* Rights

Parker clearly understood his rights based upon his affirmative response following explanation of each right that he understood each right. Moreover, his response "I can't imagine why I would want to talk to the

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[48] When Parker was interviewed on June 16, 1996, he was receiving Mellaril. (2 RT 241.) When he was interviewed on June 18, 1996, his medication had been changed from Mellaril to Haldol as a substitute for Mellaril. (2 RT 241.) Haldol is an antipsychotic medication given to reduce symptoms of mental illness and to balance the chemical messengers in the brain. (2 RT 241.) Side effects of Haldol are drowsiness, rapid heart beat, lower blood pressure, and sometimes vision problems. (2 RT 242.) Parker was administered Haldol at 5:00 p.m. on June 18, 1996. (2 RT 243.)

[49] The defense consulted with Dr. Sharma, a psychiatrist, regarding Dr. Spiehler's testimony and ultimately did not call any expert to testify at the hearing on Parker's motion to suppress evidence. (2 RT 247-248, 261-262, 264, 266-267.)

Costa Mesa Police Department" when asked if he wanted to speak with the detectives shows a clear understanding that he fully understood it was his choice whether or not he wanted to speak with the detectives. Moreover, Parker displayed no reluctance in speaking with detectives and instead willingly engaged in discussions to find out what information they had regarding him and the crimes in their cities.

The law is clear that a suspect need not utter any particular words in order to waive the protections afforded by *Miranda*. The relevant inquiry is whether the defendant in fact knowingly and voluntarily waived the rights delineated in *Miranda*. (*North Carolina v. Butler*, *supra*, 441 U.S. at p. 373; *People v. Whitson*, *supra*, 17 Cal.4th at p. 246.) Accordingly, a valid *Miranda* waiver may be express or implied. (*Id.* at p. 247.) Waiver can be inferred from the actions, words, or other course of conduct of the person interviewed. (*Id.* at p. 246.)

A defendant's willingness to answer questions after acknowledging an understanding of the *Miranda* rights is sufficient to constitute an implied waiver. (*People v. Medina* (1995) 11 Cal.4th 694, 752; *People v. Sully* (1991) 53 Cal.3d 1195, 1233.) As this Court has observed:

> Once the defendant has been informed of his rights, and indicates that he understands those rights, it would seem that his choosing to speak and not requesting a lawyer is sufficient evidence that he knows of his rights and chooses not to exercise them.

(*People v. Johnson* (1969) 70 Cal.2d 541, 558, overruled on different grounds in *People v. DeVaughn* (1977) 18 Cal.3d 889, 899, fn. 8.)

If the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension, a trial court may properly conclude that *Miranda* rights have been waived. (*Moran v. Burbine*, *supra*, 475 U.S. at p. 421.) Once it is determined that the 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. (*Id.* at pp. 422-423; see also *People v. Whitson*, *supra*, 17 Cal.4th at p. 247.)

Parker was advised of and expressly waived his *Miranda* rights in the five interviews with investigators that followed his initial interview with Detectives Giesler and Redmond. Notably, the first subsequent interview wherein Parker expressly waived his *Miranda* rights occurred prior to Parker confessing his crimes to Detectives Giesler and Redmond. Investigator Tarpley advised Parker of his *Miranda* rights before being rejoined by Detectives Giesler and Redmond, and obtained an express waiver of those rights. (1 RT 146; 6 CT 1630-1631.)

Later that same evening, after being transferred to Corcoran State Prison, Parker was again advised of his *Miranda* rights by Anaheim Police investigators, and once again, expressly waived his rights. (1 RT 207, 209.) Two days later, Parker was advised of his *Miranda* rights again by Anaheim Police investigators and he once again expressly waived his rights. (12 CT 2079-2080.) The following day, Parker was again advised of his *Miranda* rights by Costa Mesa Detectives Giesler and Redmond. (1 RT 166; 7 CT 1804-1805.) When asked if he would speak to them, Parker "Yes, I have no problem with that." (7 CT 1805.) The next day, Parker was once again advised of his *Miranda* rights by Anaheim investigators, and he again expressly waived his rights. (7 CT 2136.)

Parker's prior experience with the criminal justice system also evidences his awareness and understanding of his rights to counsel and to remain silent. (See *People v. Hawthorne*, *supra*, 46 Cal.4th at p. 87.) Before speaking with detectives, Parker had pled guilty to felonies in three previous cases – including assaulting a fellow inmate. (See 10 CT 3176-3189; 10 RT 2170, 2254.) In discussing the lack of likelihood of his being

released when his current prison term was up in 23 days once his DNA had been connected to multiple homicides, Parker himself acknowledged that he knew the procedures "quite well." (5 CT 1619-1620.) The number of *Miranda* advisements and express waivers, combined with the extensive experience Parker had with the criminal justice system, clearly demonstrate that he knowingly and voluntarily waived his rights before talking to Detectives Giesler and Redmond.

Parker complains he did not waive his *Miranda* rights because he told the police, "I can't imagine why I would want to talk to the Costa Mesa Police Department." (AOB 179-180.) Parker argues that his statement was a rhetorical question that would be commonly understood to mean "no." (AOB 180.) He claims the words he chose were inconsistent with a present willingness to freely and voluntarily discuss the case with police and that any reasonable investigator would have understood that he was unwilling to talk with them. (AOB 180, citing *People v. Crittenden* (1994) 9 Cal.4th 83, 129.)

Parker's reliance on *People v. Crittenden*, *supra*, 9 Cal.4th at page 129, is unavailing. In *Crittenden*, the defendant responded to *Miranda* advisements by asking, "Did you say I could have a lawyer?" and the evidence showed that the defendant had not been able to entirely hear the admonitions because of being disruptive. (*People v. Crittenden*, *supra*, 9 Cal. 4th at pp. 124, 131.) In other words, the defendant in *Crittenden* was actually inquiring about what he had been told as opposed to posing a rhetorical question.

Ignoring that Parker's question was rhetorical, Parker reasons that clarifying questions regarding whether he intended to waive his *Miranda* rights should have been asked in response to his statement. (AOB 180.) He complains that Detective Redmond's response was not to clarify, but merely "to skirt the issue of invocation altogether." (AOB 180, citing

People v. Johnson, *supra*, 6 Cal.4th at p. 27 and *People v. Russo* (1983) 148 Cal.App.3d 1172, 1177.) Parker's reliance on *People v. Johnson*, *supra*, is misplaced. In *Johnson*, this Court found the comment "maybe I should talk to a lawyer" was "troublesome" but found the trial court's determination that it was not an invocation of the right to remain silent was supported by substantial evidence given the detective's immediate effort to clarify the remark. (*People v. Johnson*, *supra*, 6 Cal.4th at pp. 28, 30.)

Parker's reference to *People v. Russo*, *supra*, is also unavailing as the defendant in *Russo* was told as a part of the admonitions from police that if he did not commit the crime he would not need an attorney and his statement was "I don't know if I should have a lawyer here or what." (*People v. Russo*, *supra*, 148 Cal.App. 3d 1172, 1174, 1177-1178.) Parker's comment "I can't imagine why I would want to talk to the Costa Mesa Police Department" is not an ambiguous comment that warranted clarification as to whether Parker was invoking his right to remain silent.

When told at the outset that his DNA had been connected to homicides in Costa Mesa, Parker quickly interjected he had never lived in Costa Mesa. Parker fully understood his rights and was intent on finding out what investigators knew about his crimes.[50] The totality of the circumstances makes it clear that Parker impliedly waived his rights in speaking with Detectives Giesler and Redmond.

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[50] While Parker said at the beginning of his discussion with Detective Giesler and Redmond that he knew a "little bit" about DNA (see 5 CT 1548), he subsequently admitted much more extensive knowledge of DNA when he admitted that he had read Joseph Wambaugh's book *The Blooding* when he was "doing time the first go around" and "it snapped my mind quite a bit." (5 CT 1616.)

C. Parker Had Not Invoked His *Miranda* Rights When Detective Tarpley Interviewed Him Regarding Crimes Committed in Tustin

Alternatively, Parker contends that even if he did waive his *Miranda* rights at the outset of his initial interview with Detective Redmond, he invoked his right to remain silent repeatedly and unambiguously during that interview. (AOB 180-184.) Parker claims that he unambiguously invoked his right to remain silent after Detective Giesler asked him to tell her what happened, and he replied: "I will reserve the right to speak at another time." (AOB 182, quoting 5 CT 1610.) The statement Parker cites followed detectives starting to focus on the crimes to which Parker's DNA had been linked and was made after Parker agreed with Detective Giesler when she stated "I think it's time to talk about it, don't you?" (5 CT 1610.)

In context, Parker's statement did not indicate Parker was no longer willing to talk with the detectives. At most, it meant he did not want to discuss the subject of details relating to the crimes at that moment.

Parker argues that Detective Giesler understood his statement about reserving the right to speak to be an invocation of his right to remain silent when she responded: "I'm not going to do anything to violate your rights Gerald. I mean we read you your rights, and I'm not going to step on your toes." (*Ibid.*) To the contrary, Detective Giesler was confirming that the detectives were adhering to Parker's understanding of the process – which was that he could decide whether and when to speak to the detectives about what he did to the victims in the case they were investigating. Parker continued speaking freely with detectives after Detective Giesler's statement gave him every opportunity to indicate an intent to stop speaking with detectives.

Parker contends he also invoked his right to remain silent during the interview when he stated: "The day is not today." And, when asked,

"why?," he replied, "I can't take it." (AOB 183, fn. 46, citing 5 CT 1612.) Parker was merely explaining his reasoning for choosing to wait to explain things to the detectives. Parker also contends it was an invocation of his right to remain silent when detectives explained it would be good for Parker to "get it off his chest," and Parker replied: "Yeah but there's also a reason for wanting to wait too." (AOB 183, fn. 46, citing 5 CT 1615.) Parker also relies on his: "Like I say, once again, there's, there's I think for me, there's a time and a place for saying what I have to say, and in reference to what happened, I, there's nothing else that I can tell you." (AOB 183, fn. 46, citing 5 CT 1616-1617.) Additionally, he argues he invoked his right to remain silent when he told detectives: "Like I say, I think I should wait until later on before ...." (AOB 183, fn. 46, citing 5 CT 1618.) Lastly, he relies on his statement: "I just need some time to call upon myself, to bring, to draw upon some strength... to say what I have to say." (AOB 183, fn. 46, citing 5 CT 1620.) None of these statements constituted an invocation of Parker's right to remain silent.

In context, Parker never conveyed any intention other than wanting to speak with detectives. He was explaining and discussing the pros and cons of waiting with detectives. At most, Parker's statements evidence his altering the course of questioning. He clearly remained willing to talk throughout his discussions with investigators. He never sought to stop questioning altogether. (See *People v. Clark* (1992) 3 Cal.4th 41, 122.) Parker's comments were not an invocation of his right to remain silent. (See *People v. Rundle*, *supra*, 43 Cal.4th at p. 116, overuled on other grounds, *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 11.)

Parker attempts to distinguish his case from *People v. Rundle* because in *Rundle* the defendant had already confessed to murder before attempting to stop the interview because he had a headache after expressing no prior reluctance to speak with police. (AOB 183.) Parker argues that he

expressed reluctance to speak with investigators from the outset, did not confess to any crime and continued to deny responsibility. (AOB 184.) As detailed above, there was no reluctance to speak with Detectives at any time.

D. Detective Tarpley Did Not Improperly Reinitiate Questioning

In *People v. Fioritto* (1968) 68 Cal.2d 714, 719, this Court held that the California Constitution does not permit police to reinitiate an interrogation after a suspect has invoked his right to remain silent even if police repeat *Miranda* warnings. Subsequently, the United States Supreme Court determined that police may lawfully reinitiate questioning provided the suspect's rights are "scrupulously honored." (*Michigan v. Mosley* (1975) 423 U.S. 96 [96 S.Ct. 321, 46 L.Ed.2d 313].) California did not adopt the rule enunciated in *Michigan v. Mosley*. (*People v. Pettingill* (1978) 21 Cal.3d 231, 251.) As Parker correctly notes, Proposition 8 did not retroactively abrogate application of the *Fioritto* rule for secondary investigations to acts occurring before enactment of the initiative on June 9, 1982. (AOB 185-186, citing *People v. Smith* (1983) 34 Cal.3d 251, 258, and *People v. Weaver* (2001) 26 Cal.4th 876, 921, fn. 5 [the date of the crime and not the confession is the controlling date for purposes of application of Proposition 8].) Accordingly, it would be a violation of *Fioritto-Pettingill* for Detective Tarpley to interview Parker if he had actually invoked his right to remain silent at any time during his interview with Detectives Redmond and Giesler absent Parker initiating contact with detectives. Moreover, any violation of *Fioritto-Pettingill* would be unaffected by Parker having been readmonished and waiving his *Miranda* rights. However, inasmuch as Parker never invoked his *Miranda* rights

prior to Detective Tarpley interviewing him, it was not improper for him to question Parker.

E. Any Failure to Exclude Parker's Statements Did Not Prejudice Him

Where the erroneous admission of statements obtained in violation of *Miranda* is harmless beyond a reasonable doubt, a defendant is not entitled to relief. (*People v. Davis*, *supra*, 46 Cal.4th at p. 539.) Parker contends he was prejudiced by the admission of his statements to police.[51] (AOB 188-190.) To the contrary, Parker would not have enjoyed a more favorable outcome even if his statements to police had been excluded as the evidence of his guilt independent of his statements was overwhelming.

