In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

HOWARD LARCELL STREETER,

Defendant and Appellant.

CAPITAL CASE

Case No. S078027

San Bernardino County Superior Court
Case No. FVA07519
Honorable Bob N. Krug, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

After months of secret planning, Yolanda Buttler executed her well planned escape from Streeter, who had isolated, terrorized and abused her for the last year of their five year relationship. With the help of her siblings, Yolanda went into hiding with her three young children and her disabled niece, planning to start a new life.[1]

Streeter had told Yolanda he would kill her if she left him. When Streeter returned home from work and noticed Yolanda was gone, he methodically hunted her down. He went to the homes of Yolanda's family members, one after the other, vowing to kill each of them and to kill Yolanda if they did not tell him where she was. He showed up at their homes in the middle of the night, shattering windows and pounding on doors, threatening Yolanda's family that they would start dropping like flies if he did not find her. Streeter threatened Yolanda's brother with a gun, and for that offense, he was convicted of assault with a firearm, and spent several weeks in jail. Despondent and homeless after his release, Streeter continued to threaten Yolanda's family, saying she would regret what she had done.

Two weeks later, Streeter stumbled upon information that Yolanda was living in an apartment in Victorville. He called Yolanda repeatedly and after substantial persuasion, he convinced her to allow him a public visit with their five-year-old son at a Chuck E. Cheese restaurant in Fontana. Under the pretext of that visit, Streeter arrived early, parked his car in the parking lot and left a suicide note addressed to his parents in his glove compartment, apologizing for what he was about to do to Yolanda,

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[1] To avoid confusion, Respondent uses first names for witnesses who share a common surname.

and asking them to raise his son. He filled an antifreeze container with gasoline, and placed it in his trunk. And then he waited.

When Yolanda arrived, Streeter took their son from her car and placed him in the safety of his own car. Then he beat Yolanda and pushed her down and kicked her. He retrieved the gasoline from his trunk and poured it on Yolanda's car, where her 6-year-old disabled niece was trapped in the back seat. Seeing this, Yolanda's 13-year-old son jumped in the driver's seat and drove the girl around the corner to safety.

Streeter poured the gas on Yolanda, soaking her. Then he beat her again and dragged her by her hair across the parking lot, releasing her while he retrieved a lighter from his car. Streeter chased Yolanda through the parking lot, and despite the efforts of a bystander to intervene, Streeter lit Yolanda on fire.

The flames shot 15 feet in the air. There were adults and children in the parking lot, including Yolanda's own children, who watched helplessly as Yolanda burned. Streeter ran away but was apprehended by a witness. Responding paramedics tried repeatedly to administer pain medication to Yolanda during the 15 minute drive to the hospital, but their efforts failed because she was so severely charred and mutilated. She was smoldering. Her clothes had melted onto her body. She said her hands were melting. Even a last-resort method of using a large bore needle to inject pain medication directly into the marrow of the shin bone failed. Yolanda screamed during that ride, in torturous pain. She asked about her children, and begged to be killed. Yolanda sustained second and third degree burns to approximately 55% of her body surface. Her injuries were so severe she was never able to communicate again. She died ten days later from pulmonary failure as a consequence of subcutaneous burns.

STATEMENT OF THE CASE

On August 28, 1997, the San Bernardino County District Attorney filed an information charging Streeter with the murder of Yolanda Buttler. (Pen. Code, §187, subd. (a).) The information alleged special circumstances of lying in wait (Pen. Code, §190.2, subd. (a)(15)), and the intentional infliction of torture (Pen. Code, §190.2, subd. (a)(18).) (1 CT 55-57.)

Streeter was arraigned on the information and entered a not guilty plea. (1 CT 58.)

Streeter's motion to strike the "lying in wait" special circumstance was deemed a motion pursuant to Penal Code section 995, and the motion was granted. The complaint was deemed to have been refiled, and the matter proceeded to preliminary hearing on the "lying in wait" special circumstance. Streeter was held to answer, the information was deemed refiled, and Streeter denied the charge and special circumstance allegations. (1 CT 93, 102.)

Following the presentation of evidence, instructions and arguments, the jury retired for deliberations on September 16, 1998. (1 CT 174.) On September 21, 1998, the jury returned verdicts finding Streeter guilty of murder and finding the special circumstances to be true. (1 CT 180, 259-262.)

On October 14, 1998, the jury advised the court they were unable to reach a verdict as to Streeter's penalty. (1 CT 285-286.) The court found the jury was hopelessly deadlocked and declared a mistrial as to the penalty phase. (1 CT 288-289.)

Streeter's penalty phase retrial commenced on November 2, 1998. (1 CT 329.) On November 25, 1998, Streeter's motion to continue the trial was granted. The jury was released. (2 CT 367-369.)

Streeter's penalty phase retrial began again on January 19, 1999. (2 CT 382.) On April 1, 1999, the jury set the penalty at death. (2 CT 468, 470.) Streeter's motion to modify the judgment pursuant to Penal Code section 190.4, subdivision (e) was denied. Streeter was sentenced to death for the murder of Yolanda Buttler. (2 CT 568-593.)

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

STATEMENT OF FACTS

A. Guilt Phase

Streeter and Yolanda Buttler lived together for approximately five years. (8 RT 761.) They had one child together, Little Howie[2]. Yolanda's two other children, Patrick and Lawanda, and Yolanda's niece, Shavonda, also lived with them.[3] (8 RT 760-761.)

In December 1996, Yolanda told her siblings Lucinda and Quentin that Streeter had been beating her. She said Streeter had pulled her hair out and beaten her up and that she was scared. She bled and sustained injures from the beating, resulting in scars and scabs on her head. (10 RT 974-975, Ex. 7.)

Yolanda and her siblings devised a plan to move Yolanda out of her home while Streeter was at work. (10 RT 974-975.) Quentin advised Yolanda to get a restraining order. (10 RT 975.)

On January 4, 1997, Quentin helped Yolanda find an apartment and move out. He took her to her sister's house in Los Angeles. Yolanda was so scared they stayed in a motel to make her feel safer. They stayed for a

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[2] Howie III was also known as Little Howie and baby Howie.

[3] At the time of trial, Patrick was 15 years old, Lawanda was 16 years old, Shavonda was 8 years old, and Little Howie was 6 years old. (8 RT.)

week before moving Yolanda into an apartment in Victorville. (8 RT 762, 10 RT 974-980.)

Yolanda applied for a restraining order on February 7, 1997. In her declaration, Yolanda wrote,

> On December 30th, 1996, Howard went crazy. He took my braids and wraped (sic) them around his hand. He had a very very tight grip on them. He kept pulling and pulling on my braids so hard he pulled my hair out of my head. When I would scream he told me to shut up and put his hand on my neck. ¶ All of this because I wouldn't have sex with him. When my daughter came to see what was happening he told her to leave, he said if she didn't leave she could stand there and watch. ¶ He would start drinking and get really mean. He push (sic) me out the house and lock the door. He would throw things at me. One time he held me down because I wouldn't give him my bank card. He would push me around. He would call me bitches and hores (sic). One time we went to Knotts Berry Farm he told me if I didn't leave with him he would beat my ass and every one around us heard. Some times he would make me give him my money and he would make me have sex with him.

(Ex. 21, See ICT 108-109.)

A few weeks after Yolanda fled, Streeter found her telephone number. He called her and convinced her to allow him to see Little Howie, and they had an uneventful visit in a public setting. (8 RT 763.) Streeter called frequently after that, trying to convince Yolanda to reconcile with him. She agreed to meet him for a second visit a couple of weeks later at a Chuck E. Cheese restaurant in Fontana. (8 RT 764.)

On Sunday, April 27, 1997, Yolanda, Patrick, Shavonda and Little Howie went to the Chuck E. Cheese restaurant in the Kmart shopping center in Fontana in San Bernardino County, arriving in the mid-afternoon.[4]

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[4] There was conflicting prosecution testimony as to the timing of the Buttler's arrival at Chuck E. Cheese and the events that unfolded thereafter. Estimates ranged between 1:00 and 3:30 p.m. (6 RT 510-514, 549-551, 8 (continued...)

(6 RT 574-577, 8 RT 764.) Yolanda drove, and Patrick was in the front seat. Shavonda and Little Howie were in the back. Streeter was there when they pulled in. He appeared nervous and was clapping his hands. (8 RT 764-765.) Patrick went along in case he needed to protect his mother, because Yolanda was nervous that Streeter had found their number and had been calling and trying to convince her to get back together. (8 RT 767-768, 771.)

Patrick and Little Howie got out of the car, and Yolanda stayed in the car with Shavonda. (8 RT 768.)[5] As soon as they got out of the car, Streeter grabbed Little Howie and started heading towards his own car. Yolanda asked, "where are you taking him?" and Streeter said something like, "don't worry, I'm taking him." (8 RT 768.)

Yolanda drove behind Streeter as he walked to his car, which was parked in the third row. Yolanda parked in the second row and got out of her car. They began to argue and Patrick yelled for help. Yolanda tried to get Little Howie out of Streeter's car, and Streeter pushed her away. They pushed back and forth and Yolanda asked Streeter what he was doing. (8 RT 768-769.)

(...continued)
RT 764.) The parties stipulated that the 911 dispatch tape showed the report of a person on fire was received at 3:21 p.m. (10 RT 973.) Streeter testified that he arrived a little before their scheduled 4:00 meeting, and Yolanda arrived 30 to 45 minutes after that. (9 RT 891.)

[5] Much of Patrick's testimony was admitted by stipulation after he became very emotional on the witness stand. Evidence impeaching Patrick was also admitted by stipulation; specifically, that Patrick told an officer Streeter took Little Howie out of the back seat of Yolanda's car, that Streeter and Yolanda got into a physical fight and Streeter dragged Yolanda through the parking lot by her hair while he was hitting her, that Streeter pushed her to the ground and kicked her, and that an armed security guard did nothing to help. (8 RT 772-773.)

Patrick went to the passenger side of Streeter's car and pounded on the door, yelling to Little Howie to get out of the car. Streeter went to the trunk of his car and took out a plastic container which had gas in it. Yolanda saw him and began to run back towards her car. (8 RT 769.) Streeter chased her and poured gas on the front of her car. Shavonda was trapped in the back seat because she was disabled and needed braces to walk. Yolanda was on the other side of the car trying to get away. Streeter caught up to her and poured gas on her. (8 RT 769.) Patrick was scared for Shavonda because he smelled the gas and knew the car could catch on fire. He jumped into the car and drove it to the end of the parking lot, then ran back towards Yolanda and Streeter. (6 RT 526-527, 8 RT 756-757, 770.) When he came back, the plastic can was on the ground and Yolanda was on the ground, and Streeter was hitting her. (8 RT 770.)

Several witnesses saw some or all of the events in the parking lot. Edward Jasso and his coworker Darlene Herrera were in Jasso's car in the parking lot of the Chuck E. Cheese restaurant. (6 RT 574-577.) Jasso adjusted his hat in the mirror and as he did, he saw two people, later identified as Streeter and Yolanda Buttler, in the parking lot. He saw liquid being thrown and initially believed the two were engaged in a water fight. Jasso soon realized it was not a water fight when he saw Streeter push Yolanda to the ground. Streeter was hitting and kicking her. He heard Streeter call Yolanda a "fucking bitch." (6 RT 577-579, 596.)

Jasso got out of his car and told Streeter to leave the woman alone. Streeter dragged Yolanda by her hair and then let go of her and went to his car and took off his shirt. Yolanda was dazed and began walking towards Chuck E. Cheese. Streeter reached into his car and Jasso thought he might be getting a knife or a gun. Jasso told everyone to run. Then Streeter came back towards Yolanda and Jasso. He was holding a light colored lighter with a silver tip. (6 RT 579, 581-582, 586-587, 595.)

As Streeter approached Yolanda, Jasso tried to grab the lighter from Streeter's hand but Streeter's arm was slippery from gasoline and Jasso's hand slipped off. Streeter was four or five feet from Yolanda at that point. Yolanda was wet from gasoline. Streeter caught up to Yolanda and lit the lighter when he was three or four inches away. Yolanda went up in flames right away. Jasso tried to grab Streeter as he lit the lighter, but Jasso accidentally grabbed Yolanda and Jasso's arm caught on fire. (6 RT 581-585, 588-591.) Streeter ran west as Jasso tried to put out the fire on his arm. (6 RT 592.)

John Robert Martinez IV was in the parking lot of the restaurant when he heard a woman yelling for help and saw a couple of children in the area. Martinez parked his van and took his two year old daughter out. He saw Streeter yelling and beating up Yolanda and pulling her hair. Streeter hit Yolanda more than four times. Streeter slammed Yolanda to the ground. Streeter then went to his car, took a yellow antifreeze container out of the trunk, and poured something from the container onto Yolanda's car, and onto her body. He then dragged Yolanda back towards his car because he had nothing to light it with. (6 RT 521-523, 528-530.) He saw Patrick jump in Yolanda's car and drive it to the end of the parking lot. (6 RT 526-527.)

Martinez ran into a card shop next door to the Chuck E. Cheese and told the owner, Richard Wayne Thompson, to call 911. It appeared to Martinez that the man was going to light the car and the woman on fire. By the time Martinez and Thompson went back outside, the woman had been lit on fire. A ball of flame shot 15 feet into the air. (6 RT 510-512, 523-525.) The woman was burned from the top of her head to her waist. People were throwing water on her and wrapping her in blankets. (6 RT 547.)

Anzerita Chonnay also witnessed the incident as she was heading from the shopping center into the parking lot. She heard a couple yelling at each other, and saw Streeter hit Yolanda. Chonnay ran inside to have someone call 911 and came back out again. Chonnay saw Streeter take something from the trunk of his car and begin pouring it while people yelled at him. She saw that a man was trying to intervene, but Streeter pushed him away. Then she saw Yolanda on fire. The flame shot up very high and people around started trying to help the woman, using their clothing to try to put out the flames. (6 RT 549-555, 558-561.) Chonnay saw Jasso take his shirt off and use it to try to help Yolanda as he yelled to others to go after Streeter. (6 RT 593.) While Yolanda was burning, Patrick was holding onto the younger children with his arm around each of them. (6 RT 556-557.)

There was a lot of commotion. Streeter took off his shirt as he ran from the scene. Richard Kim Humphreys, a customer in the card shop, went outside and saw people yelling after Streeter, who was running in a westerly direction. Humphreys jumped in his truck and followed Streeter, who tried to climb the fence to the 10 freeway. Humphreys told Streeter to stop. Streeter climbed down and walked back towards the food store. Streeter was not wearing a shirt. The police arrived. (6 RT 513-520, 524-525, 548.) Streeter smelled very strongly of gasoline and appeared to be under the influence of alcohol, but no drugs or alcohol were found in Streeter's blood, which was drawn at 5:39 p.m. that night. (7 RT 692-694, 702-703, 712-713, 722.)

Paramedics arrived and treated Yolanda. She was still standing. There were dozens of people in the area, including children. Two of the children appeared to be Yolanda's. They were within arm's reach and she was trying to get them within her grasp. (7 RT 688-689.)

Yolanda's clothing was black, burnt and smoldering. It had melted onto her skin. The paramedics cooled her down with saline solution and poured water on her head and hands to relieve the pain. She was crying and screaming in pain. She repeatedly asked about her children and was assured they were with the police. Paramedics were unable to administer pain medication while transporting her. During the ride, Yolanda grasped one of the paramedics and pulled him close to her face and said, "Just kill me. Please kill me." (7 RT 669-672, 687-690.) Yolanda was taken to the San Bernardino County Medical Center burn ward. She was unable to make a statement because of her injuries. (8 RT 758.)

Yolanda was treated for approximately 10 days in the burn unit at the San Bernardino County Medical Center until her death. (8 RT 759.) Thirty-nine-year-old Yolanda Buttler died at 11:00 a.m. on May 7, 1997, from thermocutaneous burns. (7 RT 630, 8 RT 759.)

The burned area included an area about two inches behind the hairline, the entire face, the front of the chest, both arms and the top of both thighs. There were second and third degree burns, which were extensive from the waist up. The back was burned but the area around the abdomen and pelvis was mostly spared. (7 RT 637-638.)

Thermocutaneous burns are burns caused by flame or heat as opposed to chemicals. The lungs were dense and swollen showing evidence of organ failure. The mechanism of death was pulmonary failure caused by the effects of subcutaneous burns. (7 RT 633-634.) The burns were consistent with burns caused by a gasoline fire. The pain inflicted by these types of burns could be severe and potentially extreme. (7 RT 636.)

Dr. David Lee Vannix was the medical director and attending surgeon of the burn center at San Bernardino Medical Center. He has extensive training and experience studying and treating burns, and he was in charge of Yolanda's care while she was at the hospital. (7 RT 640-643.)

Yolanda was admitted to the hospital in critical condition, meaning she had life-threatening injuries which would have led to her imminent death without aggressive support measures and treatment. She was catheterized and given medications and fluids including pain and anxiety medication. An intratracheal tube was inserted for her respiratory needs. (6 RT 644.)