Parker's DNA was found on all of his victims' bodies with the exception of Ms. Carleton. The probability of a random match with the DNA profile on the semen recovered from Ms. Fry's body was 1 in 6.9 million for Caucasians and 1 in 4.4 million for African-Americans. (8 RT 1645-1646.) The probabilities for a random match with the general population with the semen from the string of the tampon in Ms. Rawlins' body was 1 in 670 billion, and 1 in 404 billion for African-Americans. (8 RT 1613-1617.) Parker's DNA profile matched the DNA detected in sperm fractions from vaginal swabs taken from Mrs. Green. (8 RT 1621-

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[51] In the guilt phase, the prosecution did not offer all of the interviews with Parker into evidence. Instead, it offered a redacted 77-page transcript of the June 14th interview by Detectives Giesler and Redmond (Trial Exh. No. 93; see 8 CT 2466-2543), a redacted 130-page transcript of the June 14th interview by Detectives Tarpley, Giesler and Redmond (Trial Exh. No. 95; see 9 CT 2545-2674), a redacted 193-page transcript of the June 18th interview with Detectives Giesler and Redmond and Sergeant Boyland (Trial Exh. No. 103; see 9 CT 2681-2873A), and a redacted 25-page transcript of the June 16th interview by Detective Raulston (Trial Exh. No. 24; see 8 CT 2439-2464.)

1624, 1649-1653.) The same DNA profile and same probabilities applied to the semen found on the bodies of Ms. Kennedy and Ms. Senior. (8 RT 1574, 1613-1617.) Parker argues his words contributed to the jury accepting the validity of the DNA evidence which was the only evidence besides his confessions linking him to the murders of Kimberly Rawlins, Debora Kennedy, and Chantal Green. (AOB 189.) Parker fails to explain why the jury would require any assistance from Parker's confessions to credit the validity of DNA evidence.

Moreover, the damning DNA evidence was not the only evidence linking Parker to the series of brutal attacks. Parker's fingerprint was left at the point of entry in Sandra Fry's apartment, and his palm print was left near the point of entry into Debra Senior's apartment. (7 RT 1270-1271, 1291-1294, 1302-1305, 1452, 1460.) Beyond the fingerprint evidence at two scenes and the DNA evidence, there was also a similarity in the manner in which Parker's crimes were committed. While the amount of force continued to escalate over the series of attacks, all of Parker's victims were struck multiple times in the head with a blunt object. The crimes in Costa Mesa occurred in close proximity to each other. The attacks on Ms. Rawlins and Ms. Carleton occurred on the same street (307 and 224 Avocado Street) in Costa Mesa. (See Statement of Facts, *supra*.) The crimes in Tustin also occurred in close proximity to each other.

Considering the totality of the evidence against Parker independent of his statements to police, it is clear beyond a reasonable doubt that he would have been convicted even if his statements to police had been excluded.

III. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY WITH CALJIC NOS. 4.30 AND 4.31 REGARDING THE DEFENSE OF UNCONSCIOUSNESS

Parker contends his conviction and death sentence must be reversed because he was denied his constitutional rights to a jury trial, due process of law, a reliable determination of guilt, and to present a defense when the trial court refused his request to instruct the jury with CALJIC Nos. 4.30 and 4.31 on the defense of unconsciousness. (AOB 191-202.) The trial court did not err in refusing the instructions as there was no substantial evidence presented to the jury supporting a defense of unconsciousness. Moreover, the jury rejected, under proper instructions, any suggestion that Parker was impaired at the time of the murders. For this reason, Parker could not demonstrate prejudice even assuming the trial court erred in failing to instruct on the defense of unconsciousness.

Unconsciousness is ordinarily a complete defense to a charge of criminal homicide. (Pen. Code, § 26; *People v. Halvorsen* (2007) 42 Cal.4th 379, 417; *People v. Abilez* (2007) 41 Cal.4th 472, 516; *People v. Ochoa* (1998) 19 Cal.4th 353, 423.) However, if the state of unconsciousness is induced by voluntary intoxication, the lack of consciousness is not a complete defense and it does not excuse the homicide. (Pen. Code § 22; *People v. Halvorsen*, *supra*, 42 Cal.4th at p. 417; *People v. Abilez*, *supra*, 41 Cal.4th at p. 516; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 423.) Where the defendant was voluntarily intoxicated, the requisite element of criminal negligence is deemed to exist regardless of whether the defendant was unconscious at the time of the killing, and the defendant is guilty of involuntary manslaughter. (*People v. Abilez*, *supra*, 41 Cal.4th at p. 516; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 423.)

Unconsciousness within the meaning of Penal Code section 26 does not mean the defendant is in a coma or unable to walk. (*People v.* Halvorsen, *supra*, 42 Cal.4th at p. 417.) Unconsciousness can exist "'where the subject physically acts in fact but is not, at the time, conscious of acting.'" (*Ibid.*; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 423, quoting *People v. Kelly* (1973) 10 Cal.3d 565, 572.)

Parker requested the trial court instruct the jury with standard CALJIC jury instruction Nos. 4.30 (Unconscious Act – Defined – Burden of Proof) and 4.31 (Presumption of Consciousness). (8 RT 1798.) These requested standard jury instructions stated:

> A person who while unconscious commits what would otherwise be a criminal act, *is not guilty of a crime.*
>
> This rule of law *applies to persons who are not conscious of acting* but who perform acts while asleep or while suffering from a delirium of fever, or *because of* an attack of [psychomotor] epilepsy, a blow on the head, *the involuntary taking of drugs or the involuntary consumption of intoxicating liquor*, or any similar cause.
>
> Unconsciousness does not require that a person be incapable of movement.
>
> Evidence has been received which may tend to show that the defendant was unconscious at the time and place of the commission of the alleged crime for which [he][she] is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was conscious at the time the alleged crime was committed, [he][she] must be found not guilty.

(9 CT 2889 [CALJIC No. 4.30], emphasis added.)

> If the evidence establishes beyond a reasonable doubt that at the time of the commission of the alleged crime the defendant acts as if [he][she] were conscious, you should find that [he][she] was conscious, unless from all the evidence you have a reasonable doubt that the defendant was in fact conscious at the time of the alleged crime.

> If the evidence raises a reasonable doubt that the defendant was in fact conscious, you must find that [he][she] was unconscious.

(9 CT 2890 [CALJIC No. 4.31].)

There must be substantial evidence that a defendant was unconscious before he is entitled to have the jury instructed on a defense of unconsciousness. (*People v. Halvorsen*, *supra*, 42 Cal.4th at p. 418.) "If the defense presents substantial evidence of unconsciousness, the trial court errs in refusing to instruct on its effect as a complete defense." (*Id.* at p. 417.) The trial court did not err in refusing to instruct with CALJIC Nos. 4.30 and 4.31 on unconsciousness as a complete defense because of the lack of substantial evidence presented to the jury that Parker was unconscious when he committed the charged offenses.

In discussing the proposed instructions, the prosecutor indicated that CALCJIC Nos. 4.30 and 4.31 had no application because Parker's statements to police that had been admitted into evidence involved his voluntary consumption of alcohol. (8 RT 1799.) The trial court asked if there was any evidence other than the defendant voluntarily ingesting drugs or alcohol that the defense was relying on in requesting instruction with CALJIC Nos. 4.30 and 4.31. (*Ibid.*) In response, Parker's counsel argued that it was possible that, because of the voluntary ingestion of alcohol and drugs, at some point the continued consumption of alcohol and drugs by Parker resulted in an involuntary ingestion of alcohol and drugs. (8 RT 1799-1800.) Counsel acknowledged that there had been no expert testimony to support the contention that at some point ingestion of alcohol and drugs could render subsequent ingestion of alcohol and drugs involuntary, but argued there were "articles" discussing the involuntary nature of alcohol and drug abuse. (8 RT 1800.) The trial court noted the absence of any expert testimony to support the theory that consumption of

alcohol and drugs by Parker became other than voluntary. The request for instruction with CALJIC Nos. 4.30 and 4.31 was denied by the trial court based on insufficient evidence to support giving the instructions. (8 RT 1800.)

In addition to being unsupported by any evidence, the defense theory that voluntary consumption of alcohol and drugs became involuntary prior to murdering his victims is legally unsupportable. The voluntary consumption of alcohol and/or drugs is attributed to the defendant's negligence such that it cannot serve as a complete defense to criminal liability for a homicide. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 423.) Defense trial counsel's suggestion that at some point Parker was so intoxicated due to the voluntary consumption of alcohol and drugs that additional intoxication was other than voluntary cannot withstand scrutiny. The distinction Parker attempted to draw regarding his voluntary consumption of alcohol is completely at odds with the definition of unconsciousness within the meaning of Penal Code section 26.

On appeal, Parker apparently recognizes the lack of both factual and legal support for the theory advanced below since he has chosen to rely instead on an argument never advanced below. Parker now argues that the trial court misapprehended his statements to police because one of his statements was subject to being interpreted as evidence that he was unconscious at the time of his crimes. As the basis for his request for instruction on unconsciousness as a complete defense to the charged crimes, Parker cites to his statement to Detective Tarpley wherein he referenced "blackouts." (AOB 199-200, citing 9 CT 2580-2581.) The statement was part of a discussion wherein Investigator Tarpley showed Parker a photograph of Debora Kennedy and asked him if he had any idea why Parker's semen would have been found inside of her. (9 CT 2571.) Parker said he had no idea. (9 CT 2572.) As the discussion continued,

Parker interjected his voluntary abuse of drugs and alcohol as a possible explanation as to how he could have killed someone but not recalled doing so.

Investigator Tarpley: Okay, um, have you ever killed anybody in your entire life?

Gerald Parker: If I have, that's something I'm not knowledgeable about.

Investigator Tarpley: You might have killed somebody, but you just don't have knowledge of it today?

Gerald Parker: *True.*

Investigator Tarpley: Okay, and that would be because of drugs and um…

Gerald Parker: Drugs and alcohol use. I, I have been a drug and alcohol user for years. I just abuse, abuse over and over.

[tape changed and Parker confirms nothing said while tape in recorder was changed]

Investigator Tarpley: Okay. Um, okay, the last thing I think we talked about was that you might have a done a homicide, *but if you did do it, you don't have any knowledge of it.*

Gerald Parker: Right.

Investigator Tarpley: It would have been when you were under the influence of drugs or something like that?

Gerald Parker: Right.

Investigator Tarpley: Gerald, I feel comfortable talking to you and I think you feel comfortable um, talking to me.

Gerald Parker: Correct.

Investigator Tarpley: Okay? Um, I've got a job to do, and I'm sure you're aware of that, okay, and I do have an obligation to this girl's um, family, and I appreciate you know, giving them

the message that they should look to God and everything, um, you lived close to her, okay. You lived practically almost on the same street as her.

Gerald Parker: Right.

Investigator Tarpley: You might have done, is it possible that you might have done something to her that today, that if you had it to do over again, you wouldn't do?

Gerald Parker: I hope to God not, you know, like I said, I never, I can't recall ever seeing this woman and I don't think so.

Investigator Tarpley: Would it be possible that early in the morning one, one day in October, 1979, that you might have gone into a ah, two story apartment, gone in through the ground floor, and found a woman in bed and, might have attacked her, but just might not remember her, um, because of the condition that you were in? *Would that be possible?*

Gerald Parker: *It's possible.*

Investigator Tarpley: Okay.

Gerald Parker: And *the reason why I say it's possible* because, just because what *some of the people that I have known have told me* about. I, I have friends that told me *that I black out sometimes and say things, have said things and done things that I don't recall*, you know, that they said I did, I don't know, I ...

(9 CT 2580-2583, emphasis added.)

Parker contends his self-serving comment to police about friends indicating he sometimes said and did things he did not recall, and his friends telling him that he would "blackout" was sufficient to require the trial court to instruct on unconsciousness as a complete defense to the charged crimes. Parker argues that any doubts regarding the sufficiency of the evidence supporting his unconsciousness defense should be resolved in his favor – particularly in a capital case. (AOB 198, citing *People v. Wilson* (1967) 66 Cal.2d 749, 762-763.) Parker's point is unavailing

because his "blackout" comment does not present anything to which a benefit of the doubt could be accorded.

There was never any connection made by the defense about the effect of drugs and alcohol on Parker's crimes other than what he explained to Investigator Tarpley: it impeded his ability to get an erection when attempting to rape his victims. (9 CT 2608.) Even if the "blackouts" are assumed to be unrelated to Parker's voluntary abuse of drugs and alcohol, his self-serving hearsay comment about "blackouts" is not substantial evidence supporting the request to instruct with CALJIC Nos. 4.30 and 4.31.

A defendant's "professed inability to recall the event, without more, [is] insufficient to warrant an unconsciousness instruction." (*People v. Rogers* (2006) 39 Cal.4th 826, 888.) Parker's showing below did not even rise to the inadequate level of a claimed inability to recall. This is because Parker's initial self-serving claim of a lack of recollection was followed by detailed confessions to six murders whose commission evidenced sophisticated planning and premeditation. His recall of his crimes, even seventeen years later, included accurate depictions of each crime scene, descriptions of his victims, and minute details that included the location of furniture, appliances, or his victim's belongings. The defense never offered any evidence whatsoever to refute the evidence that Parker's mental state was one of obvious clarity.

The comment about Parker's friends relating things he had done or said that he could no longer remember obviously did not include his crimes against Sandra Fry, Kimberly Rawlins, Marolyn Carleton, Chantal Green, Debora Kennedy, and Debra Senior. As this Court found in *Halvorsen*:

> Defendant's own testimony makes clear that he did not lack awareness of his actions during the course of the offenses. The complicated and purposive nature of his conduct in driving from place to place, aiming at his victims, and shooting them in vital

> areas of the body suggests the same. That he did not, by the time of trial, accurately recall certain details of the shootings does not support an inference he was unconscious when he committed them.

(*People v. Halvorsen*, *supra*, 42 Cal.4th at p. 418.)

The evidence in this case did not even rise to the level this Court found lacking in *Halvorsen*, as the evidence in this case did not include Parker testifying at trial to a lack of recall. Instead, the evidence consisted of Parker's statements to police which included his recalling in detail the same rape/murder that prompted Parker to interject his voluntary abuse of alcohol and drugs and his vague reference to "blackout." Specifically, Parker was able to recall that Debora Kennedy was on the floor in her apartment watching television over 16 years earlier, when he entered through a window. (9 CT 2609.) He recalled taking a mallet out of a pick-up truck parked in front of another apartment that was about two doors down from Ms. Kennedy's apartment. (9 CT 2610.) He was able to recall that he had raped Ms. Kennedy and ejaculated inside of her. (9 CT 2612.)

In addition to *People v. Wilson*, *supra*, Parker relies upon *People v. Bridgehouse* (1956) 47 Cal.2d 406, overruled on other grounds, *People v. Blakeley* (2000) 23 Cal.4th 82, 89, where the defendant's testimony characterized his action as "distorted by a haze of mental void" and claimed a "hazy" and "very vague recollection." (AOB 198, citing *People v. Bridgehouse*, *supra*, 47 Cal.2d at p. 410.) Similarly, in *People v. Wilson*, *supra*, the defendant testified he did not remember shooting his victim. (*People v. Wilson*, *supra*, 66 Cal.2d at p. 762.) As this Court has noted, "in both *Wilson* and *Bridgehouse*, the defendants testified to a mental state consistent with unconsciousness and with prior statements to police." (*People v. Halvorsen*, *supra*, 42 Cal.4th at p. 418.) Parker's statements to police do not reach the defense showing made in either *Bridgehouse* or *Wilson*.

The evidence of unconsciousness relied upon on appeal in this case is also less than that found insufficient for instruction on unconsciousness in *Rogers*, as the defendant in *Rogers* had at least professed a lack of recall about his crimes. In contrast, the evidence in this case consists solely of Parker's statements to police – where an initial claim of no knowledge is then followed by remarkable recall regarding details of his crimes notwithstanding the passage of over 16 years before DNA testing enabled authorities to connect his crimes to each other, and then to Parker.

In addition to Parker's specific recollection in 1996 regarding raping and murdering Ms. Kennedy right after making a vague reference to "blackout[s]," Parker also displayed remarkable recall regarding his murder of Sandra Fry in 1978. Parker described how he entered her apartment complex, and correctly recalled that he heard music playing inside her apartment. (8 CT 2244-2449; 7 RT 1273.) He remembered that he climbed inside the apartment through a bedroom window. (8 CT 2447-2448.) He recalled how petite Ms. Fry was, and the color and length of her hair, and that she was wearing blue jeans. (8 CT 2450; 8 RT 1753.) He recalled how he waited for her to get off the phone, and then he waited a few more minutes after she hung up the phone. (8 CT 2450-2453.) His description included recalling his being unable to get an erection and accurately recalling that he ejaculated onto her body. (8 CT 2459; 7 RT 1283-1286, 1291; 8 RT 1631.) He could remember that he left her apartment through the same window he entered. (8 CT 2460-2461.) Parker recalled how she was having difficulty breathing and was able to compare the sound to the breathing of his other victims. (8 CT 2460.) Anyone who could recall and contrast to police the sounds of his victims as he would leave them for dead is hardly someone whose recollection is consistent with any inference of

having been unconscious during a series of brutal murders committed over an 11 month period.[52]

Parker's recall of raping and murdering Kimberly Rawlins in 1979 was also quite detailed. He was able to correctly recall that she was petite. (9 CT 2623; 7 RT 1362.) He was able to remember that he listened while she visited with two friends and waited for the lights to go out after her guests had left. (9 CT 2622-2623; 7 RT 1338.) Parker accurately described the kitchen and the purse on the table to police almost two decades after murdering Ms. Rawlings. (7 RT 1701.) He correctly recalled that Ms. Rawlins and her roommate shared a bedroom. (7 RT 1702.)

When Parker was asked about a second incident on Avocado Street in Costa Mesa and told that the victim's "little boy" was at home, Parker responded: "Oh yeah, Geez, how did I forget that one." (9 CT 2621, 2629.) He then proceeded to correctly describe a wall at the back of the apartment complex, and where the single story building with his victim's apartment was located in the complex. He described entering Marolyn Carleton's apartment in 1979 through an unlocked sliding glass door on her patio. (9 CT 2629-2630.) He was able to recall that Ms. Carleton was lying in her bed when he hit her in the head three or four times. (9 CT 2630, 2634.) He remembered being interrupted while trying to sexually assault Ms. Carleton when her son called out to her. Parker described the boy as sounding like he was about 10 or 11 years old based on the "way he spoke."[53] (9 CT 2631.) He remembered the child was in the darkened hallway and was asking if something was "wrong with mommy." (9 CT 2631.) He also

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[52] In contrast to his recollection of his crimes, Parker could not recall the rank of his friend and fellow Marine Albert Garcia, citing the passage of time. (5 CT 1551.)

[53] Joey Carleton was 9 years old when Parker murdered his mother. (7 RT 1407; 10 RT 2171.)

recalled that as he was leaving the apartment he bumped into the boy in the hallway and physically moved him to the side. Based on moving the child out of his way, he guessed the boy was about three feet tall. (9 CT 2631-2632.) Parker remembered he had left the apartment the same way he entered, through the sliding glass door. (9 CT 2633.)

Parker's detailed recollection of violently attacking and raping the wife of a fellow Marine despite her being obviously pregnant belies any reliance upon Parker's initial self-serving statement to police referencing "blackout[s] sometimes" as constituting substantial evidence of unconsciousness. The diagram Parker drew of the Green's residence in 1996 from memory was accurate. (8 RT 1706.) Parker had no difficulty recalling driving up to an apartment complex and overhearing Mr. and Mrs. Green arguing inside their apartment in 1979. (9 CT 2597.) He remembered how he heard Mr. Green's car driving away and recalled picking up a weapon and walking into the Greens' apartment through a door that had been left open. He remembered how Mrs. Green sat up when he entered her bedroom but then laid back down as though she recognized him. He remembered rushing toward her and hitting her in the head. (9 CT 2600-2601.) He remembered that she was obviously pregnant as he raped her and ejaculated inside of her. (9 CT 2601-2602, 2607, 2618.)

Parker also recalled in detail raping and murdering 17-year-old Debra Senior in 1979. He accurately remembered breaking into the apartment through a crank style window in the bathroom of her apartment before she came home that night, and knocking down the shower curtain and curtain rod when he came through the bathroom window. (9 CT 2639-2640; 7 RT 1449, 1450, 1452.) Parker remembered "this one was young. I don't

know, 17, 18 something like that." He also recalled that she was "small, probably about" five feet five or six inches tall.[54] (9 CT 2648.)

Parker's detailed recollection of his crimes from 1978 and 1979 during his interview with police in 1996 contradicts the belated interpretation of his vague reference to "blackout[s] sometimes" as a basis for claiming the trial court erred in refusing to instruct with CALJIC Nos. 4.30 and 4.31. Similar to the situation in *Halvorsen*, Parker's ability to recall "in sharp detail" the commission of his crimes, demonstrate that he was not entitled to an instruction on a defense of unconsciousness notwithstanding any self-serving, vague reference to "blackout" in his interview with Investigator Tarpley.

Parker argues the failure to instruct essentially left him without any defense whatsoever since his attorneys conducted minimal cross-examination and presented no affirmative defense. (AOB 201.) The limitations on Parker's defense were attributable to the trail of evidence against him, including DNA evidence connecting him to the attempted rape and murder of Sandra Fry, attempted rape and murder of Kimberly Rawlins, rape of Diana Green, murder of Chantal Green, rape and murder of Debora Kennedy, and rape and murder of Debra Senior; fingerprint evidence connecting him to the rape and murder of Sandra Fry and rape and murder of Debra Senior, and his admissions to police connecting him to all

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[54] Ms. Senior was 17 years old and 5 feet, 10 inches tall, and weighed only 120 pounds. (8 RT 1754.) Accordingly, Parker's recollection of her petite stature was accurate, as was his recollection about her being young. The 5-inch difference in height from what he recalled is readily attributable to the fact that his interaction with her consisted of him walking up from behind her while she was seated on her couch asleep and striking her repeatedly in the head with a blunt object, rendering her unconscious before carrying her into her bedroom and placing her onto a mattress on the floor where he then raped her and left her for dead. (9 CT 2642-2645.)

six of the murders and sexual offenses against the six women. Parker received the instructions to which he was entitled, and has no basis upon which to complain regarding the trial court's refusal to instruct on the complete defense of unconsciousness.

Even assuming error, Parker would not be entitled to relief. A conviction of a charged offense may be reversed in consequence only if it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.) As this Court has explained:

> Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, and there is no reasonable probability the error of which the defendant complains affected the results.

(*People v. Breverman*, *supra*, at p. 177.)

Parker claims he was prejudiced because the defense was denied the opportunity to argue that Parker was unconscious during the commission of his crimes, and because the erroneous refusal to give the unconsciousness instruction was exacerbated by instruction on malice aforethought which would have permitted the jury to find implied malice aforethought without regard to whether Parker could formulate the requisite specific intent. (AOB 202, citing *People v. Wilson*, *supra*, 66 Cal.2d at p. 762.) Parker's argument is unavailing because the jury was properly instructed with CALJIC Nos. 8.77 and 8.79 on diminished capacity as a result of the voluntary consumption of alcohol and drugs and CALJIC Nos. 4.21 and 4.22 on voluntary intoxication. (10 CT 2941-2942; 9 RT 1933-1935.)

Parker acknowledges that his jury was instructed on the partial defenses of diminished capacity and voluntary intoxication, but merely notes that unconsciousness is "entirely separate from these partial defenses." (AOB 202, citing *People v. Baker* (1954) 42 Cal.2d 550, 575.) The distinction between a partial and complete defense does not alter the fact that the jury rejected Parker's evidence of alcohol and drug abuse as having any impact upon his crimes under proper instructions. Parker's "unconsciousness" defense is premised upon his voluntary consumption of alcohol and drugs making the jury's rejection of his voluntary intoxication and diminished capacity defenses relevant to assessing prejudice from any failure to instruct on unconsciousness.

The instructions on diminished capacity and voluntary intoxication in effect informed the jury that if they believed that Parker was "impaired" as a result of voluntary consumption of alcohol during the crimes such that he could not form the requisite intent for murder, including premeditation and deliberation, intent to kill, and intent to rape (as to felony murder), then they should find him guilty of involuntary manslaughter. (9 RT 1904-1946.) Under this lesser requirement of being merely "impaired," the jury rejected Parker's evidence of intoxication as the jury did not find Parker guilty of either second degree murder or voluntary manslaughter.

The jury's rejection of Parker's self-serving claims of intoxication is unsurprising given the evidence. For example, Parker recalled to investigators in 1996 that he made "quite a bit of noise" climbing into Ms. Senior's apartment in 1979 because the shower curtain fell into the bathtub. (9 CT 2772.) When he was asked if he injured himself climbing in through the window, Parker responded that he was "so drunk...." (9 CT 2773.) Of course, Parker also explained that he had been "circling" Ms. Senior's neighborhood posing as a jogger before climbing into a small bathroom window five feet above the ground in order to gain access to her

apartment.[55] (9 CT 2768-2769.) The level of intoxication Parker was suggesting to investigators was belied by his ability to be jogging in circles through Ms. Senior's neighborhood before having the agility to climb into her bathroom window. Parker was not unconscious when he selected and attacked his victims.

Even assuming the trial court erred in refusing to instruct the jury on unconsciousness as a complete defense, Parker was not prejudiced unless there is a reasonable probability of a more favorable outcome if only the jury had been instructed with CALJIC Nos. 4.30 and 4.31. (*People v. Wilson*, *supra*, 66 Cal.2d at p. 762, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) Parker's effort to elevate his claim of error to one of federal constitutional dimension (see AOB 191, 202) is of no consequence, because even assuming the failure to instruct implicates Parker's federal constitutional rights, Parker cannot show a reasonable possibility of a different outcome if only the jury had been instructed with CALJIC Nos. 4.30 and 4.31. (*People v. Bennett* (2009) 45 Cal.4th 577, 605, fn. 13 [the reasonable possibility standard of prejudice is the same in substance and effect as the beyond a reasonable doubt standard enunciated in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].) Given that there was virtually no evidence of unconsciousness other than Parker's misleading response to an investigator's interrogation technique, and the fact that the jury rejected his claim of having consumed alcohol and drugs (the supposed cause of any unconsciousness) as evidenced by not returning verdicts for less than first degree murder, Parker cannot show prejudice under any harmless error standard.

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[55] Parker is 6 feet 1 inch tall. (12 CT 3803.) The bathroom window Parker climbed through to gain access to Ms. Senior's apartment is 2 feet high and 2 feet wide. (7 RT 1451.)