Burns are classified as first, second and third degree. First degree burns involve redness to the skin, some pain, and do not blister or peel. Second degree burns from heat or flame usually look red, there may be some discoloration from ash or combustion, and the skin may be blackened until it is cleaned. Second degree burns will have blisters. The formation of blisters distinguishes first from second degree burns. Second degree burns involve injury to the deeper layer of dermis beyond the epidermis. If the dermis is injured nearly to its base and to the fatty tissue that underlies the skin, the burn is a third degree or full thickness burn. There may be blisters in a third degree burn, but in a very deep burn there may be none. Most commonly, a third degree burn is more white than red or pink, and there is a significant difference in the texture of skin that has suffered a third degree burn because the burn has denatured the protein structure, so the skin is thick and feels heavy and leathery, not elastic. (7 RT 648-649.) Wounds in the epidermis heal more quickly because the cells build new cells and fill in the defect. Deeper and wider burns involve layers of skin that do not have the cell type that makes more of itself to cover the wound. (7 RT 651.)

Nerve endings sense pain and transmit that information to the brain where it registers as pain. (7 RT 652.) Nerve endings in the dermis communicate information from the epidermis. Second degree burns are significantly more painful than first degree burns because they cause more injury to more nerve endings in the dermis than the epidermis. If there is a

third degree burn and none of the nerve endings survive, the burn may not initially be painful. But that painlessness is a transient phenomenon because the nerve endings begin to regenerate, and within 24 hours the patient will experience an even greater degree of pain than that caused by second degree burns. Dr. Vannix testified such pain is extreme, and "[i]t is among the most significant types of pain in human experience." (7 RT 653-654.)

With first and second degree burns, the onset of pain is immediate. With third degree burns, there is a delay in the onset of pain, but even with medication the pain will be felt within the first day.[6] (7 RT 654.)

Dr. Vannix testified that paramedics are empowered to give narcotic medication while transporting burn victims because of the significant pain as they are taken from the scene to the hospital. The paramedics here were unsuccessful in administering pain medication to Yolanda although they tried to get an IV started in three locations, and they placed a needle in the bone of Yolanda's leg. (7 RT 659, 661.) The burns were so deep and the skin was so thickened, the paramedics could not find or gain access to a vein. (7 RT 662.) Pain medications would have blunted the consciousness of pain but not to the point that Yolanda felt no pain or anxiety at all. (6 RT 668.)

Dr. Vannix testified that Yolanda sustained burns to 54 percent of her body surface.[7] Although a small percentage of healthy 39 year old patients

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[6] Dr. Vannix disagreed with the opinion of the medical examiner that the burns depicted in Exhibits 9 and 10 were second degree burns. He explained that since skin grafts had been performed in those areas, they appeared to be second degree burns, but in his opinion they were third degree burns. (7 RT 654-658.)

might survive such burns, the injury to her lungs put her in a high risk category with a very low chance of survival. (7 RT 668.)

At the scene, with the help of witnesses, police found a clump of Yolanda's hair and her earring on the ground, as well as the antifreeze can Streeter discarded. (6 RT 597-598, 8 RT 735-736, 743-744.) Streeter's car was in the parking lot with a Club locking device on the steering wheel and a gas cap sitting on the bumper. (8 RT 740-742.) Streeter's shoes, the antifreeze bottle, several items of Yolanda's clothing, and a shirt tested positive for gasoline residue. (8 RT 754-756.) No gasoline residue was found on Streeter's shorts, socks or underwear, the clump of Yolanda's hair retrieved from the scene, or Yolanda's earrings. (8 RT 754-756.)

Streeter's car was towed and inventoried. Inside, officers found a Club steering wheel locking device, a bible, and rope. A suicide/homicide note was also found in the car. (Ex. 5.) It was written on the back of a smog certificate which was attached to a vehicle registration form. (6 RT 615-618.) The note said,

> to mom and pop, I hate to do you gys (sic) like this but I don't like living the way I am so I don't know what to say but I love you both and I am very sorry to have to put you though (sic) this but my life is over I don't have any thing to live for any more. I know it going to cost a lot to berrie (sic) me but I am sorry I hope you both understand and I know what I did to Youlanda (sic) is worng (sic) but she don't dersive (sic) to live like me. P.S. If you can get my son Baby Howie and raise him to the best of your abbilty (sic). Tell him his dady (sic) is sorry for what I did but I will alway (sic) love him and to don't never fall in love with a women (sic). Love alyaw (sic) Howie. (Ex. 5, I CT 84.)

(...continued)

[7] Dr. Trenkle, the Medical Examiner, testified that Yolanda sustained injury to 55 to 60 percent of the surface area of her body. (7 RT 637-638.)

A sheriff's detective from the Arson and Bomb squad and a captain from the San Bernardino County fire department jointly investigated the case, and concluded that gasoline was poured on the victim and then ignited, causing her to burn. (8 RT 758.)

B. Defense Case

Sixteen-year-old Larcell Lamar Streeter is Streeter's son. Larcell lived mostly with his mother, Anetha Green, but spent weekends, summers, vacations and holidays with Streeter. (9 RT 828-831.) Larcell testified that Streeter treated Yolanda's children as if they were his own. Streeter did not strike Yolanda's children. (9 RT 831.)

In 1997, Streeter was in jail. Before he went to jail, he was a happy person, but afterwards, he was depressed. Larcell did not see much of his father after he got out of jail. Streeter loved Little Howie more than anything. (9 RT 832-834.)

Sesil Green testified he had been a church pastor for 25 years and was also the police chaplain for the city of Rialto. Green knew the entire Streeter family, including Streeter's parents. Streeter's family had problems when he was growing up. His mother came to services with a black eye and said there was "trouble at home." Streeter found the Lord, meaning he surrendered his life to God. (9 RT 836-838.) Some time prior to April 1997, Streeter came to the church and told Green his old lifestyle seemed foolish to him and he had changed. (9 RT 839.)

Streeter's mother Eleanor Streeter testified that she had been married to Howard Streeter, Streeter's father, for 40 years. Streeter is the second oldest of six children who all got along well. When Streeter was a teenager, she and her husband fought in front of him and she had black eyes. (9 RT 849-850.) Howard had problems with drugs, alcohol and other women. In 1972, Eleanor received the Lord in her life, and her husband received the Lord in 1978. Streeter lived with Yolanda for six or seven years and he

loved all the children. He was good to all of them, and Little Howie was his life. (9 RT 848-852.)

Streeter testified that he met Yolanda in February, 1991 in San Bernardino. They lived together in Los Angeles in March, 1991, and then moved to Fontana right after Little Howie was born. They had a beautiful, loving relationship. (9 RT 860-862.)

Their relationship began to fall apart around September 1996 when Yolanda wanted to buy a house. Streeter attempted to purchase a house but he did not make enough money. He was working at the time, but Yolanda was not. (9 RT 863.)

Streeter testified he had not seen Yolanda's statement in the restraining order declaration before it was presented at his trial. Regarding the events of December 30, Streeter testified he and Yolanda had an argument. They had been drinking and he asked her when she was coming to bed. She kept putting him off and he wanted her to come to bed to have sex. (9 RT 864.) She wore braids, which were hair extensions. They got into an argument that night when Streeter asked her to have sex. He pulled her braids and the children woke up and came into the room. After that, he went into his room and went to sleep by himself. He pulled her hair because he wanted her to come to bed. He did not rape her. He still loved her. (9 RT 865-867.)

On January 4, when he came home, the TV and VCR were gone, the children's bedroom sets were gone, and clothing was gone. Streeter was in shock. Yolanda had not given any indication that she was going to leave him. (9 RT 868.)

Streeter called Yolanda's brother, Victor, in Fontana but he claimed he did not know Yolanda had left Streeter. Streeter was hurt. He purchased alcohol and rock cocaine and went back to the apartment and

drank and did drugs until 10:00 or 11:00 p.m., and then he called Victor again. (9 RT 869-870.)

Victor said to quit calling. Streeter went to Victor's house to see if Yolanda was there. He knocked but nobody answered. He broke Victor's car windows with a bat. Then Streeter went to Yolanda's other brother's house in Rancho Cucamonga. He knocked but no one answered. Streeter yelled that he wanted his wife and kids back, then he picked up a rock and threw it through a window. He got in his car and left. (9 RT 872-873.) Streeter drove to Los Angeles and went to Yolanda's sister's house. He knocked on the door and the sister said Yolanda was not there. (9 RT 873.) They had a conversation, and the sister said she did not know where Yolanda was. Streeter said if they tried to keep his family from him, something bad would happen to them. (9 RT 873-874.)

Streeter returned to Fontana and went to work, sat in front of his place of business for 20 minutes and then left, realizing he was in too much pain to face his coworkers. (9 RT 874-875.) Streeter called Victor again. This time, Victor told Streeter that Yolanda and Little Howie were there, and that he could come get his son. Streeter drove to Victor's house but Victor kept stalling him, and Streeter realized they were not there and he had been set up. Streeter drove off and saw an officer around the corner waiting for him. The officers pulled their weapons and arrested him. They searched and towed his car and took him to jail. (9 RT 875-877.) He got out of jail on February 28th after pleading guilty to one charge of assault with a deadly weapon. (9 RT 877.)

After his release, Streeter moved around from place to place because he had lost his apartment while he was in jail. (9 RT 879.) He did not know where Yolanda and the children were until about two weeks later. (9 RT 879-880.) He learned of Yolanda's whereabouts when their mechanic called and wanted payment for the car Yolanda had brought in for service.

Streeter refused to pay unless the mechanic told Streeter where Yolanda was staying. He got Yolanda's phone number from the mechanic, and called her. Lawanda answered the telephone and Streeter hung up. (9 RT 881.) He called back later and talked to Yolanda. He told her he wanted them back and he loved her. She would not give him a second chance. (9 RT 882.)

Streeter called again later that night and talked to Patrick and Yolanda. He said he wanted to see the children. He knew Lawanda would not want to see him because of the incident on December 30th. (9 RT 882.)

They arranged a meeting at the Discovery Zone in Rancho Cucamonga. Yolanda brought Little Howie and Shavonda. They spent about an hour and 45 minutes together, and Streeter said he wanted to see them again. Yolanda said to call her and they would talk about it. (9 RT 885-886.)

During the next two or three weeks, Streeter called Yolanda almost daily telling her he wanted her back. She refused. He told her that if she did not come back, he might do something to himself, and that he could not live without her. They agreed to meet at Chuck E. Cheese on April 27th at 4:00 p.m. (9 RT 887.)

Streeter arrived a little before 4:00. (9 RT 888.) He stood at the curb and waited for Yolanda and the children, for 30 to 45 minutes, becoming angry and frustrated. (9 RT 891.)

Yolanda pulled up to the curb and Streeter got Little Howie out of the back passenger seat of the car. Yolanda got out of the driver's side and said she was going to park. Streeter said he was going to leave and started to walk towards his car. He put Little Howie in the passenger's seat and then got into the driver's seat of his car. (9 RT 893.)

Streeter tried to take the Club locking device off of his car as Yolanda argued with him about taking Little Howie. Yolanda scratched Streeter and

hit him. He pushed her out of the way and then got out of his car and they got into a scuffle. (9 RT 894-895.) Streeter claimed he kept gasoline in the trunk of his car to put in his carburetor. He opened the trunk and got the gasoline out. Streeter testified he did not know why he took the gasoline out, and that he only remembers bits and pieces of what happened next. He was angry, upset and in a rage. He poured gasoline on both Yolanda and himself. Someone tried to grab him, and the next thing he knew, they were both on fire. (9 RT 896-898.)

Streeter testified he did not mean to do it. He asked God to forgive him. He testified he did not mean for this to happen, and he did not intend to kill Yolanda. (9 RT 898.) Regarding the note in his car, Streeter testified he wrote the note to his mother and father. The note explained that he knew what he did to Yolanda was wrong, and that she deserved a better life than what he could give her with drugs and alcohol. (9 RT 898-900.) It was a suicide note. He never intended to hurt Yolanda at all. When he wrote that what he did to Yolanda was wrong, he was referring to the incident on December 30th when he pulled her braids from her hair. (9 RT 900.) He was hurt and did not have his family. He was going to show the note to Yolanda so she would feel sorry for him and take him back. (9 RT 901-902.)

The note asked his parents to raise Little Howie because he did not want Little Howie to be raised by a stepfather. (9 RT 902-903.) He wrote in the note that he did not kill himself because he was taught that he would not go to heaven if he did, so he intended to die but did not intend to do it himself. He never planned to kill Yolanda. He went to Chuck E. Cheese to have dinner and mend his relationship with Yolanda. He got angry when she did not show up at 4:00. (9 RT 902-904.)

On cross-examination, Streeter testified that although the note was dated April 27, 1997, he actually wrote it three to five days earlier when he

had been drinking, as he was sitting in his car in front of his sister's house. (9 RT 922-923.) Streeter claimed he filled up his car in Los Angeles before driving to Chuck E. Cheese. He testified he did not know how the gas cap got on his bumper but thought he may have left it there when he filled up his car in Los Angeles. Streeter claimed he already had gas in the antifreeze container. (9 RT 924-925.) Streeter admitted he was on formal probation at the time of Yolanda's killing for felony assault with a deadly weapon for what he had done to Victor Buttler. (9 RT 927, 10 RT 949-950.) Streeter testified he could not remember whether he had an opportunity to leave when he went to the trunk of his car, whether he had an opportunity to remove the Club device from the steering wheel, or why he opened the trunk. He testified he did not remember if he poured gas on Yolanda's car, or whether Shavonda was in the car. He denied that the reason he put the club on the car was so that no one would steal it when he fled from the police. (10 RT 957-968.) On redirect examination, Streeter said that when he grabbed Little Howie, his intent was to leave with the baby. (10 RT 969-972.)

C. Rebuttal

Patrick testified Streeter was not a loving father to him. They had a bad relationship because Streeter was mean to Yolanda. Patrick went with his mother on April 27th to meet Streeter at Chuck E. Cheese, because he was worried about her and wanted to make sure nothing happened. Streeter did not try to take the Club off the steering wheel. (10 RT 987-989.)

Lawanda Johnson, Yolanda's 16-year-old daughter, testified that they lived with Streeter for five years. She did not like him because he threatened Yolanda, pushed her around and threw things at her. (10 RT 993-994.) On December 30, 1996, she woke up to her mother screaming. It was after midnight. Streeter was pulling Yolanda's hair and dragging Shavonda by her leg braces, in front of Little Howie. Streeter told

Lawanda, "If you want to watch, then I'll just pull harder." She stopped watching because her mother started screaming louder. She and Little Howie watched as Streeter got on top of Yolanda and did something sexually to her. Both of their pants were down. He tortured Yolanda for hours. The next day Yolanda's head was sore on the back and the sides. They did not call the police because they had a plan to leave Streeter, and he gets crazier when the police get involved. (10 RT 996-997.) These kinds of incidents went on for at least the last year of Yolanda and Streeter's relationship. (10 RT 998.)

Victor Buttler testified that on January 4, 1997, Streeter showed up at his house at 3:00 or 4:00 in the morning while Victor was asleep. Streeter pounded loudly on the door, and then Victor heard the sound of breaking windows. Streeter broke the windows on Victor's wife's van. Victor ran outside and saw Streeter drive away. He called the police. (10 RT 1024-1025.) The police came out and took a report.

That same night, Streeter called Victor and admitted breaking the windows, and said people in the family would start dropping like flies if Victor did not tell Streeter where Yolanda was. (10 RT 1026.) Victor called his brother Rallin, who said someone had just been to his house and broken the windows. Rallin then called the police. Streeter continued to make threatening calls to Victor over the next several weeks. (10 RT 1030.)

Lucinda Buttler, Yolanda's sister, testified that Yolanda talked about leaving Streeter for two years, and during the last year she explained that he was abusive. (10 RT 1004-1006.) Lucinda once observed Streeter push Yolanda out of their mother's home. Streeter did not like Yolanda to speak to her sister so Yolanda would call Lucinda secretly while Streeter was at work, and Lucinda would call her back so the phone bill was not suspicious. Yolanda had her own money and her own apartment when she

met Streeter. Lucinda and Quentin helped Yolanda move. Yolanda was planning to move to Texas but her car broke down. She got the children school records to enroll them in a new school. (10 RT 1006-1011.)

Streeter threatened to kill members of their family one by one when he was trying to find Yolanda and Little Howie. Streeter told Lucinda what he had done to Victor so that Lucinda would take his threats seriously. (10 RT 1010.)

D. Penalty Phase[8]

Yolanda was studying to be a dental assistant during the first few years of her relationship with Streeter, and then worked as a dental assistant. At the time of Yolanda's death, her daughter Lawanda was 14 years old, her son Patrick was 13 years old, and Little Howie was 5 years old. Yolanda also raised her niece Shavonda, who was 6 years old. Shavonda was the daughter of her brother Donald. Shavonda's mother abandoned her in the hospital. Shavonda was handicapped. Donald had asked Yolanda to raise Shavonda and she raised her as if she was her own child. Streeter did not buy furniture or cars for the family and he did not take the children anywhere. Patrick and Lawanda did not like Streeter because he was mean to their mother. (19 RT 1938-1941, 2073, 20 RT 2121-2123.)

Evidence was presented regarding Streeter's violent history. On December 27, 1982, Streeter drove to the home of Erline Mayfield. Mayfield's son, Paul Triplett, was dating a woman named Necee who was the mother of Streeter's child. Streeter followed Necee's father as he drove Paul and Necee to Mayfield's home. (21 RT 2168-2170, 2193-2194.)

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[8] Streeter's penalty phase was tried to a different jury than his guilt phase, so much of the evidence pertaining to Streeter's history with Yolanda and the circumstances of the crime was presented in both trials.

Streeter fired a shotgun at the front of the house. There were two or three adults, and seven or eight little children in the house, including a four-month-old baby. The baby was right in the window, and other people were in the door. Gunshots broke the glass and bent the window frame. (21 RT 2168-2170, 2193-2194.)

The violence carried on through Streeter's relationship with Yolanda. Lawanda testified that Streeter and her mother had a tumultuous relationship over the two years prior to her death, and Streeter was mean to the children. Streeter would push Yolanda around and hit her. Once, he did not like the way Yolanda cooked dinner so he threw a plate at her. He would tell her what to do, and take her keys and do something to her car so it would not start. (19 RT 1937-1939.) Yolanda's sister Lucinda testified that on the day of their father's funeral, Streeter wanted to leave, and he pushed Yolanda out the door. (20 RT 2124.)

On December 30, 1996, at around midnight, Lawanda woke up to her mother screaming. She saw Streeter pulling Yolanda by her hair up and down the living room and hallway. When Streeter saw Lawanda watching, he said, "I do it harder. You want to watch? You want to watch?" Yolanda screamed louder. Streeter tried to make Yolanda have sex with him on the couch. Little Howie was on the couch and Streeter did not care. Streeter got on top of Yolanda with his pants down. His hands were on her neck and her hair, and he was pulling on her braids. He did this for hours. (19 RT 1943-1944.)

Lawanda did not call police because in the past, when the police came, they would leave and things would get worse. When the police became involved, Streeter would begin watching every move they made. He was abusive and controlling. He pulled the phone cord out of the wall so they could not call the police. They had been planning to leave Streeter for a year, but they intensified their plans after the incident in December,

and made a plan to leave while Streeter was at work on January 4th. (19 RT 1943-1949.)

Streeter did not allow Yolanda to call her sister Lucinda, but when Streeter was at work Yolanda would call Lucinda and then Lucinda would call her right back so that the phone bill did not reflect the call. Yolanda told Lucinda Streeter was verbally abusive and she wanted to leave him. Yolanda told Lucinda Streeter did things to her car to prevent her from leaving. (20 RT 2121.) They made a plan for Yolanda to move on January 4th while the children were on school break and Streeter was at work. Yolanda was going to move to Texas. She got her children's school records so she could transfer them to a school there. (20 RT 2125-2126.)

Lucinda and their brother Quentin helped Yolanda to move. They first went to a motel in Los Angeles, and then Quentin convinced her to move to Victorville so he could protect her. Yolanda told Victor Streeter had threatened to kill her if she left. Quentin observed the injuries to Yolanda's head from the December incident, and took photographs. The family moved Yolanda into a motel for a couple of weeks before moving her into an apartment. (19 RT 2007, 2031, 2126-2127.) Yolanda wanted to move to Texas, but her brother Victor convinced her to stay and get a restraining order against Streeter. (19 RT 2016, 2069, Ex. 21.)

Yolanda's family members testified about Streeter's efforts to hunt down Yolanda after she left him. Streeter went from Victor's house to Rallin's house to Lucinda's house, and then back to Victor's house. (19 RT 1969-1970.) Streeter arrived at Victor's house at 3:00 or 4:00 a.m. Streeter yelled that if he did not find out where Yolanda was, they were all going to start dropping like flies. Streeter said he was going to hurt Victor or someone in the family if he did not find out where Yolanda was. Streeter smashed the windows of Victor's minivan and drove away. Victor called

police and called his brother Rallin to warn him about Streeter's threats. (19 RT 2005-2012.)

Rallin, a friend and his daughters were awakened in the early morning hours by a loud banging on the door. Rallin told his friend to call 911. A window on his house broke, and glass shattered. Rallin grabbed a knife and opened the door and saw Streeter's car driving away. There were 10 to 15 dents in the front door of Rallin's house in the shape of a gun. (19 RT 1966-1968.)

Streeter then went to Lucinda's home in Los Angeles. He pounded on the door and said he knew Yolanda was there. He threatened Lucinda and said he was going to kill members of their family one by one if Yolanda did not show up. He said he was not playing, and he reminded Lucinda of what he had done to her brothers. (20 RT 2128-2129.)

Streeter went back to Victor's house with a gun and threatened him, yelling from the yard that they were going to die if they did not tell him where Yolanda was. (19 RT 2013-2014.) Streeter pointed the gun at Victor and said he knew Yolanda was in there. He had the gun in his waistband and showed it to Victor. Streeter left. He made a series of threatening phone calls throughout the night, and came back around 6:30 in the morning, when he was arrested. (19 RT 2015-2016, 2031-2039.)

On February 18, 1997, Streeter pled guilty to felony assault with a deadly weapon, a violation of Penal Code section 245, subdivision (a)(2). He was placed on felony probation. (19 RT 1935.) Streeter went to jail for the incident with Victor, but when he got out, the threats against the family continued. Streeter said he would blow them away, and blow away anyone who got in his way. He said he was going to kill them one by one until he got them all, and that Yolanda was going to regret what she had done. (19 RT 1970-1971.)

Rallin testified that in 1996, Yolanda told him Streeter was being evil towards the children and she wanted to leave him. (19 RT 1960-1961.) Rallin lived with his mother. After Yolanda left Streeter, Streeter kept calling and threatening Rallin and his mother. Streeter said he would kill Rallin and take the whole family out if Rallin did not tell him where Yolanda was. He also said when he did find Yolanda, she was going to regret it. He told Rallin to watch his back because he was going to get him. (19 RT 1965.)

The prosecution presented evidence of the circumstances of the crime. The evidence revealed the same facts presented in the guilt phase. Appellant was waiting for Yolanda and upon her arrival, he grabbed Little Howie and took him to his car. He beat Yolanda, poured gasoline on her car and her body, and lit her on fire. Yolanda was severely burned over approximately 54% of her body, and she suffered intense pain. (19 RT 2072-21 RT 2188.)

Dr. Vannix described the burns depicted in exhibits 8 and 10 which were photographs taken at the autopsy. He explained there were yellowish areas on her torso and upper arm which are third degree burns all the way through the skin and into the underlying fat. There were slits made early on in her care because the skin loses its elasticity so it will stiffen, and requires expansion to allow for breathing and circulation. Some areas from Yolanda's elbow to her fingers were surgically treated by removing dead skin and fat and transplanting skin from her thigh. Yolanda had very little skin available for transplant, so the skin grafts were run through a machine which punches parallel holes into the skin which causes it to be stretched, so that less skin is needed to cover a larger area. The hope is that the little holes will fill in and heal if the grafts survive. In the photograph, what appears to be a sheet is actually skin that was shaved off Yolanda's thigh.

(20 RT 2110.) Yolanda suffered significant burns to approximately 54% of her body. (20 RT 2111.)

Evidence was presented as to the impact of Streeter's crime on Yolanda's family. Patrick was withdrawn and afraid. He slept with a knife under his pillow and had nightmares. Patrick was still terrified. He secured the house like it was a jail, locking the door behind Lucinda when she took out the trash. He did not leave the yard and did not have any friends. (20 RT 2136.) Patrick blamed himself, wishing he had done more. He had tremendous guilt, feeling that he failed to protect his mother. He did not sleep well and did not care to play sports anymore. He did not take the medication that was prescribed. He drove the car that day to protect Shavonda even though he does not know how to drive. (19 RT 2089-2090, 2138-2139.)

Shavonda has been depressed. Little Howie acts out. He once broke a dog's leg by swinging it around and throwing it. He had not done these things before. The entire family has suffered emotional turmoil from having a family member killed in this manner. (19 RT 1971-1976, 2019-2020.) Victor feels guilty because he convinced Yolanda to stay in California. Yolanda's murder has destroyed his life. He lost his job because he came to court every day. He had nightmares. (19 RT 2019-2020.)

Belinda and Lucinda, Yolanda's sisters, testified about how these events affected the children. Belinda cared for Lawanda and Shavonda since Yolanda's death. Lucinda took in Patrick and Little Howie although she already had four boys of her own, and it was a financial strain. Lawanda was in therapy and was not doing very well. She used to be a straight A student who was well adjusted, but then she became depressed. She did not sleep. She took sleeping pills and stayed up all night crying. Lawanda talked about how much she missed her mom. She was in the

magnet program and was planning to go to college, and she was going to miss her mom at graduation. (19 RT 2088, 2140.) Little Howie wet the bed and had bowel control problems. He went to psychiatrists, psychologists and group therapy. Little Howie had behavioral problems at school, and once tried to drown a puppy in a bucket of water. These problems developed after Yolanda's death. (20 RT 2141-2142.) He did not talk for months. He had nightmares and hated to be alone. He said that he was there watching his mother get burned. (21 RT 2197-2198.) Lucinda testified, "It's undescribable what he did to my family." (20 RT 2134.)

All the children were in counseling once a week, and the boys went twice a week. (19 RT 2089-2090, 2138-2139.) Belinda tried not to cry in front of the children but it was hard on her and her husband. She never had a chance to say goodbye to Yolanda or assure her that she would take care of her children. They put flowers on Yolanda's grave on her birthday and on Mother's Day. It is hard for the children to wake up on Christmas without their mom. (19 RT 2093, 2140.) Lucinda tried to be strong for the children. She tried to be a mother figure but she cannot replace Yolanda and she misses her sister. (20 RT 2141-2142.)

Lawanda testified that she was very close with her mother. She was not able to visit her mother in the hospital. She planned to visit Yolanda when her condition improved, but one day her grandmother and her aunt picked her up from school and she knew something was wrong. Everyone was there crying, and they told her that her mother had died. Lawanda still dreams about her mom and thinks about her every day. (19 RT 1951-1952.)

Maria is Yolanda's mother. She wants justice to be done. The children have had a lot of emotional problems. The hardest part was to have to tell the children their mother was dead. (21 RT 2197-2198.)

E. Defense Case

Streeter's mother, Eleanor Streeter, testified that Streeter and Yolanda lived together for five years. Streeter took Patrick, Lawanda and Larcell to games and practices. Streeter and Little Howie loved each other. (22 RT 2303-2305.)

Streeter was very hurt when Yolanda left with the children. (22 RT 2303.) Streeter cried when he told his mother Yolanda had left him. (22 RT 2306.) Little Howie came to live with Eleanor for three months after the murder. Little Howie was happy and laughing when he spoke to Streeter on the telephone, and he drew pictures to send to his father which depicted the two of them holding hands. Little Howie did not experience traumatic shock from his mother's death or act differently after she died. (22 RT 2297-2301.) Little Howie was close to Patrick and talked to Streeter about playing with Patrick and having a good time. (22 RT 2302-2303.)

Diane Jones testified she was Streeter's neighbor for four years. She and Yolanda were good friends who sometimes partied together. Lawanda and Jones' daughter Kanisha were good friends. Streeter took the girls to color guard practice every day and took Patrick to football. He took the children to dances, out for pizza, and to different outings. (22 RT 2311-2317.)

Streeter testified he met Yolanda in February1990 or 1991. She never had a job; she was always on welfare. They lived together in Los Angeles before moving to an apartment in Fontana. Streeter is the biological father of Larcell and Howie but calls Lawanda and Patrick his children. Streeter testified that he drove the children everywhere. Over the years he bought Yolanda four cars. (22 RT 2319-2320, 2325.)

Streeter testified that he and Yolanda had a beautiful relationship. They loved each other and he thought everything was okay. (22 RT 2322.)

In 1996, several of their siblings were buying houses and Yolanda wanted to buy a house. They found a house in Fontana, but Streeter did not qualify for the loan and he was the only one working. That was a big letdown for both of them, and things were not the same after that. (22 RT 2356-2357.)

Yolanda started acting differently. Once, he was watching a football game and she told him to watch it in the back bedroom. She stood in front of the television, so he grabbed her by the back of her collar and shoved her out the door and closed the door. She stayed on the porch and came back five minutes later and resumed the argument. Streeter took the baby and left for his mother's house. Yolanda called and asked him to come back. (22 RT 2357-2359.)

On December 30, 1995, he and Yolanda had been drinking, and they were kissing and touching. He wanted her to come to bed but she kept putting him off, asking for more time. He grabbed her hair and her hair extension fell out. (22 RT 2323-2324.) She told Streeter to stop. The children came into the room, so he let go of her hair and told the children to go to bed. He went into his room and shut the door. Streeter denied asking the children if they wanted to watch, and denied that he was on top of Yolanda on the couch. He testified that Yolanda was sitting on the couch and Howie was laying asleep on the other half of the couch. (22 RT 2324-2325.)

Streeter testified Yolanda left while he was at work on January 4th. He came home that day and saw that everything was gone. He was nervous and scared. Yolanda had never told him she wanted to leave. He had never forbidden Yolanda from going anywhere, except when they had been out drinking. He never hid the car keys from her. They had two cars and she had access to either of them at any time, because he would carpool to work

in Chino, where he was the lead supervisor doing bottom metal work. (22 RT 2325-2327, 2330-2331, 2346.)

When Streeter discovered Yolanda had left him, he went to the store and bought beer and purchased drugs and came home. He was in a state of shock. He started drinking and doing drugs and making calls to find out where everyone was. He called Victor and did not believe Victor when he said he did not know where Yolanda was. He did not threaten to kill Victor. (22 RT 2331-2332.)

Streeter went to Rallin's house and knocked on the door but no one answered. He threw a rock through the window and drove off. He never spoke to Rallin or his mother on the phone. He never used a gun to knock on the door. He never owned a gun. At Victor's house it was a bumper jack that he had in his hand but he used his hands to knock on the door. He had brought the bumper jack in case he needed to defend himself. (22 RT 2336.)

Streeter called Victor again, and Victor said Little Howie was there. But Little Howie was not there, and as Streeter left Victor's house, the police pulled him over. (22 RT 2337.) Police searched for a gun and did not find one, but he pled guilty to having a gun because he wanted to take advantage of a deal that would get him out of jail. He was in jail for 30-38 days. He did not make phone calls from jail trying to locate Yolanda. (22 RT 2338-2339.)

When Streeter got out of jail, he had lost his apartment and was homeless. He lived in the streets, in his car, in parks or with his mom or sister. He never threatened to kill or hurt anyone in the Buttler family. (22 RT 2339-2340.)

Streeter found out where Yolanda was staying about two weeks after getting out of jail. (22 RT 2342.) A mechanic called Streeter's mother requesting payment for repairs he had done on the car Yolanda brought in

for service. The car was in both their names. Streeter went to the mechanic and showed him proof that he was the owner of the car, and then he gave Streeter paperwork which contained Yolanda's name, address and telephone number. (22 RT 2344.) Streeter was filled with joy. (22 RT 2344.) He called the number and Lawanda answered and he hung up. He called back later and talked to Yolanda to tell her he was sorry and he loved her and wanted to get back together but she said no. She said not to come over. (22 RT 2345.) Streeter contacted Yolanda three times that day and asked to see her and the children. She agreed to set up a meeting at the Discovery Zone pizza parlor in Rancho Cucamonga. (22 RT 2348.) He called her every day and said he was homeless and miserable and needed her back and loved her. She had never been afraid of him, and she never said she was afraid of him. (22 RT 2348-2349.)

They met at the Discovery Zone. She brought Little Howie and Shavonda with her. The children went off to play, while he and Yolanda sat and ate and talked about their relationship for about an hour and forty-five minutes. He wanted her back. When they left, he was at ease because he knew she and the children were okay, but he was not satisfied with their meeting. (22 RT 2349-2352.) They did not make plans to get together again. She asked him not to come to the house in Victorville, and he did not come. They talked on the phone, and she agreed to meet him again at Chuck E. Cheese on April 27th. (22 RT 2354.)

That day, he waited for Yolanda at Chuck E. Cheese for 30 minutes on the curb, and began to think she was not going to show up. (22 RT 2360-2361.) She arrived, and he took Little Howie out of the back seat of her car. Yolanda followed them to his car, asking what he was doing. He said he was leaving with Little Howie. Streeter put Little Howie in the front passenger side of his car. (22 RT 2361-2364.)

Yolanda started grabbing and pulling and scratching at Streeter. They fought. He had gasoline in the trunk. He carried it all the time, to use in the carburetor when the car would not start. Streeter testified he does not remember pouring gasoline on Yolanda or setting her on fire. He did not intend to kill her or hurt her. He lost his mind and lost control. (22 RT 2365-2366.)

Streeter does not remember when he wrote the note that was found in his car. He was heartbroken. It was a suicide note, written to his parents to let them know he was sorry for what he did to Yolanda, meaning that he pulled her hair on December 30th. (22 RT 2368, Ex. 5.) The note is dated April 27th, but he wrote it before then. The statement in the note saying that Yolanda "doesn't deserve to live like me" meant that Yolanda deserved a better lifestyle than he could give her, which involved drinking and drugs. (22 RT 2370-2371.) When Streeter wrote the note, he was sitting in his car alone, frustrated, homeless, and on the edge. He was listening to music which brought back memories, and he did not want to live anymore. (22 RT 2370.) He planned to give the note to Yolanda on April 27th to make her give him another chance. He did not intend to hurt Yolanda. He intended to kill himself but did not have an idea how, possibly a police chase or police shooting. He wanted to have someone else kill him because he is Christian and wanted to go to heaven. (22 RT 2371-2372.)

Streeter spoke to Little Howie on the phone while he was awaiting trial. Little Howie wrote him a letter while he was in custody. (22 RT 2367-2368; Ex. 43, 44, 45.)

Streeter testified that he was sorry, he wants to pay for his sins and he feels horrible. If he lives, he can help people, but if he dies, it is God's will. Streeter said if he could speak to Yolanda, he would tell her he loves her, that he is sorry, and that God has given him the opportunity to make up for

what he has done by leading other inmates in the right direction. "In Yolanda's honor, I try to help people to try to save their lives. And if I can touch one person or two persons, then that person can, in return, touch another person, and we have a chain reaction going on by helping people." (22 RT 2373-2375.)