IV. VICTIM-IMPACT EVIDENCE WAS PROPERLY ADMITTED

Parker complains that his statutory rights, state and federal constitutional rights to a fair and reliable penalty determination and due process of law, and the prohibition against ex post facto laws, were violated by the admission of "highly-emotional and largely irrelevant" victim-impact evidence in the penalty phase of trial. (AOB 203-212.) The trial court did not abuse its discretion in finding that the victim-impact evidence was not unduly prejudicial, and its admission did not violate Parker's rights to a fair and reliable penalty determination and due process, or the proscription on ex post facto laws.

Evidence of a murder's impact on the victim's family and friends was not admissible in the penalty phase of a capital trial until 1991, when the United States Supreme Court held that "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question," and is thus admissible evidence. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720], overruling *Booth v. Maryland* (1987) 482 U.S. 496, 501 502 [107 S.Ct. 2529, 96 L.Ed.2d 440]).) California law also permits victim-impact evidence and argument in appropriate cases at the penalty phase of a capital trial to show the circumstances of the crime. (*People v. Navarette* (2003) 30 Cal.4th 458, 515; *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

The admission of victim-impact evidence, however, is not without limits. "[I]rrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*People v. Jackson* (2009) 45 Cal.4th 662, 692.) Moreover, victim-impact evidence cannot be "so unduly prejudicial that it renders the trial fundamentally unfair" in contravention of a defendant's right to due process under the Fourteenth

Amendment. (*Payne*, *supra*, 501 U.S. at p. 825; *People v. Edwards*, *supra*, 54 Cal.3d at p. 835.)

A. The Proceedings Below

Parker objected to the introduction of any victim-impact evidence or photographs depicting the victims in life on the grounds that the testimony may be unduly emotional and prejudicial. (10 RT 2047; see *People v. Stitely* (2005) 35 Cal.4th 514, 565, fn. 23.) Defense counsel also expressed concern about the impact on the jury from observing members of the victims' families crying in the courtroom during testimony by victim-impact witnesses. (10 RT 2046.) The trial court overruled the defense objection, noting that reasonable steps would be taken to prevent emotional displays by family members during the victim-impact testimony. (10 RT 2048.) The trial court took steps to address defense concerns that jurors not be exposed to family members crying outside the courtroom after the victim-impact testimony by admonishing spectators outside the presence of the jury prior to the victim-impact testimony in the case:

> ... First of all, to family members who are present at today's proceeding. And some of you may have been present during all or part of the first part of the proceeding. And I do not want a family member to misconstrue my comments. I have not, I want to stress to you, I have not seen any activity or conduct on the part of a family member that would be deemed inappropriate or improper.
>
> Today's proceedings, which gets into the penalty phase of the trial, involves giving the family members an opportunity to testify before the jury and to the impact concerning the loss of a loved one. And as you acutely recognize, time, or the passage of time does not abate that sense of loss. It is normal. It would be reasonable to anticipate that you will show your feelings concerning that loss, the impact of losing a loved one. And there's nothing improper about that.

> But, I want to take whatever steps are reasonable to try to avoid having someone say that the jury decision, whatever that may be at the conclusion of this phase of the proceeding, was unduly influenced by emotion during the course of the trial.
>
> To try to avoid someone saying that, I simply will provide for the family member to testify. And then once we conclude what is called victim impact evidence, I'm going to have the jury be excused from the courtroom, and ask you to remain where you're at until they have sufficient time to get on the elevator and go about their business.

(10 RT 2061-2062.)

After the victim-impact testimony concluded, defense counsel indicated that it was a denial of due process to admit victim-impact evidence in a trial relating to crimes that occurred at a time when victim-impact testimony was not admissible. (10 RT 2256-2257.) The trial court noted the objection was untimely and meritless. (10 RT 2257.)

Parker brought a motion for new trial on the ground that the victim-impact testimony was so prejudicial it denied him a fair trial and due process of law. (12 CT 3763.) Parker complained in his new trial motion that victim-impact witnesses, spectators, and jurors were crying during the victim-impact testimony. (12 CT 3764.) He also indentified the testimony by Jackie Bissonnette regarding the murder of her sister, Debra Senior, and the testimony of Sandra Kennedy regarding the murder of her sister, Debora Kennedy, as exceeding the limits on victim-impact testimony. (12 CT 3765 fn. 1.) The trial court denied the motion for a new trial after finding that the victim-impact testimony was not unduly prejudicial to Parker. (12 CT 3861.) The victim-impact testimony during the penalty phase consisted of the following:

1. Sandra Fry

Judith Brown testified about the loss of her younger sister Sandra Fry. Sandra was one of ten children. Sandra was very compassionate and loved people and animals. When Sandra was murdered, she had moved out of the family home into an apartment three days earlier. News of her death was devastating. The last time the family got together was at her funeral. After she died, all her siblings gradually left California. Brown was pregnant when Sandra was murdered. She was overprotective of her son and he grew up fearful. She identified a photograph of Sandra taken about four months before her murder. (10 RT 2106-2110; People's Exh. No. 119.)

2. Kimberly Rawlins

Cheryl Rawlins testified about losing her baby sister and best friend, Kimberly Rawlins. She recalled her sister as a very happy and giving person, and a gorgeous petite young woman. The two sisters had gone camping the weekend before the murder and had plans to go to the Spaghetti Factory restaurant the night of her murder, but Kimberly had stayed home because she had cramps. (10 RT 2141-2142, 2144.) Kimberly's goal was to do everything twice – once for the thrill and a second time in order to do it with a little bit of grace. The plan was for Kimberly to help Cheryl through her first two years of college, and then Cheryl would help Kimberly with her first two years of college. Kimberly worked at a warehouse, shipping critical implant devices and was very good at her job. (10 RT 2141-2142.) Kimberly had just moved out the apartment she shared with Cheryl when she was murdered. Cheryl found out about Kimberly's murder from an officer who came to her door. She was so upset that the officer had to tell her to put on more clothes in order to go and identify the body. (10 RT 2142-2144.) The family initially could

not afford a grave marker. Cheryl and Kimberly's brother went to the cemetery and could not find Kimberly's grave. He had been sober for quite some time but started drinking again after Kimberly's murder and the family was not sure of his whereabouts. (10 RT 2144-2146.) Cheryl described Kimberly's death as "like a rip. And you can do whatever you want, but all you're doing is wiping the pus away." (10 RT 2145.) A photograph of Kimberly taken the Christmas before she was killed was introduced into evidence. (10 RT 2146; People's Exh. No. 121.)

3. Marolyn Carleton

Joseph Lee testified regarding the loss of his mother, Marolyn Carleton. He was nine years old when Parker murdered his mother. He recalled awakening that night to his mother screaming his name. He knocked on the door and yelled, "Mom, what's wrong?" There was no answer. The door to her bedroom opened a few seconds later and a figure with a dark complexion and dark hair pushed him up against the sink and fled down the hallway out of the apartment he shared with his mother. He turned on the light in his mother's bedroom and found his mother lying on the floor, propped against her night stand. She was incoherent and when he placed his hand behind her head, he realized it was bloody. He went into the bathroom and got a wet wash cloth to try to stop the bleeding. He realized there was too much blood and called the operator for assistance. (10 RT 2171-2712.) His mother was the "most understanding, loving and caring person always looking out for my well-being." She always put him first even though she was working and going to school. He explained that she "was everything a young boy like myself at the time would want in a mother. She cared, protected, guided, put me before herself, and loved me like only a mother could. She was everything to me. She was my friend, my teacher, my life, and most of all she was my mother. When she died

that early morning, a part of me died. That can never be replaced." (10 RT 2172-2174.)

Mary Lee testified about losing her sister. They spoke to each other every day on the phone and shared everything: secrets, recipes, and how Marolyn's son was doing in school. Marolyn was excited about having gone back to school. Mary carried a photograph of Marolyn in her wallet taken on August 20, 1979 – when they had been at the Angel's game and Mary had sang the national anthem at Anaheim Stadium. Less than a month later, Marolyn's life was taken not through illness, accident, or old age, but by a "cruel and senseless act of violence." Their mother was not available to testify about the loss of Marolyn because she died of cancer the year before Parker's trial, so Mary read a poem written by their mother in 1988 entitled "what if." Mary identified a photograph of Marolyn taken before she was murdered. (10 RT 2180-2184; People's Exh. No. 123.)

4. Debora Kennedy

Sandra Kennedy recalled the loss of her aunt, Debora Kennedy. Debora was a giving, sensitive, and creative person. Debora used to babysit Sandra, but they were only two years apart so they were like sisters. They spent their summers together. Sandra had gone to Knott's Berry Farm with her boyfriend the night Debora was murdered. She was called home and found police officers there and the family was crying. Debora's murder devastated her family. Debora's sister found Debora's body, and at the time of the penalty phase, Sandra noted that particular sister looked 20 years older than her twin sister. After Debora's murder, Sandra worried there was a vendetta against their family. Out of respect for their grandmother, who had a stroke shortly after Debora's murder, the family chose not to talk about it a whole lot. Sandra identified a photograph of

Debora taken before she was murdered. (10 RT 2184-2188; People's Exh. No. 124.)

5. Debra Senior

Jackie Bissonnette recalled the loss of her younger sister Debra Senior. Debra was the youngest of four children and four years younger than Jackie. Not a day goes by without Debra being in her thoughts. Debra loved animals and dreamed of owning a horse. Jackie remembers Debra's smile, her laugh, her kindness. Debra was known to her family and friends as "Debbie" and Jackie named her eldest child Debbie after her sister. Even though Debra was only 17 years old when she died, she had already graduated from high school and was working full-time. Debra missed her friends when her parents moved to the city of Orange so when a friend asked if she wanted to rent an apartment with her in Costa Mesa, she accepted the offer. When she was murdered, Debra planned on moving home in a few weeks in order to attend Orange Coast College. Their parents were out of town when Debra was murdered: her mother had gone up north to a wedding and her father had gone to Yosemite for the weekend with her brother Mike in order to spend time with him while he was on leave from the Navy. Jackie had no way to reach her parents and dreaded telling them the news. Her mother arrived home first, with cake for Mike's birthday. Jackie only recalls seeing the pain she saw in her mother's eyes upon learning that Debra had been murdered one other time – about an hour later when she saw her father's eyes as he was told the news. The pain the family felt was indescribable. Her father died three years after Debra's murder. (10 RT 2132-2140.)

Jackie read a statement for her mother. It conveyed the hopes and dreams that she and her husband had when they emigrated from England by way of Canada in 1959. When Debra was born, she was born an American,

so they tried to find the most American name they could – so they chose Debbie after Debbie Reynolds. When her husband died three years later of myocardial infarction she was sure it was because his heart was broken when Debra was murdered. Debra loved poetry and her mother selected two poems she had saved for Jackie to read as part of her statement. (10 RT 2132-2140.) A photograph depicting Debra Senior a few months before her death was introduced into evidence. (10 RT 2139, 2271; People's Exh. No 120].)

B. The Testimony of Eight Victim-Impact Witnesses Regarding the Murders of Five Women as Evidence of the Circumstances of his Capital Crimes Did Not Deprive Parker of a Fair and Reliable Penalty Determination

Parker complains that testimony reflecting the mourning processes of eight family members rendered the penalty verdict unreliable. (AOB 207.) He relies on a decision from New Jersey to urge a standard for victim impact that limits victim-impact testimony to "one witness per victim" absent "special circumstances." Parker reasons one witness per victim is "adequate" to provide the jury with a "glimpse" of his victims' uniqueness. (AOB 206, citing *State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180.) This Court has consistently expressed its approval of *Payne* and rejected any bright-line limitations on victim-impact testimony. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1288; *People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1056-1057; *People v. Pollock* (2004) 32 Cal.4th 1153, 1183; *People v. Raley* (1992) 2 Cal.4th 870, 915.) Moreover, this Court has repeatedly approved of multiple witnesses testifying to victim impact. (*People v. Zamudio* (2008) 43 Cal.4th 327, 364, quoting *People v. Pollock*, *supra*, 32 Cal.4th at p. 1183 ["trial court may admit 'victim impact testimony from multiple witnesses who were not present at a murder scene

and who described circumstances and victim characteristics unknown to the defendant.'"]; *People v. Panah* (2005) 35 Cal.4th 395, 416, 494-495 [no due process violation where five members of victim's family testified regarding the victim and their loss]; see John H. Blume, "Ten Years of *Payne*: Victim Impact Evidence in Capital Cases," 88 Cornell L. Rev. 257, 270 (2003) [most states allowing victim-impact evidence place no limit on the number of witnesses].) Parker's complaint ignores the reason there were eight victim-impact witnesses who testified — the sole reason so many victim-impact witnesses testified to Parker ruining their lives was because of the number and nature of his violent acts towards innocent individuals. As this Court has held:

> Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a).

(*People v. Lewis & Oliver*, *supra*, 39 Cal.4th at pp. 1056-1057.) In so holding, this Court recognizes that the prosecution has a legitimate interest in rebutting the mitigating evidence that the defendant is entitled to introduce, by introducing aggravating evidence of the harm caused by the crime, "'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.'" (*People v. Prince*, *supra*, 40 Cal.4th at p. 1286, quoting *Payne*, *supra*, 501 U.S. at p. 825.)

1. The Trial Court Properly Admitted Photographs Depicting the Victims in Life as Victim-Impact Evidence

Parker objected to admission of photographs of the victims in life. (10 RT 2033, 2040-2041, 2047, 2060-2061.) The jury was presented with

only five photographs depicting five of Parker's victims as they appeared in life shortly before their murders.[56] (10 RT 2033, 2060.) There was nothing unduly emotional or remarkable about the photographs depicting each of these victims in life. (See People's Exh. Nos. 120-124.) There was nothing unduly prejudicial or unfair about admitting a single photograph of each of the five adult victims as they appeared in life shortly before their murders. (*People v. Stitely*, *supra*, 35 Cal.4th at pp. 564-565; *People v. Boyette* (2002) 29 Cal.4th 381, 444; *People v. Carpenter* (1997) 15 Cal.4th 312, 401; *People v. Cox* (1991) 53 Cal.3d 618, 688).