Streeter testified that although he once wanted to die, his life now belongs to the Lord Jesus Christ. If he is allowed to live the rest of his life in prison, he will do the Lord's will. In honor of his children, Yolanda, and the Buttler family he will give Bible studies, talk to other inmates, give his opinion on drug problems, family problems or gang problems, and read to other inmates from the scripture. (22 RT 2524.) Streeter testified he hopes that for every person he touches, they will touch someone else, and his wife and family will be pleased to know that he is helping others. He can counsel others if he is allowed to live; the good Lord is using him for that. But he can't do those things if he is given the death penalty. (22 RT 2524-2525.)

F. Rebuttal

The People's rebuttal case consisted primarily of statements Streeter made during the booking process, and to three psychologists who examined him while his case was pending. The evidence was admitted by stipulation.

Officer W. Blessinger transported Streeter for booking into jail. He detected a strong odor of gasoline coming from Streeter as he drove to the police station. Upon booking Streeter, Officer Blessinger believed he smelled a strong odor of alcohol coming from Streeter's breath and person. He asked appellant booking questions which included, "have you ever thought about ending your life?" Streeter answered, "I wrote a note before I did what I did." Streeter said the note was a suicide note and that he was not supposed to be alive, he was supposed to be dead. Streeter would not answer Officer Blessinger directly when asked about wanting to kill

himself, but Streeter told the officer he wrote a suicide note which was in the glove compartment of his vehicle. (22 RT 2560-2561.) Officer Blessinger advised other officers, who obtained the note and booked it into evidence. During the booking process, Streeter made a spontaneous statement that his ex-wife had broken up with him in January, that she had packed up the children and moved to Victorville, that she ruined his life, and that he wanted to ruin her life. (22 RT 2561-2562.)

Dr. Michael Kania examined Streeter in August, 1998. During the examination, Streeter said Yolanda's family was uncooperative when he was trying to find her, and he swore and threatened the family. Streeter told Dr. Kania that Victor made threatening gestures so he got a tire iron from his car, but no blows were struck. Streeter said his grades were average in elementary and junior high school. (22 RT 2563-2564.) He was expelled for truancy and fighting, went to a continuation school, and graduated in 1978. Streeter worked as a welder's helper for 7 months. (22 RT 2564.)

Streeter described the 1982 incident to Dr. Kania. He said Paul Triplett had beaten him up, so he went home and got a shotgun. When he returned, he fired a shot at Paul and two shots into the house and then left. (22 RT 2564.) He told Dr. Kania that before he was arrested, he was drinking 48 ounces of beer nightly. He routinely stopped on his way home from work to buy 4 wine coolers for Yolanda and three 40 ounce bottles of beer for himself, and fast food for the children. He and Yolanda would take turns smoking cocaine and drinking while the children watched television. After he got out of jail, he started drinking again and smoking cocaine after work. On the day of his arrest, he had 40 ounces of beer. He had spent the weekend at his uncle's house drinking beer and smoking cocaine. From there, he drove to his mother's house and then to Fontana, drinking beer the

whole time. He "flipped out" when he got to Chuck E. Cheese. (24 RT 2564-2565.)

Streeter described the murder to Dr. Kania. He said he and Yolanda argued, and she turned around and left. He pulled her by the hair. She fell and he kicked her. "I just freaked out. I wasn't thinking. It just happened." Streeter said no words were spoken between them. He went to his car and took gasoline out of the trunk. Yolanda ran and he chased her and splashed her with gas. He stood next to her with a lighter in his hand, just trying to scare her. Yolanda was wiping her face when a bystander grabbed his hand which caused him to flick the lighter and ignite Yolanda and himself. (24 RT 2565-2566.)

Streeter told Dr. Kania he did not know what he was thinking when he went to the trunk. He never thought about hurting himself or anyone with the gas which he routinely kept there. He just acted. When asked by Dr. Kania why he acted as he did, Streeter tearfully stated that he asks himself this question repeatedly, "Why me? Why did I do it? I ask God to forgive me. Why did God let this happen to me? I never did anything wrong. What did I do to deserve all of this? I don't know why. Why is God punishing me? Why did I do this? I don't know." Streeter told the doctor that due to his religious upbringing, he believed he would burn in hell forever if he committed suicide, so it would be better to create a situation where someone else killed him. (24 RT 2566.)

Dr. Postman examined Streeter on November 15, 1998. (24 RT 2567.) Streeter told Dr. Postman that at Chuck E. Cheese, he and Yolanda got into an argument over how long he would keep Howie. She started scratching and hitting him. He went to his car and removed gasoline and doused her with it, then actuated a lighter which led to her being set on fire. (24 RT 2567.)

Dr. Craig Rath also examined Streeter. Streeter told Dr. Rath he was expelled from Fontana High school for racial riots and playing dice and having marijuana. He transferred to Eisenhower High his junior year, and was admitted provisionally with strict rules. He continued to ditch school and he transferred to Burch continuation school where he received a diploma. (24 RT 2568.) In high school, he played baseball and football and got B's, C's and D's, with occasional A's in physical education. After leaving the military, he worked for six months for Amron Pipe Company as a welder's helper after leaving the military until he was fired. (24 RT 2568.) He went to jail when he was younger for shooting at an inhabited dwelling. He got into an argument with Paul Triplett and his brothers, and they beat him up. He went to his father's house and got his dad's 12 gauge shotgun, loaded it and returned, aimed it at Paul and his buddies, and then fired and missed because of kickback. Paul's buddies ran into the house, and Streeter fired through a bedroom window and the front door and then drove off. (24 RT 2568-2569.) Once, he had to go to Alcoholics Anonymous for a driving under the influence charge. He completed the classes but continued drinking. He also went to drug rehabilitation in Chino and was sober for six months, but then resumed using drugs. Streeter told Dr. Rath that he and Yolanda split up because she always wanted something better. She wanted a house, and she started rebelling when they could not get a house. She wanted him to get a new job. She made up excuses to get mad at him. Streeter told Dr. Rath that once, he was watching a football game, and Yolanda stood in front of the television. He grabbed her by the back of the collar and pushed her out the door and locked the door. Lawanda went out to talk to her mother and removed a screen to let Yolanda back in. Streeter became enraged and went to his mom's house for 5 or 6 hours with Howie. Yolanda called him and he came back. (24 RT 2570.) Streeter said on December 30th, he was in the

mood for sex but Yolanda was not, and she kept refusing him so he grabbed her by the back of the hair and she started screaming and crying and the children saw what happened. He gave up and went to the bedroom, then took a shower and went to bed. (24 RT 2570-2571.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED STREETER'S *MARSDEN*[9] MOTION

Streeter contends the trial court improperly denied his motion to replace appointed counsel at the penalty phase trial, resulting in a violation of his state and federal constitutional rights. Streeter claims the error requires reversal of his death sentence. (AOB 8-37.) There was no error, and in any event, reversal is not required.

Streeter's first *Marsden* motion was made on August 27, 1998, during jury selection for his guilt phase trial. (4 RT 273-278A.) The court held a hearing outside the presence of the jury and the prosecutor. Streeter told the judge that although his appointed attorney, Robert Amador, had been assigned to the case from the beginning, Streeter was unaware of his defense and had not seen any police reports or documents. (4 RT 275.) Streeter said Amador had informed Streeter he could get the death penalty and be dead by the age of 55. (4 RT 275.) Streeter did not feel Amador was prepared to respond to the prosecutor's motions, and Amador had not filed a written response to the prosecutor's motion to admit statements Yolanda had made in a declaration in support of a restraining order. (4 RT 276.) The court asked Streeter to provide specific examples of what he would like Amador to do that Amador had not done. Streeter generally responded that he would like his attorney to challenge the truthfulness of

[9] *People v. Marsden* (1970) 2 Cal.3d 118.

the evidence. The court pointed out Streeter had not offered any facts or evidence that his attorney had failed to bring out. (4 RT 277-278A.)

The court tentatively denied the *Marsden* motion, but appointed a lawyer to explore the matter further, stating:

> All right, Mr. Streeter, in regard to your complaints voiced earlier, I am searching for an attorney to talk to you. I'm not going to relieve Mr. Amador. Frankly, I'll suggest you have not yet at this point convinced me that there is a reason. But before I go any further with deciding what to do, you're going to have the opportunity to talk to another lawyer, not Mr. Amador.

(1 CT 135, 4 RT 355.)

On August 31, 1997, following the appointment of independent counsel Chuck Nascin to discuss Streeter's concerns about his representation, the court held a further hearing on the issue. Nascin informed the court that he had accepted appointment to explore Streeter's concerns. He met with Streeter on August 28, for over an hour, and they discussed all of Streeter's concerns. (4 RT 357-359.) Nascin informed the court that Amador had arrived to speak to Streeter as Nascin was leaving, and Streeter said he would talk to Amador and think about the matter of his representation over the weekend. (4 RT 359.) Subsequently, Streeter informed Nascin and the court that he intended to withdraw his *Marsden* motion and proceed with Amador representing him. (4 RT 359-360.) Streeter said that after talking to Amador, he understood what Amador was doing and wished to withdraw his *Marsden* motion. (4 RT 361.)

Streeter's guilt phase jury trial concluded with guilty verdicts and true findings on the special circumstances. (1 CT 180.) Streeter's first penalty jury became hopelessly deadlocked and was discharged by the court on October 15, 1998. (1 CT 286.) On November 2, 1998, prior to the penalty phase retrial, Amador informed the court he had concerns that another lawyer was interfering with the attorney client relationship, and stated that

if he continued to feel that way he would ask to be relieved. Amador informed the court that another attorney had been visiting Streeter in jail, and Streeter refused to tell him why. Streeter joined the request to relieve Amador, claiming Amador did not want to represent him, and he did not want Amador's representation. The prosecutor informed the court he had run a jail log at Amador's request after hearing that Streeter was getting visits from lawyers exploring claims of ineffective assistance of counsel. That log revealed an attorney named Karlson had visited Streeter nine times in jail. Streeter told the court Karlson had informed him there was nothing he could do for Streeter until the trial was over. The court issued an order to show cause against Karlson, and appointed Nascin to explore whether a *Marsden* hearing should be conducted. (14 RT 1375-1384.)

On November 4, 1998, in the presence of Streeter, the prosecutor, and attorneys Amador, Nascin and Karlson, the court stated he had informally met with Karlson. Karlson told the court he had been contacted by Streeter's family about being retained to represent Streeter. Karlson said he had informed Streeter that he would not be able to assist him until the matter was completed, and claimed he had not interfered with Amador's representation. (15 RT 1409-1411.) Nascin then informed the court he had spoken to Streeter about Streeter's concerns regarding Amador's representation, and he felt a *Marsden* hearing was appropriate because he believed there was a breakdown in communication and confidence. Nascin agreed to represent Streeter at that hearing. (15 RT 1411.)

The prosecutor left the courtroom. The court placed Karlson under oath and questioned him about his contacts with Streeter in jail. Karlson testified he had informed Streeter he could give him no advice until his present proceedings on the case had concluded, including the penalty phase retrial. (15 RT 1417.) Karlson testified he informed Streeter that his present attorney was the only person that could help him in these

proceedings. (15 RT 1419.) The court inquired as to whether Karlson would be willing to accept appointment for purposes of a *Marsden* hearing and a penalty retrial. Karlson informed the court he would consider it. (15 RT 1419-1420.)

Subsequently, the court inquired of Nascin as to his conclusions regarding the necessity of conducting a *Marsden* hearing. (15 RT 1421.) Nascin informed the court he felt there was such a need, as there appeared to be a breakdown in the attorney client relationship. (15 RT 1421.) Nascin informed the court he would be willing to represent Streeter in the penalty retrial if the *Marsden* motion was granted and Karlson was unavailable. (15 RT 1422.)

On November 5, 1998, the *Marsden* hearing was held, with Nascin representing Streeter. Nascin confirmed that Streeter desired to go forward with the hearing. (15 RT 1437.) Streeter confirmed his desire to have Amador relieved because he had lost confidence in Amador. Streeter testified that his request to relieve Amador was based on Amador's desire to be relieved, as well as the fact that Amador never checked into certain things during the guilt phase that Streeter asked him to look into. Streeter felt Amador was unprepared for the trial because Amador had asked him whether certain things were true. Streeter explained he had withdrawn his earlier motion to relieve Amador because Amador had spoken to him and assured him things would get better, but things had not changed. Streeter testified he felt that Amador was not putting his full effort into fighting for him and that he had not had a fair trial. (15 RT 1439-1441.)

Streeter testified his feelings about Amador changed when the first penalty jury hung and he wanted answers to questions and was unable to reach Amador by phone. (15 RT 1441-1442.) Streeter contacted Karlson because he could not reach Amador, and he and his family needed to know what was going to happen next. (15 RT 1443.) Streeter said that if Amador

was professional and had been doing a good job, Amador would not have been concerned about Streeter's contacts with Karlson. (15 RT 1443-1444.) Streeter testified he lost confidence in Amador, and pointed out that Amador had informed the court that he had advised Streeter not to testify although Streeter had a right to testify and wanted to exercise that right. (15 RT 1444.)

Amador testified he believed the attorney-client relationship had broken down to a point where he should be relieved. (15 RT 1446.) He testified that Streeter's consultation with other attorneys had caused irreparable harm. He stated that he could still try the case because he had all the information he had before, including witnesses provided by Streeter. Amador said the defense team had spoken to the witnesses, and concluded they would have harmed Streeter's case even more. For example, one witness told a defense investigator that Streeter had asked him for a gun a few days before killing Yolanda. (15 RT 1447.) Amador testified he had not called those witnesses or listed them so that the District Attorney would not find out about them. (15 RT 1447-1448.) Amador testified he did not want to represent Streeter because he felt uncomfortable representing a person who did not think he was doing his best. However, Amador testified that his feelings would "absolutely not" detract from his professional representation of Streeter in the penalty phase. (15 RT 1448.)

Amador testified he asked to be relieved because his client was not cooperative with respect to disclosing the nature of his involvement with Karlson. (15 RT 1449.) Amador testified that if Streeter was counseled to cooperate and communicate with Amador, Amador would be able to cooperate and communicate with him. (15 RT 1449.)

The court denied the *Marsden* motion. Specifically, the court stated that its function was to insure that Streeter got a fair trial, and there was nothing unfair about Streeter's trial. (15 RT 1450.) The question was

whether the conflict was of such a nature that it would objectively affect Amador's representation. (15 RT 1451.) The court found it was "naïve" for Streeter to claim he did not understand why a professional person would seek to be relieved based on Streeter's consultation with other attorneys. (15 RT 1451.) The court pointed out that was a "perfectly understandable" reason for Amador to have requested he be relieved, and noted that Streeter had joined in that request, taking a position that "if Mr. Amador doesn't want to represent me, I don't want him to represent me either." (15 RT 1452.) The court stated Streeter had not provided any specifics regarding his claim that Amador had failed to do things Streeter had asked him to do. (15 RT 1452.)

The court found Amador was prepared. It disagreed with Streeter's claim that Amador had not fought for him, noting that Amador objected appropriately, answered motions appropriately, responded appropriately in every way, and argued very persuasively. (15 RT 1453.) The court told Streeter his expectations of securing a not guilty verdict were unreasonable, considering the eyewitnesses and his confession. (15 RT 1453.) The court noted that Amador had successfully hung the first penalty trial by persuading one to two thirds of the jury that Streeter should not get the death penalty. (15 RT 1454.) The court accepted Amador's statement that his ability to professionally represent Streeter would not be compromised. (15 RT 1454.) The court did not believe Streeter's statements that Amador had advised him to lie. (15 RT 1455.) The court found the personal relationship between Amador and Streeter had broken down, but the relevant question pertained to the professional relationship. The court ruled as follows:

> I am denying the motion to relieve Mr. Amador for the following reasons: Based upon the history of this case, there has been no showing, in my opinion, of ineffective representation by Mr. Amador. ¶ Second reason, I have confidence in Mr.

> Amador's ability to continue to act as a professional and to try this case as it should be tried and let the jury decide what the ultimate verdict should be.
>
> . . .
>
> I have heard nothing this morning, in my opinion, that indicates Mr. Amador cannot continue on with this case. ¶ All I've heard is there's been a dislike established in your mind from Mr. Amador. Mr. Amador is not happy with you. I find nothing in the cases that said that is a basis to discharge the attorney. There is no other showing that somehow the effectiveness of representation is not going to be affected - - demeaned.

(15 RT 1455-1456.)

Preliminarily, Streeter has forfeited his right to challenge the denial of his *Marsden* motion, because he did not request the substitution of counsel at the penalty phase trial which resulted in his death judgment. In *People v. Vera* (2004) 122 Cal.App.4th 970, 981, the court held a defendant's conduct may amount to an abandonment of a request for substitute counsel. There, the court found the defendant abandoned his request when he refused to accept the court's invitation to present his claims at a later hearing. (*Ibid.*)

Here, Streeter requested a substitution of counsel prior to his guilt phase trial, and again prior to his first penalty retrial, but did not renew his request for substitute counsel before the penalty trial that culminated in his death judgment. The surrounding circumstances and Streeter's conduct reveal he intended to abandon his request for new counsel and proceed through the penalty phase with Amador representing him.

Streeter's initial request for new counsel was made (and withdrawn) during jury selection at the guilt phase trial. (4 RT 273-278A, 361.) His next request for new counsel resulted in a *Marsden* hearing which was held and denied before his first penalty phase retrial. (15 RT 1419-1456.) That trial ended in a mistrial on November 16, 1997, after Streeter moved to

recuse the judge. (16 RT 1605-1609.) Streeter's new penalty phase trial began more than two months later, on January 19, 1998. (16 RT 1617.) Although Streeter had ended the prior *Marsden* proceedings by informing the judge of his intent to find new counsel (15 RT 1457), and more than two months had passed since the last mistrial, Streeter did not renew his *Marsden* motion or otherwise seek new counsel prior to or during his second penalty phase retrial. His failure to do so was reasonably construed as an abandonment of his *Marsden* claim, and constitutes a forfeiture of his right to raise that claim on appeal.

Assuming arguendo the issue is not forfeited, it fails on the merits. A trial court's decision declining to relieve appointed counsel is reviewed under the deferential abuse of discretion standard. (*People v. Jones* (2003) 29 Cal.4th 1229, 1245; *People v. Silva* (2001) 25 Cal.4th 345, 367.) A denial of a *Marsden* motion is not an abuse of discretion unless a defendant has shown that a failure to replace the appointed attorney would substantially impair his right to assistance of counsel. (*People v. Horton* (1995) 11 Cal.4th 1068, 1102.) When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that the defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. (*People v. Smith* (2003) 30 Cal.4th 581, 604; *People v. Jones, supra,* 29 Cal.4th at pp. 1244-1245.)

The trial court here did not abuse its discretion in denying Streeter's motion to relieve Amador. After a full hearing on the matter conducted by an attorney specially appointed to represent Streeter, the trial court found

that Amador was providing adequate representation and that there was no irreconcilable conflict. The trial court specifically stated it disbelieved Streeter's testimony that Amador had told him to lie. (15 RT 1455.) The court also credited Amador's statement that the breakdown in communication would not compromise his representation of Streeter. (14 RT 1454.) A trial court is entitled to accept counsel's representations when there is a credibility dispute during a *Marsden* hearing. (*People v. Jones, supra,* 29 Cal.4th at p. 436.) Most importantly, the court noted the absence of any evidence at the hearing that Amador had failed to do things Streeter had requested, or that there was any breakdown in the professional relationship between Streeter and Amador, stating the evidence revealed only a personal dislike. (15 RT 1452, 1455-1456.)

Streeter's case is very similar to *People v. Gutierrez* (2009) 45 Cal.4th 789, 802-804. There, the defendant argued his motion for substitute counsel was improperly denied for reasons similar to those claimed by Streeter; namely, that his attorney had failed to adequately consult with him, failed to make critical motions, failed to explain certain things, and was generally unprepared. This Court held the trial court had not abused its discretion in denying the motion. In so holding, this Court distinguished *Bland v. California Department of Corrections* (9th Cir. 1994) 20 F.3d 1469, 1477, in which the defense attorney had spent only 15 to 20 minutes with the defendant prior to trial, failed to prepare the defendant to take the witness stand, and failed to investigate exculpatory witnesses. In contrast, this Court found there was no evidence in *Gutierrez* that the defense attorney was not fully prepared for trial. Further, while this Court found the defendant's attorney could have been more "artful" in explaining his reasons for not pursuing certain motions, his decision not to file a motion he believed would be futile did not substantially impair the defendant's right to the effective assistance of counsel. (*Id.* at p. 804.)

The same result is required here. "[T]here is no absolute right to substitute counsel." (*People v. Gutierrez* , *supra*, 45 Cal.4th at pp. 789, 803.)

> If a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment, and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law.

(*People v. Jones, supra,* 29 Cal.4th at pp. 1229, 1246, citations omitted.)

Streeter's primary complaint is that he was unable to reach Amador for two weeks after the mistrial, during which time he began consulting other attorneys. (AOB 32-35.) In *People v. Hart* (1999) 20 Cal.4th 546, the defendant claimed he had not seen his attorney for more than seven months, despite numerous requests, and counsel had failed to keep appointments with him on nine occasions, and had not discussed anything with the defendant. This Court found no error in the trial court's denial of the defendant's *Marsden* motion, finding the trial court had reasonably concluded that trial counsel was prepared for trial and did not need to visit the defendant on a regular basis. Moreover,

> [t]he number of times one sees his attorney, and the way in which one relates with his attorney, does not sufficiently establish incompetence.

(*People v. Hart*, *supra*, 20 Cal.4th at p. 604, citing *People v. Silva*, *supra*, 45 Cal.3d at pp. 604, 622.)

Streeter attempts to bolster his claim that Amador provided ineffective assistance of counsel by discussing Amador's "rather tepid" performance throughout the case. (AOB 9-11.) He points to Amador's request to rush through the preliminary hearing, his failure to file a written response to some of the prosecutor's motions, his allegedly ineffective questioning of jurors to discern their racial bias, his willingness to stipulate to some of the

evidence, and the infrequency of his visits with Streeter, as indicative of a lawyer who was "far from the zealous advocate a defendant on trial for his life would expect to have." (AOB 9-11.) But a court is not supposed to defer to a defendant, and dismiss his appointed attorney, merely because the defendant is "frustrat[ed]" with him, or because the defendant disagrees with him about trial tactics. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1092.)

With the exception of Streeter's inability to contact Amador during the two week period following his first penalty retrial, these matters were not presented to, or considered by, the trial court in ruling on the *Marsden* motion at issue. In any event, none of these facts, even as characterized by Streeter, come close to the standard for deficient performance or prejudice. The record reveals Amador was a zealous advocate, focusing on the issues which he perceived were most likely to succeed, and which were most important to his case. For example, counsel questioned prospective jurors at length, and brought a *Wheeler*[10] motion, claiming the prosecutor's peremptory challenges were racially motivated. (17 RT 1839.) Counsel zealously opposed the prosecutor's request to admit photographic evidence of Yolanda's body, and an audio tape of Yolanda's screaming in the ambulance. (5 RT 473, 18 RT 1895-1896.) He moved to exclude the prosecutor's expert from testifying about Yolanda's pain and suffering. (6 RT 619.) He argued against the admission of statements Yolanda made in her declaration in support of a restraining order. (3 RT 204-205.) His stipulations pertained to evidence Streeter does not even claim was inadmissible, and by stipulating, Amador minimized the emotional impact of much of the evidence, and kept the jury focused on the disputed issues which were pertinent to his defense. (See, e.g., 8 RT 764-773[Patrick's

[10] *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277.

emotional testimony admitted by stipulation]; 8 RT 756-757 [testimony of physically disabled six-year-old witness Shavonda admitted by stipulation.]) A reviewing court defers to a trial counsel's reasonable tactical decisions, and strongly presumes that "counsel's conduct falls within a wide range of reasonable professional assistance." (*People v. Coffman* (2004) 34 Cal.4th 1, 87, citations and internal quotation marks omitted.)

Streeter did not meet his burden of showing an irreconcilable conflict or a breakdown in the relationship likely to result in ineffective representation. The record is clear that the trial court provided Streeter with sufficient opportunity to voice his concerns and, upon considering those concerns in context of the evidence presented at the hearing, reasonably found them insufficient to warrant relieving trial counsel. Thus, the trial court properly exercised its discretion in declining to substitute counsel.

If there was any error, it was harmless. The improper denial of a *Marsden* motion is reversible unless the record shows beyond a reasonable doubt that the error did not prejudice defendant. (*People v. Marsden, supra*, 2 Cal.3d at p. 126, citing *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L. Ed. 2d 705, 87 S. Ct. 824].) That standard is easily met here.

Amador had been assigned to the case from its initiation. He had tried both the guilt phase and the previous penalty phase, and testified that he was fully aware of all the facts and circumstances which would allow him to proceed without compromising the quality of his representation. (15 RT 1446-1449.) Streeter's defense team had followed up on leads Streeter provided, and concluded those witnesses would have been harmful to Streeter's case. For example, one witness said Streeter had asked him for a gun a few days before killing Yolanda. (15 RT 1447.)

While Streeter emphasizes the critical importance of communication between a capital defendant and his attorney (AOB 35-36), his claim is

weakened by the fact that his failed efforts to contact Amador occurred during a finite, two-week period following a hung jury on his first penalty trial, before any proceedings occurred with respect to his retrial. Streeter offered no evidence to indicate that his case was compromised, but testified the harm that resulted was that he and his family needed to know what was going to happen next. (15 RT 1443.) The evidence at the *Marsden* hearing supports the conclusion that the difficulties that developed in the relationship between Amador and Streeter occurred because of Streeter's unwillingness to be candid with Amador about the nature of his consultation with Karlson during that two week period. Amador explained his request to be relieved was based on his client's unwillingness to cooperate with respect to disclosing the nature of his involvement with Karlson, and if Streeter was counseled to cooperate and communicate, Amador would be able to do the same. (15 RT 1449.) The passage of time, and the occurrence of an entirely new trial with no further complaints from either Amador or Streeter indicate there were no further problems with the relationship between the two, and Streeter suffered no prejudice from Amador's continued representation.

Streeter has forfeited his right to challenge the denial of his *Marsden* motion. In any event, the motion was properly denied. If there was any error, it was harmless beyond a reasonable doubt.

II. STREETER'S AGREEMENT TO LET A SUBSTITUTE LAWYER STAND IN DURING THE DISTRIBUTION OF JUROR QUESTIONNAIRES AND HARDSHIP SCREENING AT HIS PENALTY PHASE RETRIAL DID NOT AMOUNT TO A DENIAL OF THE RIGHT TO COUNSEL

Streeter claims the presence of a substitute attorney during the distribution of juror questionnaires and hardship screening in his penalty phase retrial violated his right to counsel under the federal and California Constitutions. (AOB 37-56.) Streeter was not deprived of the right to

counsel. No presumption of prejudice arises from the substitution of counsel because Streeter was represented by counsel at all times, and the substitution did not occur during a critical stage of the proceedings. Streeter's claim requires a showing of actual prejudice, and he cannot make such a showing. In any event, Streeter knowingly and voluntarily waived the right to the presence of his primary attorney during those proceedings. Streeter's claim should be rejected.

On January 19, 1999, the date set for Streeter's penalty phase retrial, his attorney, Mr. Amador, was not in court. The following dialogue took place in the presence of appellant and the prosecutor:

> THE COURT: . . . Mr. Streeter, welcome back. We haven't seen you for awhile, but we are going to get started on this thing again. I need to clarify something on the record. You had somebody, I guess, talk to you this morning about the situation with Mr. Amador?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And I want you to clearly understand what we are going to do today. It isn't going to have any effect to presentation of any evidence or any position that you may have or the District Attorney has. It is simply going to be as you experienced before, a procedure whereby the Court explained to them, the jury panel, what is going to be happening during the next couple three weeks and going to hand out the questionnaires.
>
> And I need to obtain from you your consent to proceed on this basis with this counsel, Mr. Ducre, who is going to come and sit in for Mr. Amador. And I have had Mr. Ducre in this courtroom many times and he is an excellent lawyer. I am not getting into that. I am merely explaining to you Mr. Amador is not going to be here. I am sure you've been informed Mr. Ducre will be here, and I want your consent that we can proceed with this part of the proceedings in Mr. Amador's absence with you being represented by Mr. Ducre with the explanation and understanding that nothing will happen regarding the presentation of your case or the prosecution's case except to

explain to the jury the procedure and hand out the questionnaires and have them returned on a later date. You agree with what I've said, [prosecutor]?

MR. WHITNEY: I do, your Honor.

THE COURT: And Mr. Streeter, will you consent that we can proceed this morning and accomplish this much and Mr. Amador will then be here the next time that you will be here?

THE DEFENDANT: Mr. Amador will be here the next time I'm here?

THE COURT: We certainly plan on that.

MR. WHITNEY: Excuse me. With this exception that he may not be here tomorrow and - -

THE COURT: Well, right. We'll be going on with this jury panel situation tomorrow, but both days will be exactly the same procedure. Nothing will be done regarding your case, just the taking and handing out of the questionnaires.

Do we have your consent to proceed to do that in the presence of this new attorney, or at least this substituted attorney, and Mr. Amador then being here when we do actually start your case.

THE DEFENDANT: Yes.

THE COURT: Okay.

(16 RT 1617-1619.)

Following that exchange, attorney Julian Ducre came into the courtroom to represent Streeter.[11] (16 RT 1619.) During Mr. Amador's absence, and while Mr. Ducre was representing Streeter, the following proceedings occurred.

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[11] Mr. Amador's assistant, Ms. Amador, was present at that point. It is not clear whether she was present for the entire discussion. (16 RT 1619.)

On January 19, 1999, in the morning, the first group of jurors was brought into the courtroom and sworn. The parties were introduced, and the prospective jurors were told that defense attorney Amador was ill. The court explained this was a penalty phase trial, discussed scheduling issues and explained the jury selection procedure, including the fact that questionnaires would be distributed for the attorneys to review and the prospective jurors would be dismissed and ordered to return on February 1st, at 10:00 a.m. (17 RT 1619-1633.) Questionnaires were distributed. The court explained the grounds upon which a prospective juror would be dismissed for hardship. Those prospective jurors who intended to claim hardship for one of those reasons were asked to stay and explain their request. The other potential jurors were dismissed. (17 RT 1635.) All prospective jurors requesting hardship excusals were excused by stipulation. (17 RT 1635-1643.)

On January 19, 1999, in the afternoon, the second group of prospective jurors was called in and sworn. The parties were introduced, the Information was read, and the court explained that this was a penalty phase trial, and discussed the jury selection procedure and scheduling. The questionnaire was distributed and explained. The trial court explained the grounds for a claim of hardship. Those not claiming hardship were excused, and the others were asked to remain in the courtroom to explain. All prospective jurors requesting hardship excusals were excused by stipulation. (18 RT 1644-1682.)

On January 20, 1999, the third group of prospective jurors was called in and sworn. Again, the parties were introduced, the Information was read, and the court explained that this was a penalty phase trial, and discussed the jury selection procedure and scheduling. The questionnaire was distributed and explained. The trial court explained there were four grounds for claiming hardship. Those potential jurors not claiming

hardship were excused, and the others were asked to remain in the courtroom to explain their reasons. (17 RT 1683-1698.) All prospective jurors requesting hardship excusal were excused by stipulation. (17 RT 1698-1710.)

The prosecutor informed the court about a discussion he had with someone from Mr. Amador's office regarding a request for discovery and scheduling. Mr. Amador's assistant stated she would discuss a witness scheduling matter with Mr. Amador and get back to the prosecutor. (17 RT 1713.) The trial court ordered the prosecutor to meet and confer with Mr. Amador regarding the questionnaires and return to court on February 1, 1999. The prosecutor informed the court Mr. Amador had medical tests scheduled for February 2, 1999. (17 RT 1714.)

On February 1, 1999, Mr. Amador was present in court when the first group of prospective jurors returned after having filled out their questionnaires. (17 RT 1715-1716.)

A. Streeter's Death Sentence Should Be Affirmed Because He Was Not Deprived Of His Constitutional Right To Counsel, There Is No Presumption Of Prejudice, And There Was No Actual Prejudice From The Substitution Of Counsel During The Distribution Of Juror Questionnaires And Hardship Screening

Streeter was represented by counsel at all times. Nonetheless, he claims the absence of his primary attorney from voir dire constituted "structural error" which requires automatic reversal of the judgment. (AOB 55, citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [111 S.Ct. 1246, 113 L.Ed. 2d 302].) Alternatively, he argues prejudice is presumed because counsel was absent during a critical stage of the proceedings. (AOB 56, citing *United States v. Cronic* (1984) 466 U.S. 648 [104 S.Ct. 2039, 80 L.Ed.2d 657].) Neither is correct. Streeter's claim that he was deprived of

his right to counsel requires a showing that he suffered actual prejudice, and Streeter has not and cannot make that showing.

1. Streeter Must Show Actual Prejudice To Establish A Violation Of His Constitutional Right To Counsel

> The right to the effective assistance of counsel is . . . the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." [Citations omitted.] [In *Cronic*, t]he high court gave examples of the ways in which a trial might cease to afford meaningful adversarial testing: "'The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.' ... 'Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.'"

(*People v. Dunkle* (2009) 36 Cal.4th 861, 930, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, citing *In re Aveena* (1996) 12 Cal.4th 694, 727, quoting *United States v. Cronic*, *supra*, at pp. 656-657, 659, fns. 25 and 26.)

Structural errors requiring automatic reversal apply to defects in the trial mechanism itself as opposed to trial error. For example, the total deprivation of the right to counsel at trial affects the trial in such a way as to defy a harmless error analysis. (*Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 309-310, citing *Gideon v. Wainwright* (1963) 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799].) Streeter's claim of structural error can be quickly dismissed. Streeter was represented by counsel at all times, and attorney Amador participated in the entire presentation of the case against Streeter.

The substitution of counsel during the distribution of juror questionnaires and hardship screening did not compromise the fairness of the trial proceedings in such a way as to make it impossible to determine its effect on the outcome.

Streeter is not entitled to a presumption of prejudice from the substitution of counsel. Both the state and federal constitutions grant a criminal defendant the right to counsel. Prejudice is presumed where there is a complete denial of counsel at a critical stage of the proceedings, or if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. (*United States v. Cronic*, *supra*, 466 U.S. at p. 658; *People v. Benavides* (2005) 35 Cal.4th 69, 86.) There is not a complete deprivation of counsel when an attorney representing the defendant is present at all times, even if it is an attorney standing in for the defendant's lead counsel. (*People v. Benavides*, *supra*, 35 Cal.4th at p. 86; see also, *Carroll v. Renico* (6th Cir. 2007) 475 F.3d 708, 712-713.)