2. The Victim-Impact Evidence Was Not Unduly Cumulative

Parker complains that Marolyn Carleton's son, Joseph Lee, was permitted to testify about the impact of his mother's murder and "then read a prepared statement" to the jury. (AOB 207, citing 10 RT 2172-2174.) He also complains that Marolyn Carleton's sister, Mary Lee, was then permitted to read her prepared statement and also read a poem her deceased mother wrote in memory of her murdered daughter. (AOB 207, citing 10 RT 2180-2184.) Additionally, he complains that Jackie Bissonnette read her statement about her sister Debra Senior and a statement prepared by her mother which included two poems that her murdered daughter had written. (AOB 207, citing 10 RT 2132-2140, 2271.) There is nothing about Mr. Lee relying on a prepared statement in addition to answering questions that would have diverted "the jury's attention from its proper role" or invited

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[56] The prosecution did not offer any photograph of Chantal Marie Green as victim-impact evidence. (10 RT 2040.) The prosecution initially offered a photograph of Sandra Fry that was taken one to two years before her murder. (10 RT 2040.) The photograph that was ultimately introduced into evidence was taken within a few months of her murder. (10 RT 2060.)

"an irrational, purely subjective response" in reaching a penalty-phase verdict. The same is true regarding two short poems Debra Senior had written that her mother wanted to share as a means of communicating her loss. The fact that Marolyn Carleton's mother did not live to testify at Parker's penalty phase about the loss of her daughter did not preclude Marolyn's sister from reading a poem their mother wrote about the loss of Marolyn. There was nothing improper about communicating the effect of the murder on other members of the family. (*People v. Brown* (2004) 33 Cal.4th 382, 398; *People v. Taylor* (2001) 26 Cal.4th 1155, 1172.)

It is well established that testimony by family members about the various ways their lives were adversely affected by a victim's death is proper. (*People v. Huggins*, *supra*, 38 Cal.4th at pp. 236-238.) In describing the character of a victim, witnesses may also testify to "the psychological effects of [a victim's] death on other individuals and the community." (*Id.*) That families are aggrieved is an "obvious truism" and an "obvious and predictable" consequence of murder. (*People v. Sanders* (1995) 11 Cal.4th 475, 550.) Moreover, specific examples or stories concerning a victim's life are wholly permissible as relevant victim-impact evidence. (*People v. Roldan* (2005) 35 Cal.4th 646, 722, 730-732.)

3. The Victim-Impact Evidence Did Not Impermissibly Extend to Matters Beyond the "Direct Harm" From Parker's Murders

Parker contends the victim-impact evidence was irrelevant and prejudicial because it included "prejudicial information about illnesses and unfortunate circumstances family members had suffered that had no logical connection to" his brutally assaulting and murdering their family members. (AOB 207.) Specifically, he complains that the jury learned that the mother of Marolyn Carleton had recently died of cancer (10 RT 2187); that Debra

Kennedy's sister (who had found her body) married a neo-Nazi and isolated herself from her family (10 RT 2187); and Debra Senior's father died three years after her murder because it broke his heart (10 RT 2138). Parker argues that this information left the jury with the impression he was responsible for "more than just the direct harm caused by his crime." (AOB 207.)

There was nothing unexpected or prejudicial in learning that Debra Senior's mother believed that her husband died from a broken heart as a result of dealing with the aftermath of their daughter being senseless and brutally raped and murdered. Similarly, that the jury would learn that Marolyn Carleton's mother did not live to testify at Parker's trial regarding the loss of her daughter, or that Debra Kennedy's sister had difficulties after her sister's murder, is not anything that was unduly inflammatory or prejudicial, nor of a nature as to invite an irrational or purely emotional response from jurors. (See *People v. Hamilton*, *supra*, 45 Cal.4th at pp. 926-927.)

There was no unfairness from the victim-impact evidence presented below. As this Court aptly observed: "[i]t is common sense that surviving families would suffer repercussions from a young woman's senseless and seemingly random murder long after the crime is over." (*People v. Brown* (2003) 31 Cal.4th 518, 573.)

None of the evidence concerning victim impact, considered individually or cumulatively, would have diverted "the jury's attention from its proper role" or invited "an irrational, purely subjective response" on the penalty-phase verdict (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836), "untethered to the facts of the case" (*People v. Pollock*, *supra*, 32 Cal.4th at p. 1180).

4. The Victim-Impact Testimony Was Not Unduly Emotional

Parker relies on his trial attorney noting that "at least one" juror was "emotionally affected by the crying in the audience" and that the jury had to be affected by walking past a "phalanx of family members." (AOB 208.) He also contends the trial court itself noted the "emotionally charged" courtroom created by victim-impact testimony. (AOB 208, citing 9 RT 2013-2014.) What the trial court stated was that it "had not seen any undue display of emotion" on the part of the jurors. (9 RT 2013-2014.) The trial court made the observation that the nature of the killings Parker committed had to have a "tremendous emotional impact on jurors" and that someone would "have to be dead not to be impacted by what's going on." (9 RT 2013-2014.) Further, the trial court subsequently stated for the record after the victim-impact testimony concluded that it observed nothing that could be classified as an undue emotional display by any family members observing the trial while a victim-impact witness was on the stand testifying. (10 RT 2257.) Reference by the trial court to the emotions being experienced by jurors is not about any showing of emotion that is attributable to the number, nature, or content of the victim-impact testimony. Rather, it is in reference to the fact that Parker's crimes themselves were horrific and disturbing based upon the nature and amount of force he used and the predatory nature of his series of murders. The victim-impact testimony was not unduly prejudicial or emotional in conveying the loss from the senseless brutal murder of so many young women.

5. The Unsolicited Comment From a Victim-Impact Witness Regarding the Bible and Her Belief Parker Would Receive the Death Penalty Did Not Prejudice Parker

Parker complains that the prosecutor did not prevent Sandra Kennedy from making a statement relating to the Bible and her belief that Parker would receive the death penalty while under cross-examination by defense counsel. (AOB 209, citing 10 RT 2189.) The trial court and prosecutor undertook all reasonable precautions to ensure the victim-impact testimony was appropriate. The prosecutor submitted a written summary of the testimony to be elicited. (9 RT 2026.) The prosecutor understood that the testimony would be restricted to the loss of the victim on the witness and his or her family and conveyed to the victim-impact witnesses that certain areas, including appropriate penalty, were not something they could comment about. (9 RT 1998.) Notwithstanding the efforts by the trial court and prosecutor, the following exchange occurred during cross-examination of Ms. Kennedy:

> Q. ....
>
> You don't believe that there was a family vendetta, do you?
>
> A. Now, after hearing all the evidence in court, he's just a coldblooded murderer with no dignity, regard, or respect for anyone, including himself.
>
> And, Mr. Parker, I suggest you meet God before you get executed and ask for forgiveness for all of these lives that you took. I've forgiven you, I have. I will never forget. I have a compassion for you that God has put in my heart after months and months of prayer, preparing for this trial.
>
> I have prayed for you. I have you on a prayer chain at my church. I'm even prepared to write you from prison if you don't get the death penalty because I want you to know that your eternal life, your spiritual life, weighs in the balances right now.

And the Bible says that you will be tormented in hell for eternity if you do not accept responsibility for what you've done and ask God on bended knees in humility and brokenness for forgiveness and ask him to cleanse you and prepare you to take you home because I'm quite certain you will get the death penalty.

God does not withhold consequences for actions, but in the spiritual realm he can still save you.

I have a lot of pain and a lot of disregard for you, but God also spoke something to me concerning you and your heart, and that is somewhere along the line you were so hurt or so abandoned that you felt no self-worth.

I may be wrong about that, but that's what I believe God spoke to my heart and that you have been numb from early childhood and that this vendetta that you have against women has nothing to do with you hating women, it has to do with you feeling broken and hurt and abandoned and worthless.

And I'm really sorry that that has taken place in your life from early childhood, but it by no means was any, any excuse for doing what you did.

And the fact that you said that you were under the influence of drugs when it happened, well you know what? You weren't under the influence of drugs when you decided to take the drugs. You should have gotten yourself some help to take care of your anger. And I'm really sorry that you didn't because I'm quite certain that you lived a violent life, you will die a violent death. That is scriptural.

The Court: Miss Kennedy, I want to thank you for coming up here and telling us what the impact was on yourself and on your family. I'm going to let you step down at this time.

(10 RT 2188-2190.)

As Parker acknowledges, his defense counsel utilized Sandra Kennedy's emotional response under cross-examination during closing argument. (12 RT 2564-2565.) What Parker ignores is how effectively the defense used the response by Sandra Kennedy to defense counsel's question. Specifically, defense counsel argued:

> And I'd like to talk about the alternatives, death or life imprisonment. Death or condemned to everlasting redemption. And in that regard I'd like to read you a brief paragraph of what Miss Sandra Kennedy said to Mr. Parker. You remember that.
>
> And she said to Mr. Parker. "Mr. Parker, I suggest you meet God before you get executed and ask forgiveness for all the lives that you took. I've forgiven you. I have. I will never forget. I have compassion for you that God has put in my heart after months and months of prayer preparing for this trial. I have prayed for you. I have you on a prayer chain at my church. I'm even prepared to write you from prison if you don't get the death penalty because I want you to know that your eternal life, your spiritual life, weighs in the balance now. And the Bible said that you will be tormented in hell for eternity if you do not accept responsibility for what you've done and ask God on bended knees in humility and brokenness and forgiveness."
>
> That's what she said. And she said it from the heart. And some people didn't like to hear her say that because there wasn't enough hate in it, there wasn't enough real venom in it. There was a thoughtfulness to it.

(12 RT 2564-2565.)

As Parker acknowledges, his counsel asked that the jury not be admonished about Ms. Kennedy's response to the question on cross-examination. (AOB 209, citing 10 RT 2254-2259.) Parker criticizes the trial court for not conducting a "hearing" to determine admissibility of the proposed victim-impact testimony. (AOB 210.) Parker's complaint ignores the fact that the trial court was extremely diligent about victim-impact testimony. (See 9 RT 2013-2018 [discussion about precautions to avoid undue display of emotion from family members in courtroom observing victim-witness testimony], 2026 [court reviewed in advance of testimony an outline of victim-witness testimony].) Moreover, a hearing would not have ensured that a witness would not respond to a question posed on cross-examination in a manner that was inconsistent with what

occurred in a hearing – especially when the court had discussed the matter extensively with counsel and the prosecutor had discussed the scope of proper testimony with the witnesses in advance of their testifying.

6. Even Assuming Erroneous Admission of Victim-Impact Evidence, Parker Was Not Prejudiced

Erroneous admission of victim-impact evidence is subject to a harmless-error analysis. (*People v. Lewis & Oliver*, *supra*, 39 Cal.4th at p. 1058; *People v. Johnson* (1992) 3 Cal.4th 1183, 1246.) There is no reasonable possibility that Parker would have enjoyed a more favorable outcome, absent the victim-impact evidence. (*People v. Jones* (2003) 29 Cal.4th 1229, 1265, fn. 11; *People v. Bennett*, *supra*, 45 Cal.4th at p. 605, fn. 13 [the reasonable possibility standard of prejudice is the same in substance as the beyond a reasonable doubt standard enunciated in *Chapman v. California*, *supra*, 386 U.S. at p. 18].)

The testimony of the victim-impact witnesses consumed only 29 pages of transcript: 4 pages regarding Sandra Fry, 6 pages regarding Kimberly Rawlins, 7 pages regarding Marolyn Carleton, 6 pages regarding Debra Senior, and 6 pages regarding Debora Kennedy. (See 10 RT 2106-2110 [Sandra Fry]; 10 RT 2132-2138 [Debra Senior]; 10 RT 2140-2146 [Kimberly Rawlins]; 10 RT 2171-2174, 2180-2184 [Marolyn Carleton]; 10 RT 2184-2190 [Debora Kennedy].) The victim-impact testimony was very concise in conveying the loss of so many victims. Moreover, the victim-impact evidence "paled in comparison to other evidence in aggravation" and "could not have tipped the balance in favor of death." (*People v. Lewis & Oliver*, *supra*, 39 Cal.4th at p. 1058.) Parker's vicious crimes, including abducting and raping a child on the day of her father's funeral, raping and brutally beating the pregnant wife of a fellow Marine and remaining silent while her husband was convicted and punished for

Parker's crimes, combined with his utter lack of remorse for his numerous senseless brutal crimes, make it clear that his death sentence does not rest with any improper victim-impact witness testimony.

Moreover, following the victim-impact testimony, which concluded with the testimony by Sandra Kennedy, the trial court admonished the jury:

> This completes the taking of testimony this morning.
>
> The law provides for an opportunity for family members to come before you and tell you the impact that has occurred in their lives and their family [*sic*] lives as it pertains to the unlawful taking of life. Not easy on them or anybody else or on jurors.
>
> But I am concerned that at all stages of the proceeding that no one will say that the jury, who will make a decision as to the penalty or punishment, was unduly swayed by the emotion or the personal feelings of the victim family. You're entitled to listen to that evidence, consider it fully, give it whatever weight you deem is appropriate or necessary at the completion of the taking of all the evidence. And that comes under what we describe as factor (A).
>
> That's the law side of it.
>
> There's always a human side to these proceedings. And what I need to do is I'm going to have you step into the jury room until I clear the hallway. And so if you can bear with me just a few minutes, and then we'll take the lunch break, and then you need to come back at 1:30, at which time we'll take some additional evidence.