In *People v. Benavides*, *supra*, 35 Cal.4th at p. 69, the defendant was convicted and sentenced to death for the murder of a 21-month old child, along with the special circumstances of felony-murder rape, felony-murder sodomy, and felony-murder lewd conduct. For less than an hour over two consecutive days, Streeter's lead counsel was not present in the courtroom, and co-counsel conducted voir dire of the prospective jurors. This Court found the presumption of prejudice did not apply because either lead counsel or co-counsel was present at all times. (*Id.* at p. 86.) Here, too, Streeter was represented at all times by either attorney Ducre or attorney Amador.

Nor was there a failure of counsel to subject the prosecution's case to meaningful adversarial testing. In *Cronic*, the defendant was indicted on mail fraud charges involving more than $9,400,000. His retained attorney withdrew from the case shortly before trial, and the court appointed a

young lawyer with a real estate practice to represent the defendant. Although it had taken the government more than four years to investigate the case and review thousands of documents, the trial court gave the new lawyer only 25 days to prepare. The defendant was convicted of 11 of 13 counts and sentenced to serve 25 years. (*United States v. Cronic*, *supra*, 466 U.S. at pp. 649-650.) The Court of Appeals found the defendant's Sixth Amendment right to counsel was violated, and reversed his conviction without inquiring into whether he suffered any actual prejudice. (*Id.* at pp. 652-653.) The United States Supreme Court reversed the judgment of the Court of Appeals, finding

> [t]his case is not one in which the surrounding circumstances make it unlikely that the defendant could have received the effective assistance of counsel. The criteria used by the Court of Appeals do not demonstrate that counsel failed to function in any meaningful sense as the Government's adversary.

(*United States v. Cronic*, *supra*, 466 U.S. at p. 672.)

The matter was therefore remanded for the trial court to determine whether the defendant suffered prejudice from the specific trial errors he alleged. (*Ibid.*)

If the facts in *Cronic* do not demonstrate that counsel failed to function in any meaningful sense as the government's adversary, surely the facts here do not support that conclusion. The defendant in *Cronic* was represented throughout his entire trial by a lawyer with no criminal experience whatsoever, who had been given only 25 days to prepare for a case it had taken the government more than four years to put together. Here, in contrast, Streeter was represented by attorney Ducre during proceedings that occurred before any information was obtained from prospective jurors other than the reasons they sought to be excused. No legal arguments were presented and the presentation of the People's case

did not begin until after attorney Amador returned. In short, during the proceedings that occurred during attorney Ducre's brief presence and attorney Amador's brief absence, there was not even an *opportunity* for adversarial testing of the government's case, much less a failure of counsel to function as an advocate.

In *People v. Dunkle*, *supra*, this Court discussed *Bell v. Cone* (2002) 535 U.S. 685 [122 S.Ct. 1843, 152 L.Ed.2d 914], to explain the limited application of the *Cronic* presumption of prejudice.

> When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete.

(*People v. Dunkle*, *supra*, 36 Cal.4th at p. 931, quoting *Bell v. Cone*, *supra*, 535 U.S. at pp. 696-697.)

In both *Dunkle* and *Bell*, the Courts contrasted claims of ineffective assistance of counsel requiring a showing of prejudice pursuant to *Strickland v. Washington* (1984) 466 U.S. 668, 688 [104 S.Ct. 2052, 80 L.Ed.2d 674] with those entitled to a presumption of prejudice pursuant to *Cronic*. A determination as to whether prejudice is presumed turns on whether the claim is that counsel failed to oppose the prosecution throughout the proceeding as a whole, or failed to do so at specific points. "For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind." (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 931, citing *Bell v. Cone*, *supra*, 535 U.S. at p. 697.)

In *Dunkle*, the defendant claimed his attorney did not argue orally or in writing for a reduction of his death sentence, although he was otherwise present at and actively participating in the penalty trial as a whole, including the evidentiary portion and argument to the jury. This Court found *Cronic* did not apply and there was no presumption of prejudice. (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 933.) Here, similarly, Streeter

does not argue that attorney Amador was absent during voir dire as a whole. Streeter does not dispute that attorney Amador actively questioned jurors individually and as a group, voiced appropriate objections to the prosecutor's questioning, challenged several jurors for cause, gave thoughtful consideration to his use of peremptory challenges, and even argued for a mistrial during the selection of Streeter's penalty phase jury.

Streeter cites several cases in support of his argument that the substitution of a codefendant's counsel during an attorney's absence constitutes a denial of the right to counsel in the absence of a knowing and intelligent waiver. (See AOB 52-53, citing *Olden v. United States* (6th Cir. 2000) 224 F.3d 561; *United States v. Patterson* (7th Cir. 2000) 215 F.3d 776, *United States v. Russell* (5th Cir. 2000) 205 F.3d 768.) Those cases are different from this case. In those cases, the "stand-in" attorney was a lawyer representing a co-defendant. Here, in contrast, a new lawyer was brought in for the sole purpose of protecting Streeter's interests, eliminating the risk that the attorney would place his own client's interests above those of the defendant.

For the presumption of prejudice to apply, counsel's absence must occur during a critical stage of the proceedings. Streeter correctly asserts the general principle that voir dire is a critical stage of the proceedings (AOB 47), but Respondent disputes Streeter's premise that the proceedings at issue constituted voir dire. No information whatsoever was obtained from any of the prospective jurors during attorney Amador's absence, except that those prospective jurors requesting a hardship dismissal provided the reasons for their requests. (Contrast *People v. Benavides*, *supra*, 35 Cal.4th 69, where co-counsel conducted the voir dire of prospective jurors, and *People v. Lewis* (2001) 25 Cal.4th 610, 630, where this Court found the process of having jurors provide written answers to jury questionnaires was an important component of the voir dire process.)

In fact, the primary role of attorney Ducre was to insure that the proceedings did not enter a critical stage during attorney Amador's absence, and he effectively protected against that occurrence.

Hardship screening is not a critical stage of the proceedings, which is apparent because even excluding a defendant from such proceedings over his objection does not violate his constitutional rights. (*People v. Basuta* (2001) 94 Cal.App.4th 370, citing *People v. Ervin* (2000) 22 Cal.4th 48, 72.) In another context, this Court has acknowledged that the initial screening of death penalty jurors is not a process which generally carries the potential of compromising a defendant's position at trial. In *Ervin*, *supra*, this Court held the defendant himself had no right to be present during the initial screening of his jury, because the proceedings bore "no reasonable, substantial relation to his opportunity to defend the charges against him" so the burden fell upon the defendant to demonstrate that his absence prejudiced his case or denied him a fair and impartial trial. (*Id.* at p. 73.) Similarly, the initial screening proceedings here bore no reasonable relation to Streeter's opportunity to defend the charges against him, and thus did not constitute a critical stage of the proceedings.

This case is different from *Olden v. United States*, *supra*, 224 F.3d 561, and *United States v. Patterson*, *supra*, 215 F.3d at p. 776, upon which Streeter relies. (AOB 52-53.) In *Olden*, the defendant was convicted of conspiracy to distribute narcotics. He brought a motion to vacate the judgment, arguing he was denied his right to counsel because his attorney was absent during several portions of the trial; in particular, he complained about his attorney's absence during portions of the trial where an agent testified about his codefendant's activities, a witness testified about his presence during a heroin purchase, and wiretap evidence wherein illicit activities were discussed and one of the speakers claimed he was with the defendant. (*Olden v. United States*, *supra*, 224 F.3d at p. 565.) The district

court denied the defendant's motion to vacate the judgment. On appeal, the 6th Circuit Court of Appeals held,

> When the government presents evidence probative of a defendant's culpability in criminal activity, or evidence that further implicates a defendant in criminal conduct, that portion of a criminal trial is sufficiently critical to the ultimate question of guilt to trigger the protections of *Cronic*.

(*Olden v. United States*, *supra*, 224 F.3d at p. 568, citing *Green v. Arn* (6th Cir. 1987) 809 F.2d 1257, 1263, vacated and remanded on other grounds; (1987) 484 U.S. 80, reinstated on remand, (6th Cir. 1988) 839 F.2d 300; *Vines v. United States* (11th Cir. 1994) 28 F.3d 1123, 1129, [finding, in a multi-defendant case, the absence of counsel during the taking of non-inculpatory evidence was not prejudicial per se.])

In *Patterson*, the court noted that a defendant is entitled to counsel only at critical stages of the prosecution, and observed that if nothing that happened during the attorney's absence was relevant to the charges against the defendant then perhaps he had not suffered a loss of counsel during a critical stage. There, however, the defendant's lawyer skipped multiple days of a trial at which his client was accused of conspiring with other defendants, he did not waive his right to counsel or agree to vicarious representation, and the judge did not take necessary steps to appoint replacement counsel, under circumstances where it was "obvious" that all the evidence would be considered against every defendant. (*United States v. Patterson*, *supra*, 215 F.3d at p. 785.)

Here, the substitution did not occur during a critical stage in the proceedings. Streeter's representation was not compromised by a potential conflict of interest. Attorney Ducre was charged solely with representing Streeter during preliminary proceedings for the very purpose of insuring that the prosecution did not enter into a critical stage during attorney Amador's absence.

In sum, there was no structural error requiring automatic reversal. Prejudice is not presumed because Streeter was never without the presence of counsel, there was no failure of counsel to act as the government's adversary, and the substitution of counsel did not occur during a critical stage of the proceedings. Under these circumstances, Streeter must satisfy the requirements of *Strickland* before establishing a violation of his constitutional right to counsel.

2. There Was No Actual Prejudice[12]

In the absence of circumstances of such magnitude as to require automatic reversal or a presumption of prejudice, a defendant claiming a violation of the effective assistance of counsel must show counsel's performance was deficient when measured against the standard of a reasonably competent attorney, and that counsel's performance resulted in prejudice

> in the sense that it 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'

A reviewing court may reject the claim on the grounds that the defendant has failed to show prejudice without determining whether

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[12] Streeter requested this Court to take judicial notice of State Bar disciplinary proceedings involving attorney Ducre that allegedly took place at the time of his representation of Streeter. Respondent filed an objection. Whether attorney Ducre was experiencing "significant psychological, personal and family problems that resulted in State Bar disciplinary proceedings" (AOB 39, fn. 4) has no bearing on the nature and quality of his representation of Streeter in these proceedings. If this Court grants the request for judicial notice and determines that attorney Ducre's background information is pertinent in resolving this claim, it should give equal weight to the trial court's statement that "I have had Mr. Ducre in this courtroom many times and he is an excellent lawyer." (16 RT 1618.)

counsel's performance was deficient. (*People v. Kipp* (1998) 18 Cal.4th 349, 366, citing *Strickland v. Washington*, *supra*, 466 U.S. at p. 686.)

The nature of the proceedings at issue here belies any claim of prejudice. Three panels of jurors were called in separately to conduct general business matters, such as the distribution of questionnaires, introduction of the parties, orientation of the jury to the nature of the proceedings, and explanation of the grounds for hardship excusal. Prospective jurors were then dismissed with orders to complete the questionnaires, and those that remained were questioned by the court for hardship and excused by stipulation. (17 RT 1619-1714.) These proceedings were administrative in nature rather than adversarial. The nature of the representation required at such proceedings was exactly the representation attorney Ducre provided; not advocacy itself, but protection against the court conducting proceedings in which advocacy was required.

Streeter complains he was prejudiced because attorney Ducre did not object when 200 jurors were told about the case, and told about the way in which the first trial impacted the penalty phase, in a way which undermined the concept of lingering doubt.[13] (AOB 38.) But attorney Amador himself would not have objected. This is clear because attorney Amador did not object when the same information was given to prospective jurors before the start of his first penalty phase retrial. (14 RT 1332-1365.)[14] For good

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[13] The jury was told that a previous jury had determined Streeter's guilt, and their function was to determine the appropriate penalty. (16 RT 1625; 17 RT 1723-1724.)

[14] Streeter's first penalty phase trial resulted in a mistrial following a deadlocked jury. Streeter's second penalty phase trial resulted in a mistrial following a claim of judicial bias. Like the third penalty phase trial at issue here, the second penalty phase trial involved jurors who had not

(continued...)

reason. None of these proceedings worked to Streeter's disadvantage in any conceivable way. The trial court did nothing more than orient the jurors to their role in the case, and pre-screen them to determine their availability for trial. Any objection by either Amador or Ducre would rightfully have been overruled.

For the same reason, there is no merit to Streeter's suggestion that he was prejudiced by attorney Ducre's failure to object to the trial court's use of hardship criteria that was more lenient than statutorily required. (AOB 42.) Had attorney Amador been present, he would not have objected. This is clear because in Streeter's prior trial, attorney Amador stipulated to the excusal of every juror who requested a hardship dismissal on the same grounds he now claims were too permissive. (2 RT 80-97.) Again, attorney Amador had legitimate, tactical reasons for doing so, as he rightfully determined Streeter's best interests were served by insuring that the jurors who decided his fate were unburdened by anything that would compete for their attention during the pendency of his trial. Streeter has shown no prejudice.

B. Assuming Arguendo Streeter Was Denied His Right To Counsel During A Critical Stage Of The Proceedings, Reversal Is Not Required Because He Waived His Right To Counsel

Streeter claims he did not knowingly waive the right to counsel. (AOB 54-55.) But the record reveals that he did. Accordingly, even if this Court finds he was prejudicially deprived of his right to counsel during a critical stage of the proceedings, the judgment should nonetheless be

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(...continued)
participated in the guilt phase trial and thus were oriented to their limited role in determining penalty.

affirmed because he knowingly and intelligently waived the right to counsel.

Before any proceedings took place in attorney Amador's absence, the court inquired whether Streeter had talked to somebody about the situation with attorney Amador. Streeter informed the court that he had. The court explained that nothing that occurred in attorney Amador's absence would effect the evidence or his position or the District Attorney's position, and that the court was going to explain to the jury panel what would happen over the next several weeks, and distribute jury questionnaires. The court informed Streeter that it needed to obtain his consent to proceed with attorney Ducre, who would sit in for attorney Amador. The court further explained that it wanted Streeter's "consent that we can proceed with this part of the proceedings in Mr. Amador's absence when you are being represented by Mr. Ducre with the explanation and understanding that nothing will happen regarding the presentation of your case or the prosecution's case except to explain to the jury the procedure and hand out the questionnaires and have them returned on a later date." (17 RT 1618.) The court then asked,

> And Mr. Streeter, will you consent that we can proceed this morning and accomplish this much and Mr. Amador will then be here the next time that you will be here?

(17 RT 1618.)

After clarifying with the Deputy District Attorney that Mr. Amador would still be absent the following day, but that nothing would be done on the case other than what had already been described, Streeter answered "yes" when asked,

> Do we have your consent to proceed to do that in the presence of this new attorney, or at least this substituted attorney, and Mr. Amador then being here when we do actually start your case?

(17 RT 1618.)

Representation that would otherwise constitute a violation of the Constitution may be excused when a defendant knowingly and intelligently waives his right to counsel. (*Olden v. United States*, *supra*, 224 F.3d at p. 568, citations omitted.) Streeter agreed to his attorney's absence and the substitution of attorney Ducre for the relevant proceedings.

In *People v. Patterson*, *supra*, the court found the defendant's waiver of his right to counsel was inadequate. There, the defendant's lawyer missed several days of trial, including seven days of important testimony and four of five sessions of the jury instruction conference. Lawyers representing the other defendants stood in for the defendant's lawyer during his absence. When that happened, typically one of the codefendant's attorneys would let the court know defendant's lawyer was not present, and agree to stand in for him, and the defendant would say "yes" when asked whether he waived his lawyer's presence. The Seventh Circuit found the record inadequate to show that the defendant understood what his options were, and understanding his options was an essential ingredient of waiver of the right to counsel. Further, the court found the attorney's absences were

> too common and too lengthy for the normal stand-in approach. What happened looks more like a partial substitution of counsel, or the appointment of co-counsel to assist [defendant's attorney], and such steps require additional care.

U.S. v. Patterson, *supra*, 215 F.3d at pp. 784-785.)

Finally, the Seventh Circuit found the district court had failed to explore whether conflicts existed with the stand-in attorneys' representation of multiple defendants, and the district court had failed to obtain waivers from any of the defendants of their right to conflict-free counsel. (*Id.*)

In contrast, here Streeter knew exactly what was going to happen during the time attorney Ducre substituted in for attorney Amador. He had

been through identical hardship proceedings during the guilt phase and first penalty phase trial. He had previously sat through a nearly identical orientation of penalty phase jurors wherein the court explained the process to the second penalty phase jury and introduced the parties and the case. Streeter had a thorough understanding of the proceedings that would be taking place over the coming days.

Here, unlike in *Patterson*, the court explained the proceedings that would occur in attorney Amador's absence. Here, unlike *Patterson*, the stand-in attorney was present solely for Streeter's benefit. And here, unlike in *Patterson*, there were no lengthy absences during the presentation of the case and discussion of jury instructions requiring "additional care." In this case, under all the circumstances, the "normal stand-in approach" was sufficient to insure Streeter's knowing and voluntary consent.