(10 RT 2190-2191.)

The jury was also instructed at the outset of the penalty phase instructions not to be swayed by bias or prejudice against Parker. (12 RT 2568; 10 CT 3046 [CALJIC No. 8.84.1].) The jury was also instructed:

> You may consider victim impact evidence only under factor (A).

> The jury may consider victim impact evidence relating to victim's personal characteristics and impact of the murder on the victim's family under factor A.
>
> However, the jury may not consider a victim's family member characterizations and opinions, if any, about the crime, the defendant, or the appropriate sentence.

(12 RT 2572-2573; 10 CT 3052-3053.)

The jury is presumed to have followed the court's instructions. (*People v. Rich* (1988) 45 Cal.3d 1036.)

In light of the relative brevity of the victim-impact evidence, the considerable evidence in aggravation, and the instructions given, it is clear the admission of the victim-impact testimony did not undermine the fundamental fairness of the penalty determination. Even if the victim-impact evidence had been excluded, the outcome would have remained the same. Parker's death sentence does not rest with unduly prejudicial victim-impact evidence; rather, the sentences rest squarely with the evidence in aggravation, including the circumstances of his numerous senseless and brutal crimes.

C. Retrospective Admission of Victim-Impact Evidence Did Not Violate the Ex Post Facto and Due Process Guarantees

Parker contends that the admission of victim-impact evidence constitutes an impermissible retroactive application of the law in violation of ex post facto and due process guarantees in the California and United States Constitutions. (AOB 211.) Parker forfeited his claim due to his failure to object to the admission of victim-impact evidence on these grounds below. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 926; *People v. Huggins*, *supra*, 38 Cal.4th at p. 236; Evid. Code § 353.) The defense objected to the victim-impact evidence on the ground it was unduly

prejudicial. The defense then made an untimely objection to all victim-impact evidence on the ground the evidence violated Parker's right to due process. (10 RT 2256-2257.) At that time, defense counsel stated: "Well, we're kind of amazed that in 1991 you couldn't do this and now you can do this. And quite, frankly, reflecting on it overnight, I find the whole process to be a denial of due process." (*Id.*) The reference to the evidence being inadmissible in 1991, is not a proper invocation of an objection to the admissibility of evidence based on ex post facto grounds. In any event, even if the issue was properly preserved below, as Parker recognizes (AOB 211), this Court has repeatedly rejected this same contention. (*People v. Mills*, *supra*, 48 Cal.4th at p. 213; *People v. Hamilton*, *supra*, 45 Cal.4th at p. 926; *People v. Brown*, *supra*, 33 Cal.4th at p. 394.)

D. Factor (a) Is Not Unconstitutionally Vague or Overbroad

Parker contends that factor (a) of Penal Code section 190.3 is unconstitutionally vague and overbroad and creates the risk of an arbitrary and irrational judgment of death. (AOB 211-212.) Specifically, he complains that he could not have known or foreseen the testimony about his victims or the impact of his killings. (AOB 211.) He also complains about testimony of the "continuing emotional impact on the families more than 20 years later" does not fall within any reasonable or common sense definition of the "circumstances of the crime." (AOB 211-212.) This Court has already rejected the argument that it is anything other than foreseeable that families would continue to be effected by the loss of their loved ones decades after they are murdered. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 927; *People v. Prince*, *supra*, 40 Cal.4th at p. 1287, fn. 28.) The victim-impact testimony contained nothing that was not reasonably foreseeable from Parker trolling neighborhoods in search of lone females

inside apartments in order to surprise them and viciously bludgeon them in the head, in order to render them unconscious and rape them, then leave them for dead.

V. PARKER'S CONSTITUTIONAL RIGHTS WERE NOT DENIED BASED ON THE SCOPE OF THE DEFENSE PENALTY PHASE ARGUMENT

Parker contends that his death sentence must be reversed because his state and federal constitutional rights to an individualized penalty determination, to due process, and to present a closing argument were violated when the trial court arbitrarily and erroneously restricted his closing argument in the penalty phase and prevented him from arguing his lack of future dangerousness. (AOB 213-223.) Even assuming the trial curtailed defense argument on the subject, Parker was not prejudiced. The only conceivable point regarding lack of future dangerousness supported by the evidence was in fact argued by defense counsel. Further, the evidence in aggravation overwhelmingly outweighed any evidence in mitigation. For these reasons, even assuming error, it was harmless.

The prosecution may urge the jury to return a death verdict based on the future dangerousness of the defendant if the argument is supported by the evidence; and the defense may argue the lack of future dangerousness when supported by the evidence. (*People v. Ervine* (2009) 47 Cal.4th 745, 797; *People v. Harris* (2005) 37 Cal.4th 310, 358.) Parker's future dangerousness was an appropriate matter for the prosecutor to address in the penalty phase argument based on the violence evidenced in the underlying capital crimes under factor (a) and uncharged crimes of violence introduced under factor (b). (*People v. Davenport* (1995) 11 Cal.4th 1171, 1223; *People v. Bean* (1988) 46 Cal.3d 919, 951.)

Parker contends his state and federal constitutional rights were arbitrarily and erroneously denied when the trial court prohibited his counsel from arguing his lack of future dangerousness to the jury during the penalty phase.[57] (AOB 12 RT 2535-2536.) Parker notes that the trial court indicated it did not believe there was any need for the prosecution to argue the subject of future dangerousness, and therefore no need for either side to be addressing the issue of future dangerousness. (12 RT 2535-2536.) While Parker claims the trial court ruled the defense could not argue Parker's lack of future danger, it is not clear that the trial court ultimately did so. The trial court had asked for case authority on the subject of future dangerousness, and in response the prosecution identified *People v. Davenport*, *supra*, 11 Cal.4th 1171. (12 RT 2534-2535.) The prosecutor noted that both sides had presented evidence on the issue. (12 RT 2535.) The trial court told the prosecutor it was concerned about "relying on *Davenport* holding the day in the future" and expressed concern about the

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[57] Parker also complains he was not permitted to mitigate the fear of jurors about what might happen if they believed Parker were sentenced to life in prison only to be ultimately released. (AOB 222, citing *People v. Pride* (1995) 3 Cal.4th 195, 268.) In *Pride*, a juror who worked as a cook in a prison purportedly commented during deliberations that prisoners that are not housed on death row have "far greater opportunity to escape." In explaining why no misconduct occurred, this Court noted: "[t]he average juror undoubtedly worries that a dangerous inmate might escape. While [the jurors'] statements elaborating on this theme were purportedly based on his experience inside the prison system, he only said what any citizen might assume was true – that inmates sentenced to death are subjected to the tightest form of security and that they have fewer opportunities to escape than other inmates. No misconduct or presumption of prejudice appears." (*People v. Pride*, *supra*, 3 Cal.4th at p. 268.) Parker's reference to Pride as indicating he was somehow foreclosed by the trial court from addressing jurors' fear of what might happen if he were sentenced to life in prison only to be ultimately released is particularly unavailing since Parker's own mental health expert opined he would be a danger to others if he were out of custody. (11 RT 2382.)

prosecutor even talking about the subject of future dangerousness "given the evidence you have going to the jury." The trial court then told the prosecutor:

"So I just think you're skating on thin ice if you get on that topic, and if what you're asking for is guidance about argument, don't get into that." (12 RT 2535.)

The prosecutor then replied: "That's what I'm doing." (12 RT 2535.)

The Court then expressed concern that the defense was going to raise the issue. (12 RT 2535.) However, nothing suggests the trial court was ruling the defense could not argue future dangerousness. Instead, it appears the trial court was concerned that the defense would argue the subject, which would increase the likelihood of the prosecution arguing future dangerousness. (12 RT 2536.) Defense counsel previously explained the defense wanted to argue, consistent with the evidence presented, that Parker could continued to be medicated in state prison, and that facilities and doctors exist to do that. (11 RT 2509.) In the discussion regarding future dangerousness, defense counsel explained that it was the defense's intention to discuss psychotropic medication. (12 RT 2536.) Accordingly, the defense never indicated an interest in going beyond making the points that were actually argued to the jury below. Nor did the prosecution interpose any objection or seek any limitation on the defense closing argument that would have prevented argument on future dangerousness. Under these circumstances, Parker has not shown that the trial court ultimately restricted defense closing argument on the subject of future dangerousness. To the contrary, the last word from the trial court was in the context of advice to the prosecution to tread lightly, and advice to the defense not to draw the prosecution into arguing the future dangerousness.

In any event, even assuming the trial court's comments limited Parker's ability to argue future dangerousness, it was to Parker's benefit.

(See *People v. Harris, supra*, 37 Cal.4th at p. 358.) While Parker contends the prosecutor argued that notwithstanding medication, Parker remained a danger to society, and therefore argued future dangerousness to the jury (AOB 216), the prosecutor did no such thing. Notwithstanding the extensive evidence of Parker's violent behavior – including attacking an inmate while he was asleep, the prosecutor did not argue Parker's future dangerousness as a basis for returning a death verdict. The prosecutor's closing penalty phase argument was simple:

> When Mr. Parker went out to rape and murder, he did it by choice, he did it willfully, and worst of all he kept doing it.
>
> And the only reason and the only explanation there is for why he kept doing it is because he enjoyed it.
>
> There's absolutely no question that the aggravating circumstances in this case, particularly the circumstances of the crime, substantially to an overwhelming margin outweigh the mitigating circumstances in this case.

(12 RT 2556-2557.)

In context, the prosecutor was arguing that Parker's moral culpability for his crimes was unrelated to, and therefore not mitigated by, any mental problems. The excerpts of the prosecutor's argument that Parker relies on to claim the prosecutor argued future dangerousness relate to explaining that Parker's recent mental problems were not worthy of the jury's sympathy and did not mitigate his moral culpability for his crimes. Noting the testimony by Parker's mental health expert that Parker had begun to display symptoms of psychosis, the prosecutor told the jury the prosecution was not contesting that Parker might have some present mental problems and has deteriorated to the point where he needs to be prescribed medication to suppress his symptoms and his aggression. The prosecutor then explained that would not mean "he's now somehow a changed man and somehow because of this fact he deserves your mercy." The prosecutor

went on to explain that there was no evidence that Parker had any problems requiring psychiatric intervention when he committed his crimes. (12 RT 2551.) He then noted that none of Parker's supposed mental problems manifest themselves in violence or aggression. Pointing out that the voices Parker claimed to hear when Dr. Blair interviewed him did not tell him to commit crimes, the prosecutor then asked:

> And why is that significant?
>
> Well, where does the violence come from, okay? Where is the – it comes from him. Now, you can sedate him, you can tranquilize him, but you can't change him. The violence comes from Mr. Parker.
>
> And maybe more importantly, from both doctors – and you may have concluded this – none of the problems, these so-called problems, interfere with his ability to make choices and distinguish right from wrong. Okay. Whatever they are, they don't impair his judgment and they don't impair his ability to distinguish right from wrong.
>
> When he made his decision to rape and murder, he made it on his own free will in all instances. Nothing that has to do with any – anything with mental problems now even impairs him today as far as making those decisions. And as Dr. Dietz told you, he certainly wasn't impaired back then because his brain was no worse than it is now.

(12 RT 2552.)

The prosecutor's argument was that "evidence of Mr. Parker's mental status ... doesn't mitigate or lessen his offenses." (12 RT 2554.) Continuing the argument relating to Parker's moral culpability for his crimes notwithstanding any current mental problems, the prosecutor discussed Parker's antisocial personality disorder and argued:

> ... he does what makes him feel happy. Remember that? That's what the antisocial personality does. He does what makes him feel happy, and he does it without conscience. If Mr. Parker

needs drugs and alcohol to feel happy, he'll do it. If he needs to rape and murder, he'll do it.

(12 RT 2553.)

...if you give him structure in the Marine Corps, in the Boy's Republic, if you give him rules, he will adapt, he will learn to thrive.

The problem is when he gets outside of the structure, then society is going to pay for what he needs to do to be happy.

So is this evidence of Mr. Parker's mental status, is it – does it – if it doesn't mitigate or lessen his offenses, is it mitigation at all? Well, you get to decide.

(12 RT 2553-2554.)

Parker complains he was denied the opportunity to meet and rebut the prosecution's argument. (AOB 221.) There was nothing to rebut on the subject of future dangerousness, because the prosecutor did not argue the subject of Parker's future dangerousness. (See, 12 RT 2540-2557.) Parker also claims the jury was prevented from hearing and considering his counsel's argument regarding his lack of future dangerousness. (AOB 220.) Parker acknowledges, however, the defense addressed the subject of future dangerousness in penalty phase argument, but complains it was "touched only briefly." (AOB 217.) Given that Parker's closing argument consisted of 10 pages of transcript (12 RT 2558-2566), the discussion about medication and it rendering Parker non-violent would hardly have been overlooked by the jury.[58] Moreover, Parker fails to explain what more

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[58] Parker cites the length of the defense argument as indicating his right to present closing argument was infringed. (AOB 221.) The argument of both counsel was focused. The prosecution argument consumed a mere 20 pages, which included reading instructions and mentioning the six murders, as well as Parker's rape of a child and another woman, and brutal beating of another woman with a pipe. (See 11 RT

(continued...)

could possibly have been said, based on the evidence, beyond what was argued, *i.e.*, Parker has mental problems which is why prison authorities and the jail medicated him, and when he is medicated he does not have violent tendencies. The defense argued lack of future dangerousness consistent with the evidence when defense counsel stated:

> ... There is no evidence contrary to this that this man was not diagnosed for his own mental illness twenty years ago, no one diagnosed him, no one sedated him, no one medicated him. What happens?
>
> He finally gets arrested after all these horrific crimes, for which I make no excuse, and they eventually diagnose him for his mental illness. Who does that?
>
> The prison authorities can't and [the prosecutor] can't tell you any different, uncontroverted evidence. They put him on antipsychotic/psychotropic medication. They did it. He's been 29 months in the jail waiting for his trial. The jail psychiatric team – and you'll see the records – did the same thing. They medicated him. And when he's medicated, what happens? The violent tendencies are gone.
>
> We even adjusted his medication a couple of times you heard. Violent tendencies are gone. It's not the same man.