Streeter was represented by counsel acting solely on his behalf at all times, and therefore must show prejudice to establish a violation of his constitutional right to counsel. Streeter was not prejudiced from the substitution of counsel during initial hardship screening and the distribution of juror questionnaires. In any event, Streeter waived his right to counsel. The judgment should be affirmed.

III. THE TRIAL COURT PROPERLY DENIED STREETER'S *WHEELER* MOTION[15]

Streeter contends the trial court erroneously concluded he had not made a prima facie showing that the prosecutor exercised his peremptory challenges in a racially discriminatory manner during jury selection for the penalty phase retrial. This, he claims, resulted in a violation of his federal and California constitutional rights, requiring reversal of his death sentence. (AOB 57-86.) The trial court properly denied Streeter's *Wheeler* motion,

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[15] *People v. Wheeler*, *supra*, 22 Cal.3d at p. 258.

because Streeter failed to make a prima facie showing that the prosecutor exercised his peremptory challenges in a racially discriminatory manner. Assuming arguendo this Court disagrees, Streeter's death sentence should nevertheless be affirmed, because the record reveals the prosecutor excused three African American prospective jurors for genuine, race-neutral reasons.

A. Relevant facts

Streeter's claim arises out of the prosecutor's use of three peremptory challenges to strike African American prospective jurors during the penalty phase retrial. Streeter and the victim, Yolanda Buttler, are both African American.

Prospective juror number three was the only African American panelist among the first 12 people called to the jury box. (17 RT 1731-1732, See 1B CT 3, 22, 41, 60, 79, 98, 155, 193, 212, 231, 269, 288.) Following Streeter's first exercise of a peremptory challenge against Caucasian juror number 13 (See 1B CT 212), the prosecutor's exercise of his first peremptory challenge against Caucasian juror number 16 (See 1B CT 269), and the removal for cause of Caucasian juror number 19 (See 1B CT 345), the prosecutor accepted the jury. (17 RT 1768-1783.) At that time, African American prospective juror number 3 remained in the jury box, as did African American prospective juror number 23 who had been called to replace juror number 13. (See 17 RT 1731-1732, 1783, 1B CT 41, 2B CT 402.)

Streeter next excused Caucasian prospective juror number 14 (See 1B CT 231, 17 RT 1789-1790.) Again, having exercised only one peremptory challenge against a Caucasian prospective juror, and with the only two African American jurors who had been called still seated, the prosecutor accepted the jury. (See 1B CT 231, 17 RT 1790.)

Streeter next excused Hispanic prospective juror number 17. (See 1B CT 288, 17 RT 1791-1792.) For the third time, the prosecutor accepted the jury. The only two African American prospective jurors who had been called still remained seated. (17 RT 1792.) Streeter exercised his next peremptory challenge to excuse Caucasian prospective juror number 6. (See 1B CT 98, 17 RT 1792.) The prosecutor then excused Caucasian prospective juror number 33, who had been called to replace prospective juror number 6. (See 2B CT 592, 17 RT 1796.) A third African American prospective juror, juror number 35, was then called to the jury box. (See 3B CT 630, 17 RT 1798.) Following examination of that juror, the prosecutor again indicated that he accepted the jury as seated, this time with three African American prospective jurors still in the jury box; the only three that had been called (prospective jurors 3, 23, and 35.)[16] (17 RT 1808.)

Streeter questioned African American prospective juror number 35 and then moved to excuse that juror for cause. The prosecutor opposed the challenge and rehabilitated the juror through additional questioning. Streeter's challenge for cause was denied. (17 RT 1901-1808.) The People accepted the jury, again with the only three African American prospective jurors that had been called still seated in the jury box (jurors 3, 23, and 35.) (17 RT 1808.)

Streeter exercised his next challenge to prospective juror number 4, who was American Indian. (See 1B CT 60, 17 RT 1808.) African American prospective juror number 42 was called to replace juror number 4. At this time, there were four African American prospective jurors in the

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[16] After the prosecutor asserted that he accepted the jury, the Court realized it had inadvertently skipped Streeter's turn to exercise his next peremptory challenge. (17 RT 1808.)

box; 3, 23, 35 and 42. (See 17 RT 1816-1817.) Having thus far used only two of his peremptory challenges, each against a Caucasian juror, and having previously accepted the jury four times with up to three African American prospective jurors seated each time, and having opposed Streeter's request to remove an African American prospective juror for cause, the prosecutor exercised its third peremptory challenge to excuse African American prospective juror number 3. (17 RT 1818-1819.)

Prospective juror number 3 was replaced with African American prospective juror number 43. Again, there were four African American prospective jurors in the box (23, 35, 42 and 43.) (See 17 RT 1819.) Streeter challenged African American prospective juror number 43 for cause. The prosecutor asked questions to rehabilitate the juror and the challenge was denied. (17 RT 1819-1827.)

Streeter exercised his next peremptory challenge to excuse African American prospective juror number 43, leaving three African American prospective jurors in the box. (23, 35 and 42.) Prospective juror number 43 was replaced with African American prospective juror number 44 (See 3B CT 762), so again, there were four seated African American prospective jurors. Prospective juror number 44 was excused by the prosecutor with his next peremptory challenge (17 RT 1829), leaving three African American prospective jurors (23, 35 and 42) remaining in the box. African American prospective juror number 46 was called to replace prospective juror number 44, so the number was again up to four. (See 3B CT 800, 17 RT 1829.)

Streeter used his next peremptory challenge to excuse Hispanic prospective juror number 24. (See 2 B CT 421, 17 RT 1832.) The People accepted the jury. (17 RT 1836.) At that time, four African American prospective jurors were seated in the jury box. (23, 35, 42 and 46.)

Streeter exercised his next peremptory challenge to remove African American prospective juror number 35, leaving three African American

prospective jurors in the box (23, 42 and 46, 17 RT 1836.) The People exercised their next peremptory challenge to excuse African American prospective juror number 46. (17 RT 1838.) This left two African American prospective jurors, 23 and 42, in the jury box. Streeter brought a *Wheeler* motion.[17] (17 RT 1838.)

Out of the presence of the jury, Streeter moved for a mistrial on the grounds that the prosecutor was systematically eliminating African American jurors. (17 RT 1839.) In evaluating the motion, the trial court first noted that 11 African American jurors were on the panel, five had been called to the box, two had been excused by the prosecutor, and two had been excused by the defense.[18] The court asked the prosecutor if he had any comments, to which the prosecutor responded:

> Well, the law requires that a prima facia case must be made of impropriety on my part and, certainly, there has not been. I don't think [defense counsel] is claiming that I have a racist bone in my body. He knows better than that.
>
> So unless a prima facia case has been shown, I don't feel it necessary to even respond.

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[17] Although Streeter did not specifically invoke *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69], in his objection at trial, this Court has recognized that an objection under *Wheeler* preserves a federal constitutional objection because the legal principle that is applied is ultimately the same. (See *People v. Yeoman*, *supra*, 31 Cal.4th at pp. 93, 117.)

[18] The court was mistaken. Three African American prospective jurors had been excused by the prosecutor (numbers 3, 44, and 46). (17 RT 1818-1819, 1829, 1838.) The court had not considered Juror 3, who was Creole, to be African American. (18 RT 1840-1841.) Subsequently, the court conducted its analysis with the understanding the prosecutor had excused three African American prospective jurors. (See 18 RT 1841, 1844-1845.)

> The selections I have made have been without regard to color. Indeed, I have tried vigorously to keep on certain black jurors and have been unsuccessful in retaining them, because of the peremptories exercised by the defense.
>
> I think a prima facie case simply has not been nor could it ever be shown with this prosecutor, and I think [defense counsel] will agree. He knows me personally and knows that I do not take into account the color of a person's skin in selecting a jury. (18 RT 1841.)

The court stated,

> Well, prima facia the defendant has shown that three African-Americans have been excused by the prosecution as opposed to the two by the defendant, which were justified in the defendant's mind.
>
> Having heard the voir dire on No. 3 and her answers, the exercise of peremptory there was justified by the People. 45-44, excuse me, was excused after extensive questioning, I believe. 46, I think, the prosecutor passed questions and excused.

(18 RT 1841-1842.)

The prosecutor then asked for an opportunity to alert the court to its concerns with respect to prospective juror number 44. The prosecutor stated, "My decision [with respect to juror number 44] was based on the answers in the questionnaire and her demeanor." (18 RT 1842.) When asked which questions, the prosecutor stated,

> For example, I'll start from the front. She has a B.A. in Sociology, done social work and nursing all of her life. She, quote, in No. 23 "does not believe a person should murder another human being" and that could well prevent her from invoking the death penalty. ¶ [Question 25], she seems to think that "unless a person can be rehabilitated, there is no point in giving the death penalty." That is my reading of her answers in that regard. She says she could actually vote, but that she also points out in No. 35 that though some murder is intentional, it can be very emotional and the person temporarily insane, et cetera, et cetera. ¶ That those facts may alter the decision to give the death penalty, given the facts of this particular case, I

> don't think that juror could ever actually render the death verdict given what we know to be the facts of our case. ¶ Those are factors that went into my thinking with respect to No. 44, as well as her demeanor. I noted as the other, I think the next juror over was being examined, she seemed to be distant from the rest of the jurors' responses. Although the rest of the jurors reacted in generally a similar way, she was kind of a loner. And I think all those factors are calling out for a possible hung jury, if nothing else. I felt it was inappropriate as the prosecutor for me to keep that juror. (18 RT 1842-1843.)

The prosecutor did not offer justifications for excusing prospective jurors 3 and 46.[19] The prosecutor went on to explain that through the stipulation process, many jurors were excused who happened to be African American but there were legitimate reasons for excusing them, and assured the court of the "bottom line, my challenges were done for reasons having nothing to do with skin color." Finally, the prosecutor reminded the court how hard he had tried to keep some African American jurors on the panel. (18 RT 1843-1844.)

The court stated,

> I have tried enough cases with you, [] to know you are not a racist, and I think that is probably the most obvious thing that has been exemplified by your effort in this case on prior occasions and on previous occasions. ¶ In light of the fact that of the four that have been excused, the number is equal between the two parties, and having reviewed the questionnaires, and the answers given, *it is my conclusion that at this juncture, at least, there has been no prima facie showing of an intentional intent of the prosecution to enter into a pattern of excusing people from the panel merely because they are of the Black, African-American race.*

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[19] Streeter mistakenly claims the prosecutor justified his challenge of prospective juror 46 on the basis that she was distant from the other jurors and was a loner. (AOB 84-85.) Those reasons were offered by the prosecutor as additional justifications for excusing prospective juror 44. (See 18 RT 1842-1843.)

(18 RT 1844, italics added.)

The defense attorney corrected the court and reminded it that three Black jurors had been excused by the prosecutor. Further, he informed the court that he was not accusing the prosecutor of being prejudiced, but instead claiming the prosecutor was systematically eliminating African American jurors. (18 RT 1844.) The court clarified,

> I understand your motion, [defense counsel.] It is not improperly made. But I am not convinced at this juncture that a sufficient showing has been made to require further - - inquire further regarding the excusal of these jurors. And I again feel that there has been no systematic excusal without some basis for that exercise other than race. The motion is denied.

(18 RT 1844-1845.)

Streeter subsequently excused African American prospective juror number 42. (See 3B CT 725, 17 RT 1848.) The final penalty phase jury consisted of one African American juror (juror number 23), nine Caucasian jurors (jurors 1, 2, 5, 10, 12, 26, 52, 55, and 61), one Hispanic juror (juror number 54), and one Asian juror (juror number 62.)

B. The Trial Court Properly Ruled Streeter Had Failed To Make A Prima Facie Showing That The Prosecutor Exercised Its Peremptory Challenges In A Racially Discriminatory Manner

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. Hamilton* (2009) 45 Cal.4th 863, 898, citing *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 79, 88; *People v. Davis* (2009) 46 Cal.4th 539.)

> 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. Bonilla* (2007) 41 Cal.4th 313, 343, citations omitted.) *Batson* provides a three-step process for a trial court to use in adjudicating claims of discriminatory use of peremptory challenges:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

[Citations.] (*Snyder v. Louisiana* (2008) __ U.S. __ [128 S.Ct. 1203, 1208, 170 L.Ed.2d 175].) Excluding even a single juror for impermissible reasons under *Batson* and *Wheeler* requires reversal. (*People v. Huggins* (2006) 38 Cal.4th 175, 227, citing *People v. Silva, supra,* 25 Cal.4th at pp. 345, 386.)

In the instant case, the trial court denied Streeter's *Wheeler* motion at stage one of the analysis, finding Streeter had failed to make a prima facie showing that the prosecutor's peremptory challenges were racially motivated. (18 RT 1844-1845.) Streeter argues the trial court applied the wrong standard in reaching its ruling. (AOB 64-65.)

At the first stage of a *Batson/Wheeler* challenge, the trial court must determine whether the defendant has produced evidence sufficient to support an inference that discrimination has occurred. (*Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129].) Streeter's trial pre-dated the decision in *Johnson.* The trial court did not state the standard it applied in ruling that a prima facie case had not been made. Where the record is unclear as to whether the trial court applied the correct *Johnson* ("reasonable inference") standard, this Court independently

applies that standard to determine whether the record supports an inference that the prosecutor excused a juror on a prohibited discriminatory basis. (*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.) Applying that standard, the clear answer is no.

> In deciding whether a prima facie case was stated, we consider the entire record before the trial court (e.g., *People v. Yeoman*, *supra*, 31 Cal.4th at p. 116), but certain types of evidence may be especially relevant: ""[T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic——their membership in the group——and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, ... the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention.""

(*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281, fn. omitted.) (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 342.)

Here, the prosecutor did not strike "most or all" of the members of the identified group from the venire; he struck three out of seven. The fact that three stricken jurors were African American is insufficient as a matter of law to establish a prima facie case of discrimination, especially when the prosecutor repeatedly passed on an African American prospective juror that was ultimately sworn and served on the jury. (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 503-504, citing *People v. Cornwell* (2005) 37 Cal.4th

50, *People v. Box* (2000) 23 Cal.4th 1153, 1188-1189, and *People v. Farnam* (2002) 28 Cal.4th 107, 136-137.) Here, African American juror number 23 was repeatedly passed by the prosecutor and ultimately served on Streeter's penalty phase jury. Nor is the ratio of challenges used to strike African American jurors sufficient to support an inference of discrimination in this case. The prosecutor used three of five challenges to strike African American prospective jurors but in *Farnam*, *supra*, this Court rejected a similar claim even where the prosecutor used four of five challenges to strike African American jurors.

Streeter also claims the ratio of strikes was disproportionate to the ratio of African American prospective jurors on the panel. Specifically, he claims that seven out of the 25 (or 28%) of the prospective jurors called to the jury box were African American, and the prosecutor used three of his five challenges (or 60%), to strike African Americans from the jury.[20] But that statistic is misleading without considering the context in which those challenges were made. And this court is compelled to consider that context - - indeed, the entire record of voir dire - - when reviewing a trial court's first phase denial of a *Wheeler* motion. (*People v. Yeoman* (2003) 31 Cal.4th 93, 116.) This principle remains true even after the Supreme Court's decision in *Johnson*, which, consistent with that principle, requires a defendant to demonstrate a prima facie case of discrimination based on the "totality of the relevant facts." (*People v. Gray* (2005) 37 Cal.4th 168, 186.)

Two important factors stand out here to refute an inference of discrimination. First, throughout the proceedings, no fewer than five times,

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[20] By Respondent's calculations, there were 32 jurors called to the jury box, three of whom were excused by stipulation or for cause, leaving 29 jurors subject to peremptory challenges, of which 7, or 24%, were African American.

the prosecutor was prepared to accept the jury. The first four times, all African American prospective jurors who had been called were still seated, so that the prosecutor repeatedly indicated its satisfaction with a jury containing up to four African Americans before exercising a single peremptory challenge against an African American prospective juror. Second, the prosecutor extensively questioned two African American prospective jurors, numbers 35 and 43, following defense motions to excuse those jurors for cause, successfully rehabilitating those jurors in an effort to keep them on the jury. The prosecutor's efforts to keep those African Americans on the jury cuts against the theory that he used his own peremptory challenges to eliminate African American prospective jurors because of their race.

Streeter argues the trial court relied upon improper considerations in finding he had not made a prima facie showing of discrimination. Specifically, Streeter claims the court improperly relied upon the facts that 1) the prosecutor was not a racist, and 2) the defense had exercised an equal number of peremptory challenges to African American jurors. (AOB 65-69.) Streeter reads too much into the trial court's comments. The trial court denied Streeter's motion based on appropriate considerations, "having reviewed the questionnaires and the answers given." (18 RT 1844.) The court offered its opinion of the prosecutor's character in response to the prosecutor's obvious concern that he was being portrayed as a racist. The prosecutor's credibility is a legitimate consideration. (*Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1208; *Miller-El v. Dretke* (2004) 545 U.S. 231, 246 [125 S.Ct. 2317, 162 L.Ed.2d]; *People v. Lenix* (2008) 44 Cal.4th 602, 613.) In any event, as Streeter points out, historical evidence of racial discrimination in a district attorney's office is relevant to whether a *Batson* claim has been established. (AOB 66, citing *Miller-El v. Cockrell* (2003) 537 U.S. 322, 347 [123 S.Ct. 1029, 154 L.Ed.2d 931].) It follows that a

prosecutor's character as a racist or non-racist may be relevant to the determination of whether his challenges were racially motivated.

At the third stage of the *Wheeler/Batson* inquiry,

> the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Miller-El I*, *supra*, 537 U.S. at p. 339 [footnote omitted].) In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office who employs him or her.