(12 RT 2558.)

There was absolutely nothing else for the defense to say on the subject – based on the evidence. The weakness of argument on Parker's lack of future dangerousness is not the result of restrictions by the trial court. Rather, the weakness of the argument is because the evidence of Parker's lack of future dangerousness was weak. When asked if Parker would present a danger to others, his own expert opined that Parker would be a danger to others if he was out of custody, and it was "probably true" that

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(...continued)
2540-2557, 2560-2561.) Nothing in the length of the defense argument suggests a denial of Parker's right to present closing argument.

he would not be a danger to others if he were in a controlled environment in prison and being treated with psychotropic drugs. (11 RT 2382-2383.) Also, while Parker's counsel argued he would not pose a future danger if medicated, Parker admitted in his testimony that he wanted to hurt others even while medicated. (11 RT 2320.) While defense counsel argued it as a positive aspect, *i.e.*, that Parker's medication could be adjusted by authorities (see 11 RT 2558), the reality is that the facts did not lend themselves to convincing anyone that someone as violent as Parker would not pose a danger in the future.

Parker mischaracterizes the prosecutor as "taking full advantage" of the exclusion of mitigation argument and injecting the issue of future dangerousness into closing argument. (AOB 222.) The prosecutor said nothing about Parker's future dangerousness in his rebuttal closing argument. The prosecutor never even argued that Parker's violence could not be controlled by medication. Instead, the prosecutor focused on Parker's moral culpability for his crimes and argued that his current mental problems and medication had nothing to do with mitigating what he did to his victims – he is the same person who raped and murdered his victims. Specifically, the prosecutor argued:

> No question whoever did these crimes had a problem. Mr. Parker did have a problem. It's called antisocial personality.
> ...
>
> What the defense is talking about and what Dr. Blair is talking about, in 1996, 17 years after these crimes, he's reported that he hears voices. Isn't that too bad. He should hear voices.
>
> And now, in the present, to quiet voices, to control his violence in an institutional setting, he's medicated. So what?
>
> How does that mitigate his offenses? What does the medication – what does the medication do? What is it for? It's to hide his symptoms. That's what the medication is for. It

hides the same guy. The same guy who did all these rapes and murders.

Mr. Parker hasn't changed. He's the same guy.

Thank you.

(12 RT 2560-2561.)

Even assuming Parker's state and federal constitutional rights were infringed based on his being constrained in his ability to argue that he would not pose a danger to others if confined to prison for life without possibility of parole, he was not prejudiced. Parker is not entitled to relief because it cannot be said that there is a reasonable possibility that the jury would not have returned a death verdict if only defense counsel had argued that Parker did not present a future danger. (*People v. Brown* (1988) 46 Cal.3d 432, 448; see also *People v. Bennett*, *supra*, 45 Cal.4th at p. 605, fn. 13 [the reasonable possibility standard of prejudice is the same in substance and effect as the beyond-a-reasonable-doubt standard enunciated in *Chapman v. California*, *supra*, 386 U.S. 18].)

The lack of prejudice is evident from the weakness of the evidence supporting an argument that Parker posed no future danger discussed hereinabove, as well as the undeniable benefit that Parker obtained from the prosecution forgoing argument on the subject of future dangerousness in a case where the evidence of his crimes shows him to be an extremely violent and dangerous person. Additionally, Parker was not prejudiced because the evidence in mitigation paled dramatically – including the suggestion that a medicated Parker would pose no future danger – with the overwhelming evidence in aggravation.

Parker complains he was not allowed to make an argument that was "designed to give the jurors a reason to spare [his] life" and his inability to argue his lack of future dangerousness created an unconstitutional risk that

a death sentence was imposed "in spite of factors calling for a lesser sentence." (AOB 218.) In the context of Parker's case, and the evidence before the jury, Parker does not explain how further argument on the subject of his lack of dangerousness while medicated in a controlled prison environment would realistically give the jury anything beyond a theoretical, as opposed to an actual, basis to spare his life.

Even accepting the defense premise that the jury could have connected the dots between being medicated in a controlled environment within a prison to not posing a danger in the future if only the trial court had made it clear that both parties could address the subject of future dangerousness, Parker unquestionably gained from the trial court's concern over the subject. If the prosecutor had argued future dangerousness, he no doubt would have included the observation that medication was no guarantee that another inmate would not be awakened by Parker bludgeoning him with a pipe for some perceived transgression based on the evidence before the jury regarding Parker's unprovoked assault upon fellow inmate David Feurtadot. (See 10 RT 2147-2152, 2159-2170.) The prosecutor would have been free to argue from Parker's past conduct that he will be a danger in prison. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1179.) The incomprehensible brutality in Parker's numerous crimes gave the prosecution a lot to draw on in arguing that Parker would be a future danger. Moreover, in discussing Parker's potential to endanger others while confined in a prison, the prosecutor could have discussed the danger he would have presented to others in the prison, including female prison guards. (*People v. Huggins*, *supra*, 38 Cal.4th at p. 253; *People v. Bradford* (1997) 14 Cal.4th 1005, 1063-1064.)

Notably, Parker does not detail the evidence or identify those factors that called for a lesser sentence for his numerous premeditated and horrifically violent murders. In other words, while Parker complains on

appeal he was prevented from "fully develop[ing] the theme in their case and mak[ing] an explicit argument to the jury" (AOB 222), he neglects to fill in the blanks in his brief to support his claim he was prejudiced.

The fact the defense below could not overcome the evidence in aggravation is because of the compelling weight of that evidence in comparison to the minimal mitigation in this case. The prosecutor's argument was effective in its simplicity because Parker showed his many victims no mercy and no sympathy, and his lack of remorse was not simply evident in the matter of fact manner in which he recounted his crimes, it was evidenced by killing again – and again. (12 RT 2542.) Parker took away a young boy's only parent. He was not dissuaded in the least when he realized he was inside a fellow Marine's home, as he proceeded to brutally beat and rape that fellow Marine's obviously pregnant wife and said nothing even though he believed the woman's husband was on death row for what Parker did to his wife. (12 RT 2543.) Parker raped and murdered a teenager living in her first apartment and raped a child on the day of her father's funeral. (12 RT 2543-2544.) As the prosecutor asked the jury, what sympathy did Parker show the young women he brutally bludgeoned and left for dead? How remorseful is someone who goes out and does the same thing again and again? If, as Parker claimed, he only intended to rob Ms. Demirjian because he needed money, why didn't he take her purse and leave instead of continuously beating her with a metal pipe? What would have happened to her if a neighbor had not responded to her screams? (12 RT 2544.)

The only reason to spare Parker's life would be mercy and sympathy, yet Parker never showed any mercy or sympathy throughout his adult life. (12 RT 2545.) Parker was a staff sergeant in the Marine Corps who went out in search of females alone in their homes so he could rape them. It never occurred to him to rape a woman without first beating her

unconscious with a blunt object. He then left them for dead after he was done violating them for sexual gratification. The penalty phase verdict was not affected by closing argument. There is no reasonably possibility that Parker would have enjoyed a more favorable outcome in the penalty phase if only his attorneys had been able to more fully argue that he would not pose a danger in the future.

VI. CALIFORNIA'S DEATH PENALTY STATUTE AND MODEL JURY INSTRUCTIONS REGARDING THE JURY'S PENALTY DETERMINATION ARE CONSTITUTIONAL

Parker raises numerous claims relating to the constitutionality of California's death penalty statute and the standard jury instructions regarding the jury's penalty determination. (AOB 224-238.) He acknowledged his contentions have been repeatedly rejected by this Court and raises his claims on appeal in order to fairly present the issues and preserve his claims for federal review. (AOB 224, citing *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.) Each of Parker's contentions have been consistently and repeated rejected by this Court, and he offers no basis for this Court reconsidering its views on these issues in his appeal.

A. California's Death Penalty Statute and the Instructions Below Properly Address Burdens of Proof

Parker makes numerous familiar challenges to California's death penalty statute and instructions based on the absence of burdens of proof and unanimous findings in reaching a penalty verdict. (AOB 224-235.) As Parker acknowledges, his contentions have repeatedly been rejected, and he offers no reason for this Court doing otherwise in his appeal.

1. Parker's Jury Was Not Required to Make Findings Beyond a Reasonable Doubt as to the Existence of Aggravating Factors, That Aggravating Factors Outweighed Mitigating Factors, or That Death Was The Appropriate Penalty

Parker contends that the Sixth Amendment required that his jury find beyond a reasonable doubt that: (1) aggravating factors were present; (2) aggravating factors outweighed mitigating factors; and (3) aggravating factors were so substantial as to make death the appropriate punishment. (AOB 225, citing *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *Blakely v. Washington* (2004) 542 U.S. 296, 303-305 [124 S.Ct. 2531, 159 L.Ed.2d 403]; *Ring v. Arizona* (2002) 536 U.S. 584, 604 [122 S.Ct. 2428, 153 L.Ed.2d 556].) As Parker acknowledges his contention has been repeatedly rejected by this Court. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 307; *People v. Burney* (2009) 47 Cal.4th 203, 260; *People v. Friend* (2009) 47 Cal.4th 1, 90; AOB 226, citing *People v. Prieto* (2003) 30 Cal.4th 226, 263.) Parker offers no basis for this Court reconsidering its prior decisions rejecting his contention.

Parker also contends the prohibition against cruel and unusual punishment was violated and he was denied due process of law because his jury was not required to find beyond a reasonable doubt that aggravating factors outweighed factors in mitigation and that death is the appropriate punishment. (AOB 224-226.) As Parker acknowledges, this Court has repeatedly rejected this same contention. (*People v. D'Arcy*, *supra*, 48 Cal.4th at p. 307; *People v. Friend*, *supra*, 47 Cal.4th at p. 90; AOB 226, citing *People v. Blair* (2005) 36 Cal.4th 686, 753.) Parker provides no reason for this Court to revisit this issue.

2. Parker's Jury Was Not Required to Apply a Burden of Proof to Its Penalty Verdict Beyond Consideration of Unadjudicated Criminal Acts Under Factor (b)

Parker also argues that since the Sixth, Eighth, and Fourteenth Amendments compel that the jury be given the required guidance for imposing the death penalty the jury must be instructed as to a burden of proof, even if that burden is less than the beyond a reasonable doubt standard. (AOB 226-227.) As Parker acknowledges, this Court has rejected the contention that capital sentencing is susceptible to burdens of proof or persuasion because it is largely moral and normative and unlike other sentencing.[59] (*People v. Friend, supra*, 47 Cal.4th at p. 90; AOB 227, citing *People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) Accordingly, the only burden of proof applicable to the penalty phase of Parker's trial is the state law requirement that before a juror considered any unajudicated criminal acts as evidence in aggravation under factor (b), the juror must find those acts proven beyond a reasonable doubt. (See *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Robertson* (1982) 33 Cal.3d 21, 53-55, 60-62.) Parker offers no reason for this Court to reconsider its decisions rejecting application of burdens of proof to capital sentencing and the lack of any requirement that a jury be instructed as to a presumption of life instruction.

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[59] Parker also notes this Court has rejected any requirement that a penalty phase jury be instructed on a presumption of life. (AOB 227, citing *People v. Arias* (1996) 13 Cal.4th 92, 190.) Parker argues such an instruction is required in subsection 8 of this claim. (See AOB 234-235.) Accordingly, Respondent addresses its lack of merit in subsection 8 herein.

3. Parker's Jury Was Not Required to Unanimously Find the Existence of Aggravating Factors, or to Be Instructed It Must Unanimously Find Unadjudicated Criminal Activity True Before Considering It as a Factor in Aggravation

Parker contends that the Sixth, Eighth, and Fourteenth Amendments required his jury to unanimously find the existence of aggravating factors, and be instructed it must unanimously find prior unajudicated criminal acts true before considering such conduct as a factor in aggravation. (AOB 227-230.) As Parker acknowledges, this Court has repeatedly rejected both contentions. (*People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 228; AOB 228-229, citing *People v. Ward* (2005) 36 Cal.4th 186, 221-222; *People v. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v. Anderson* (2001) 25 Cal.4th 543, 584-585; *People v. Taylor* (1990) 52 Cal.3d 719, 749.) Parker offers no reason for this Court to revisit its prior decisions rejecting these same contentions.

4. The Penalty Phase Instructions Were Not Vague or Ambiguous

Parker complains the instruction to the jury to return a verdict of death if "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole" was unconstitutionally vague and ambiguous because the phrase "so substantial" is impermissibly broad and does not channel discretion sufficiently to minimize the risk of an arbitrary and capricious imposition of the death penalty. (AOB 230-231.) As Parker acknowledges this Court has rejected his contention. (*People v. D'Arcy*, *supra*, 48 Cal.4th at p. 302; *People v. Friend*, *supra*, 47 Cal.4th at p. 90; AOB 231, citing *People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.)

Parker offers no reason for this Court to revisit its prior rejection of his argument.

5. The Penalty Phase Instructions Adequately Informed the Jury Regarding Its Determination Whether Death Was the Appropriate Punishment

Parker contends the jury was not adequately instructed that it was to determine whether death was the appropriate punishment because standard CALJIC jury instruction number 8.88 instructs the jury to return a death verdict if the aggravating evidence "warrants" death as opposed to life without possibility of parole. (AOB 231.) As Parker acknowledges, this Court has rejecting this contention. (*People v. Friend*, *supra*, 47 Cal.4th at p. 90; AOB 231, citing *People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Parker provides no reason for this Court to revisit its decisions rejecting the contention.

6. CALJIC No. 8.88 Does Not Fail to Conform to the Mandate of Penal Code Section 190.3 Because It Does Not Inform Jurors They Must Return a Verdict of Life Without Possibility of Parole if They Determine That Mitigation Outweighs Aggravation

Parker complains the instructions did not inform the jury of the converse proposition that if they did not find the factors in aggravation outweighed factors in mitigation they must return a verdict of life without possibility of parole if they determined mitigation outweighed aggravation. (AOB 232.) As Parker acknowledges, this Court has rejected the contention the jury must be expressly admonished that it must return a verdict of life without possibility of parole if it finds the factors in aggravation are outweighed by factors in mitigation. (*People v. Taylor* (2009) 47 Cal.4th 850, 900; AOB 232, citing *People v. Duncan* (1991)

53 Cal.3d 955, 978.) As this Court has explained the concept is clearly implicit in model jury instruction CALJIC No. 8.88. (*People v. Taylor*, *supra*, 47 Cal.4th at p. 900.) Parker argues that this Court's analysis conflicts with its decisions disapproving of instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (AOB 232, citing *People v. Moore* (1954) 43 Cal.2d 517, 526-527; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014.) Carter's reliance on this Court's decision addressing pinpoint instructions on the issue of self-defense (*People v. Moore*, *supra*, 43 Cal.2d at pp. 526-531) or an intermediate appellate court decision on instructions relating to the burden of proof regarding mitigation that excuses or justify a homicide (*People v. Kelly*, *supra*, 113 Cal.App.3d at pp. 1013-1014) or a pronouncement on due process from the high court in the context of requiring the disclosure of alibi defense evidence as a part of reciprocal discovery (*Wardius v. Oregon* (1973) 412 U.S. 470, 473-474 [93 S.Ct. 2208, 37 L.Ed.2d 82]) affords no basis for this Court to revisit its past decisions rejecting this same claim of instructional error.

7. The Instructions Did Not Convey a Burden of Proof as to Mitigating Evidence Nor Impermissibly Foreclose Full Consideration of Mitigating Evidence

Parker complains his rights under the Eighth Amendment were violated because of a likelihood the instructions permitted the jury to apply a burden of proof for mitigation evidence and thereby prevented consideration of evidence in mitigation. (AOB 233-234.) Parker argues that since the jury was instructed in the guilt phase it had to unanimously find special circumstances true, there is a substantial likelihood that the jurors would believe that unanimity was also required to find a factor in

mitigation existed. (AOB 233.) Parker's supposition is particularly unavailing inasmuch as the jury was instructed during the penalty phase:

"Please set aside the legal instructions given during the guilt phase and any other prior jury instructions provided to you during the course of these proceedings. The instructions that apply to this phase of the trial will now be read to you." (10 RT 2064; 10 CT 3044.)

Building upon this untenable premise, Parker then argues that this supposed implied "unanimity requirement" limited the consideration of mitigation evidence in violation of the Eighth Amendment. (AOB 233, citing *McKoy v. North Carolina* (1990) 494 U.S. 433, 442-443 [110 S.Ct. 1227, 108 L.Ed.2d 369] [invalidating state's requirement that jury unanimously agree that evidence was mitigating before that mitigation evidence could be considered by a juror in a capital sentencing].) Contrary to Parker's argument, as this Court has repeatedly held, the standard model jury instructions given below did not fail to provide sufficient guidance regarding consideration of mitigation evidence. (*People v. D'Arcy*, *supra*, 48 Cal.4th at p. 303; *People v. Rogers* (2009) 46 Cal.4th 1136, 1179.)

8. No Presumption of Life Instruction Was Required

Parker argues that the presumption of life in a penalty phase is the correlate of the presumption of innocence and the absence of an instruction to the jury that the law favors life and presumes life imprisonment without parole to be the appropriate choice violates his right to due process, to be free from cruel and unusual punishment, equal protection, and his right to a reliable death sentence. (AOB 234.) This Court has repeatedly rejected the argument that an instruction on the presumption of life is required in a penalty phase proceeding. (*People v. Ervine* (2009) 47 Cal.4th 745, 811; *People v. Whisenhunt*, *supra*, 44 Cal.4th a p. 228; *People v. Geier* (2007)

41 Cal.4th 555, 618.) Parker provides no basis for this Court to revisit its views regarding the absence of any such requirement.

B. The Absence of Written Findings Does Not Deny Parker Meaningful Appellate Review

Parker complains that he was denied his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments because the failure to require written findings during the penalty phase denied his right to meaningful appellate review. (AOB 235.) As Parker acknowledges, this Court has rejected this argument. (*People v. Gamache* (2010) 48 Cal.4th 347, 406; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 307; *People v. Friend*, *supra*, 47 Cal.4th at p. 90; AOB 235, citing *People v. Cook* (2006) 39 Cal.4th 566, 619.) Parker provides no basis for this Court to reconsider its past rejections of the same claim.

C. The Jury Instructions on Mitigating and Aggravating Factors Were Constitutional

Parker contends that the jury instructions on mitigation and aggravation were unconstitutional because of the use of restrictive adjectives in the list of potential mitigating factors and failed to delete inapplicable sentencing factors. (AOB 235-236.) As Parker acknowledges, this Court has repeatedly held that use of the words "extreme" and "substantial" in CALJIC No. 8.85 and Penal Code section 190.3, factors (d) and (g) respectively, is not a barrier to consideration of mitigating evidence and does not violate the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Friend*, *supra*, 47 Cal.4th at p. 90; AOB 236, citing *People v. Avila* (2006) 38 Cal.4th 491, 614; *People v. Jackson*, *supra*, 45 Cal.4th at p. 708.) The use of the word "extreme" regarding "mental or emotional disturbance" in factor (d) and "substantial" regarding "duress or substantial domination by another" in

factor (g) was proper. Moreover, even if the jury were to find mitigating evidence regarding a mental condition fell short of being "extreme" that same mitigating evidence would then be considered under the catch-all of factor (k). (*People v. Gamache*, *supra*, 48 Cal.4th at p. 406; *People v. Mills*, *supra*, 48 Cal.4th at p. 211.) Here, Parker's jury was expressly instructed: "Evidence of defendant's mental state, illness, or disturbance may be considered a factor in mitigation even if it did not rise to the level of a legal defense. It need not be an extreme mental state, illness, or disturbance in order to constitute a mitigating factor." (12 RT 2575-2576; 10 CT 3059.) Accordingly, Parker could not conceivably have been disadvantaged by the standard instructions, even assuming error.

Parker also concedes that this Court has rejected his complaint that it is unconstitutional to neglect to delete inapplicable factors from the jury instructions. (AOB 236, citing *People v. Cook*, *supra*, 36 Cal.4th at p. 618.) While Parker asks this Court to reconsider its past decisions on deleting inapplicable factors, he provides no analysis or reason for doing so other than simply asserting that the failure to delete inapplicable factors "would likely confuse the jury." (AOB 236.)

This Court has been urged to reconsider its views on the deletion of inapplicable factors based on the argument that if the jury were instructed on inapplicable factors, it might simply count up all the possible factors and give unjustified weight to inapplicable factors. (*People v. Mills*, *supra*, 48 Cal. 4th at p. 210.) As this Court explained in declining to depart from its past rulings on the subject, such a possibility was "highly unlikely" because the jury "was instructed that any one mitigating factor could support a decision that death is an inappropriate penalty, and any mitigating factor could outweigh all the aggravating ones." (*Id.*) Accordingly, any danger that the jury would simply add up the factors is eliminated. (*Id.*)

Parker's jury was likewise instructed. (See 12 RT 2608; 10 CT 3110 [CALJIC No. 8.88].) Moreover, Parker's jury was also instructed:

> In the list of aggravating and mitigating circumstances listed in the previous instruction, the factors (A) and (B) are the only statutory factors that can possibly be considered aggravating factors. They may also be considered as mitigating factors. It is for the jury to determine whether factors (A) and (B) are either mitigating or aggravating.
>
> The absence of evidence as to a possible mitigating factor shall not be considered as a factor in aggravation. If no evidence was presented by either party as to a particular factor, then that factor is not applicable to this case.[60]

(12 RT 2572; 10 CT 3051.) There is no basis for concern regarding possible confusion, and no state or federal constitutional error predicated upon the jury being instructed regarding inapplicable sentencing factors.

D. There Is No Constitutional Requirement of Inter-Case Proportionality Review

Parker complains that California's death penalty scheme is unconstitutional because it fails to provide for intra-case proportionality review. (AOB 236-237.) This Court has repeatedly rejected the argument that its refusal to conduct intercase proportionality review of a death sentence violates the federal constitution. (*People v. Gamache*, *supra*, 48 Cal.4th at p. 407; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 307; *People v. Lewis*, *supra*, 46 Cal.4th at p. 1320; *People v. Dykes* (2009) 46 Cal.4th 731, 819; *People v. San Nicholas* (2004) 34 Cal.4th 614, 677.) Parker provides no reason for this Court to reconsider its views on the subject.

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[60] The jury was instructed that factor (c) refers to prior felony convictions that were entered on a defendant's record before the offenses were committed, and expressly instructed that "in these proceedings Factor (C) is inapplicable." (12 RT 2574; 10 CT 3057.)

E. California's Capital Sentencing Scheme Does Not Violate Equal Protection

Parker contends his right to equal protection was violated because California's death penalty scheme provides "significantly fewer procedural protections" than for those who are charged with non-capital crimes. (AOB 237.) Specifically, he complains that there is no requirement of a unanimous finding beyond a reasonable doubt for any aggravating factor or written reasons justifying a death sentence. (AOB 237.) Parker acknowledges this same contention has been rejected by this Court. (AOB 237, citing *People v. Manriquez* (2005) 37 Cal.4th 547, 590.) Parker provides no basis for this Court to reconsider its repeated rejection of the argument.

F. California's Use of the Death Penalty Does Not Violate International Law

Parker contends that California's use of the death penalty falls short of "international norms" and thereby denies him his constitutional rights under the Eighth and Fourteenth Amendments by violating "evolving standards of decency." (AOB 238.) Parker acknowledges this Court has rejected claims that California's use of the death penalty violates international law. (AOB 238, citing *People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) Parker urges this Court to reconsider its previous rejections of the claim in light of the United States Supreme Court's decision in *Roper v. Simmons* (2005) 543 U.S. 551, 554 [125 S.Ct. 1183, 161 L.Ed.2d 1], prohibiting capital punishment for crimes committed by juveniles. As this Court has repeatedly reaffirmed, international law does not prohibit a sentence of death rendered in accordance with state and

federal constitutional and statutory requirements. (*People v. Friend, supra*, 47 Cal.4th 1, 90.) Nothing in *Roper* alters that fact.

VII. PARKER WAS NOT DENIED A FAIR TRIAL AND RELIABLE DEATH JUDGMENT BASED ON CUMULATIVE ERROR[61]

Parker contends that he was denied a fundamentally fair trial and reliable death judgment based upon the cumulative effect of errors in his trial. (AOB 239-240.) There was no error, and thus no effect from errors to accumulate. Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (*People v. Seaton* (2001) 26 Cal.4th 598, 691-692; *People v. Ochoa* (2001) 26 Cal.4th 398, 458; *People v. Catlin* (2001) 26 Cal.4th 81, 180.)

Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Stewart* (2004) 33 Cal.4th 425, 522; *People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1214.) The record demonstrates that Parker received a fair trial. He is entitled to nothing more.

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[61] There are seven arguments in Appellant's Opening Brief. However, the cumulative-error argument is numbered Argument VIII. Respondent addresses the cumulative-error argument herein in Argument VII.

CONCLUSION

For the foregoing reasons, respondent respectfully requests this Court affirm the judgment of conviction and sentence of death in its entirety.

Dated: May 20, 2010

Respectfully submitted,

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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 46,757 words.

Dated: May 20, 2010

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Gerald Parker***
No.: **S076169**

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 May 20, 2010, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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SACRAMENTO CA 95826
Attorney for Appellant
Gerald Parker
(2 Copies)

CLERK OF THE COURT
ATTN HON FRANCISCO P BRISENO
ORANGE CO SUPERIOR COURT
P O BOX 1994
SANTA ANA CA 92702-1994

CALIFORNIA APPELLATE PROJECT
101 SECOND ST STE 600
SAN FRANCISCO CA 94105-3672

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COUNTY OF ORANGE
P O BOX 808
SANTA ANA CA 92702

HABEAS CORPUS RESOURCE CENTER
303 SECOND ST STE 400 SOUTH
SAN FRANCISCO CA 94107

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 May 20, 2010, at San Diego, California.

STEPHEN MCGEE
Declarant

Signature