(See *Wheeler*, *supra*, 22 Cal.3d at p. 281; *People v. Lenix*, *supra*, 44 Cal.4th at p. 613.)

At this stage, given that the trial court may "rely on the court's own experiences" and "the common practices of the advocate," the prosecutor's character as a non-racist is highly relevant. In that regard, the court stated,

> I have tried enough cases with you, [prosecutor,] to know you are not a racist, and I think that is probably the most obvious thing that has been exemplified by your effort in this case on prior occasions and on previous occasions.

(18 RT 1844.)

The record also refutes Streeter's claim that the trial court improperly relied upon the fact that the defense had exercised the same number of peremptory challenges against African American jurors. The court made it clear the defense exercise of peremptory challenges against African American jurors was not a relevant consideration. (18 RT 1840; "I don't think there is any dispute that you had a valid reason in your mind and your client's mind to excuse the two. You did. That is not an issue, really.") In any event, Streeter's exercise of peremptory challenges against three African American jurors substantially impacted the racial composition of

the jury, and undermines his claim that the prosecutor's exercise of an equal number of peremptory challenges against African American prospective jurors reveals a discriminatory intent.

1. This Court Should Decline Streeter's Invitation To Engage In A Comparative Juror Analysis

Streeter invites this Court to engage in a comparative juror analysis. He claims the prosecutor questioned African American prospective jurors more extensively than jurors of other races, and that there is no meaningful distinction between the answers provided by the three challenged prospective jurors as compared to the jurors accepted by the prosecutor. (AOB 69-85.) This Court is not compelled to conduct a comparative juror analysis in this first-stage *Wheeler/Batson* case, and should decline to do so because Streeter's failure to raise the claim in the trial court leaves this Court with an inadequate record to address the jurors' similarities or distinctions.

In *People v. Howard*, *supra*, 42 Cal.4th at p. 1020, this Court explained that the purpose of conducting comparative analysis is generally not served in a first stage case.

> We decline defendant's invitation to engage in comparative juror analysis. Like *Bonilla*, *supra*, 41 Cal.4th 313, this is a "first-stage" *Wheeler/Batson* case, in that the trial court denied defendant's motions after concluding he had failed to make out a prima facie case. It is not a "third-stage" case, in which a trial court concludes a prima facie case has been made, solicits an explanation of the peremptory challenges from the prosecutor, and only then determines whether defendant has carried his burden of demonstrating group bias. "We have concluded that *Miller-El v. Dretke* (2005) 545 U.S. 231 [162 L. Ed. 2d 196, 125 S. Ct. 2317] does not mandate comparative juror analysis in these circumstances (*People v. Bell*, *supra*, 40 Cal.4th at p. 601), and thus we are not compelled to conduct a comparative analysis here. 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 thus decline to engage in a comparative analysis here." (*Bonilla*, at p. 350.) (*People v. Howard*, *supra*, 42 Cal.4th at pp. 1019-1020.)

That reasoning applies with compelling force in this case. Since the prosecutor did not offer his reasons for excusing two of the three challenged prospective jurors, the record is silent as to the prosecutor's actual motivations for excusing those jurors. So Streeter's identification of similarities between the African American jurors challenged by the prosecutor, and the non-African American jurors the prosecutor left on the jury, begs the question; those similarities reveal nothing more than the inadequacy of the record to identify the distinctions.

This Court recently held that

> '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*, *supra*, 44 Cal.4th at pp. 602, 622.) "'[R]eviewing courts must consider all evidence bearing on the trial court's factual finding regarding discriminatory intent.'" (*Ibid.*, quoting *People v. Lenix*, *supra*, 44 Cal.4th at p. 607.)

However,

> In 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.)

The record here is inadequate to conduct a comparative juror analysis. 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.)

This analysis applies with equal force to prospective juror number 44, even though the prosecutor offered its justifications with respect to that particular juror. Comparative juror analysis is a tool for assessing the trial court's factual findings regarding a prosecutor's discriminatory intent. (*People v. Cruz, supra*, 44 Cal.4th at p. 658; *People v. Lenix, supra*, 44 Cal.4th at p. 607.) In a "first stage" case as this, the trial court merely determines whether the facts give rise to a prima facie showing of discrimination regardless of the prosecutor's actual intent. (See *Johnson v. California, supra*, 545 U.S. at p. 168; *Batson v. Kentucky, supra*, 476 U.S. at pp. 93-94.) Although the prosecutor offered its reasons as to prospective juror number 44, the court did not make any findings as to those justifications, because it found Streeter had failed to meet his burden at the first stage.

> We have encouraged trial courts to ask prosecutors to give explanations for contested peremptory challenges, even in the

absence of a prima facie showing. (*Bonilla*, *supra*, 41 Cal.4th at p. 343, fn. 13.) We emphasize that if a court ultimately concludes that a prima facie showing has not been made, the request for and provision of explanations does not convert a first-stage *Wheeler/Batson* case into a third-stage case.

(*People v. Howard*, *supra*, 42 Cal.4th at pp. 1000, 1020.)

Accordingly, comparative juror analysis should not be conducted with respect to any of the three African American prospective jurors excused by the prosecution.

2. The Record Reveals Legitimate, Race-Neutral Reasons For The Prosecutor's Exercise Of Peremptory Challenges Against Three African American Prospective Jurors

Both this Court and the United States Supreme Court have emphasized the limited usefulness of comparative juror analysis. A comparative juror analysis was conducted for the first time on appeal in *Miller El v. Dretke*, *supra*, 545 U.S. at p. 231 and *Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1210. In *Miller El*, the Court noted that if a prosecutor's proffered reasons for striking a minority juror applied to a similarly situated juror who is permitted to serve, that is evidence tending to prove purposeful discrimination. (*Miller El v. Dretke*, *supra*, 545 U.S. at p. 241.) As discussed above, *Snyder* utilized a comparative juror analysis for the first time on direct appeal, but recognized that

> a retrospective comparison of jurors based upon a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable.

(*Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1211.)

The Court elected to engage in comparative analysis in that case because the only remaining justification given by the prosecutor, not

including demeanor, was concern over hardship. Hardship concerns were "thoroughly explored" by the trial court there, so that shared characteristic could be fairly addressed. (*Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1211.)

Until recently, this Court declined to conduct such an analysis for the first time on direct appeal. (*People v. Johnson* (2003) 30 Cal.4th 1302, 1324-1325.) However, in light of the use of comparative analysis in *Miller El* and *Snyder*, this Court has recently found that comparative juror analysis is one form of relevant, circumstantial evidence that may be considered on the issue of intentional discrimination. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 622.) This Court noted,

> Thus, 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.

(*Ibid.*)

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 p. 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.)

In sum, both this Court and the United States Supreme Court have issued warnings about the unreliability of comparative analysis without a complete record of such an analysis having been developed in the trial court. In this case, the record as a whole, including a comparative analysis of prospective jurors, is sufficient to deny Streeter's claim that the People exercised their peremptory challenges in a discriminatory manner.

a. Disparate Questioning

Streeter compares the nature and extent of the prosecutor's questioning of African American prospective jurors to his questioning of

non-African American prospective jurors in support of his claim that the prosecutor's motives were discriminatory. (AOB 69-74.)

As a preliminary matter, Respondent notes that courts have pointed to opposite facts as supporting an inference of a discriminatory intent. (Compare *People v. Davis*, *supra*, 46 Cal.4th at p. 583; *People v. Bell* (2007) 40 Cal.4th 582, 597, and *People v. Bonilla*, *supra*, 41 Cal.4th at p. 342, citing a line of California Supreme Court cases, including *Wheeler*, which identify a party's *failure* to question a prospective juror as a factor suggesting discrimination, to *Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 344, relying in part on *Batson*, *supra*, to find that a prosecutor's more extensive questioning of African American jurors was some evidence of purposeful discrimination.) Armed with the language in the aforementioned cases supporting an inference of discrimination based on opposite facts, Streeter suggests both that the prosecutor's more probing questions of African American prospective jurors 3, 23 and 46 suggest a discriminatory intent (AOB 69-74), and the failure to question African American prospective juror number 44 supports the same inference. (AOB 81-82.)

The theory that disparate questioning reveals anything about a prosecutor's intent overlooks the practicalities of the voir dire process; specifically, that prospective jurors are a captive audience for all of the proceedings, and therefore a dialogue with one juror often eliminates the need for a party to engage in an identical dialogue with other jurors who have expressed similar views. For example, where multiple jurors have disclosed a common misimpression, the prosecutor's questioning of a single juror serves to disabuse all the jurors of a commonly held but mistaken belief. Having accomplished that goal, there is no reason to inquire of the remaining jurors.

Here, for example, Streeter claims the prosecutor asked minimal questions of prospective juror number 52 as compared to African American

prospective juror number 46, although the two gave similar answers on their questionnaires regarding the purpose of the death penalty and the relative harshness of the two possible penalties. (AOB 73-74.) But prospective juror number 46 was called and questioned before prospective juror number 52, and the prosecutor discussed the relevant subject matter with prospective juror number 46 before he even had a chance to question prospective juror number 52. (18 RT 1830-1832 [prosecutor questions prospective juror number 46; 18 RT 1837-1838 [prosecutor questions prospective juror number 52.]) By the time prospective juror number 52 was questioned, he had already heard the prosecutor explain to prospective juror number 46 the importance of keeping an open mind throughout the trial, notwithstanding the juror's notions about the types of cases where the death penalty should be imposed. "And that is kind of what we ask the jurors to do, to kind of sit and wait and listen to everything first." (18 RT 1831.) Having explained that responsibility to all the jurors through his dialogue with prospective juror number 46, upon questioning prospective juror number 52, the prosecutor simply clarified that he understood that others considered death to be the harsher penalty, and requested an assurance that prospective juror number 52 would be able to impose death if the facts warranted. (18 RT 1838.)

Even the pattern of questioning engaged in by both parties reveals that the decision whether or not to question a particular juror was based on efficiency and not on race. Of the first twelve jurors called, the prosecutor asked questions of jurors 1, 2, and 3 in that order, and then began directing his questions to the entire panel. (17 RT 1756-1758.) The defense attorney also questioned prospective jurors 1, 2 and 3, and then briefly questioned only two additional jurors before turning his attention to the panel as a whole. (17 RT 1743-1750.) This pattern of questioning leads to the inference that the questions posed by both parties to the first group of 12

were designed primarily to generate a discussion on a particular subject so that the inquiries could be directed to the group.

In any event, with respect to each of Streeter's claims of disparate questioning, the record either does not support his position or contains apparent justifications for questioning different prospective jurors differently. It is true the prosecutor questioned prospective juror number 3 more extensively than jurors 1 and 2, as Streeter asserts. (AOB 70-71.) But the prosecutor's questions centered around prospective juror number 3's ambiguous response to question 25, which indicated with regard to her general beliefs about reasons for or against the death penalty,

> I feel that when a person is of sound mind, admits to death and acts of cruelty willingly - knowingly - such as executionist (gang activities) then maybe the death penalty is appropriate.

(17 RT 1756-1758.)

Prospective juror number 3's examples of when she would impose the death penalty were significantly different than the facts of this case. And other information provided by this prospective juror made her an obvious candidate for a dialogue, in order for the prosecutor to assess her demeanor in general, and her attitudes towards him and the case. For example, she indicated she had been in situations where she feared violence, and she had informed defense counsel she wanted to speak privately about a violent situation in her past. (17 RT 1748.)

Streeter claims prospective juror number 10 gave answers that cried out for questioning. (AOB 71.) Streeter is wrong; nothing in prospective juror number 10's questionnaire suggested that he would have any difficulty imposing the death penalty. For that reason, the prosecutor may have chosen not to spend his time questioning that juror. Or, perhaps, he chose not to question that juror in order to avoid highlighting his answer that he would place greater weight on the testimony of police officers than

he would on other witnesses, because he would tend to believe them more since they are sworn to uphold the law. (1B CT 165.) All of these are equally plausible explanations for the prosecutor's decision not to question prospective juror number 10.

Streeter is also wrong to state that prospective juror number 23 was questioned far more extensively than other jurors. (See AOB 72.) The prosecutor asked prospective juror number 23 about an inconsistency in his questionnaire. The questions were neither extensive, probing, or different in nature or extent from the questions he asked of some other prospective jurors, such as juror number 33, regarding perceived inconsistencies in the questionnaire responses. (17 RT 1784-1787 [prospective juror number 23]; 17 RT 1793-1794 [prospective juror number 33.]) And the prosecutor kept African American juror number 23 on the jury while excusing Caucasian prospective juror number 33, a fact which flatly refutes Streeter's claim that the purpose of this alleged excessive questioning was to create a pretextual reason for exercising a peremptory challenge.

In sum, Respondent submits the process of conducting a comparative analysis of the nature and extent of questions asked of various jurors is so speculative as to be of no use whatsoever. Further, the record here reveals there was no race-based pattern of disparate questioning.

b. Comparative Analysis of Juror Responses

In conducting a comparative juror analysis, the reviewing court need only consider the responses of stricken panelists or seated jurors identified by the defendant in his claim of disparate treatment. (*People v. Hamilton*, *supra*, 45 Cal.4th at pp. 70-71, fn. 12.) In this case, each of the three African American prospective jurors stricken by the prosecution provided race neutral information upon which the prosecutor entertained legitimate concerns about the jurors' ability to serve on this case.

(1) Prospective Juror number 3

Prospective juror number 3 was a 27-year-old woman who had been married for eight years and had two children. She worked as a social services caseworker and had attended classes in cosmetology and nursing. (1B CT 39-57.) Her questionnaire stated she "strongly disagreed" that anyone who intentionally killed another person should get the death penalty, and she explained

> I believe that under certain circumstances, the person who does the killing may have good reason, or no other choice. In this instance, they should be punished, but not put to death. When I say good reason, I mean in their minds, and until the facts are known, the decision should not be made.

(1B CT 50.)

The language "good reason . . . in their minds," reasonably implies that this juror might place undue weight on a killer's subjective perspective as to whether the killing was justified. In this case, Streeter's defense was that he was suicidal and desperate after his family abandoned him. Taken together, this juror's answers suggest that she would be reluctant or unwilling to impose the death penalty under circumstances like the ones presented here. This crime was committed against a highly charged emotional backdrop, by a man who claimed that he snapped under the intensity of those emotions. Prospective juror number 3 expressed ambivalence, saying she could "maybe" impose the death penalty even in the most egregious cases involving admitted murderers who committed willful acts of cruelty, executionist or gang style crimes. (1B CT 49.)

Of even greater concern was this prospective juror's responses to questions posed by the court and the attorneys. Prospective juror number 3 informed the court she had been involved in a violent situation. (17 RT 1747-1748.) In chambers, she revealed that at age 14, her uncle attempted to rape her. There was a struggle, and he did not succeed. She further

explained that her cousin was raped by the same uncle and she was a witness in the case against him for that rape. She said this would not affect her as a juror although there would be evidence the victim was raped in this case. (17 RT 1765-1766.) The parallels between this woman's experiences and the evidence expected at trial were likely to affect her feelings about the case in unpredictable ways.

Streeter claims that prospective jurors 1, 5, 12, 52, 55 and 62 indicated, like prospective juror number 3, that they were "neutral" on the death penalty. (AOB 79.) He also claims that prospective jurors 2, 10, 12 and 52, like prospective juror number 3, indicated a similar belief that the death penalty should be reserved for the most serious of crimes. (AOB 80.) Finally, he claims that prospective jurors 2, 10, 26, 61 and 62 provided responses similar to those of prospective juror number 3, who stated there might be reasons an intentional killing would not warrant the death penalty, including an act of self defense. (AOB 80-81.)

Even assuming Streeter correctly characterizes these answers as similar, he completely overlooks the glaring dissimilarity between prospective juror number 3 and the remaining jurors. As described above, prospective juror number 3 was the victim of a violent attempted rape by a family member. (17 RT 1765.) The evidence in this case established that Yolanda left Streeter after Streeter violently raped her in front of her children. Prospective juror number 3's history was unique among the jurors and provided an objective, race-neutral basis for her removal.

Prospective juror number 3 was distinguishable for other, race-neutral reasons. As set forth above, her use of the term "maybe" indicated uncertainty about her willingness to impose the death penalty even under the worst of circumstances. And her emphasis on the subjective perspective of the defendant was of serious concern in a case where the defense was built on the defendant's extreme emotional despair.

In contrast, the other prospective jurors Streeter claims expressed neutrality on the death penalty also expressed greater confidence in their ability to impose the death penalty under the right circumstances. Prospective juror number 1 explained that the purpose of the death penalty was to send a message that murder would not be tolerated in our society, and that he could impose the death penalty if the facts warranted it. (1B CT 1-19.) Prospective juror number 5, a volunteer firefighter, explained that those who deserved the death penalty should get the death penalty, and the purpose of the death penalty was to stop crime by making an example of the person. (1B CT 77-95, 17 RT 1737.) Regarding his reasons for holding his views on the death penalty, prospective juror number 12 said that some need to die while others do not. He explained the purpose of the death penalty was that it was the harshest penalty for the worst crimes. (1B CT 193-209.) Prospective juror number 52 stated that he thought the death penalty was appropriate for crimes that were particularly gruesome, and that if the death penalty was imposed it should be carried out in a timely manner. And while prospective juror number 52 believed that life in prison might be a harsher penalty than death, she agreed to vote for death where it was warranted by the aggravating circumstances. (IIIB CT 893-911, 18 RT 1838.) Prospective juror number 55 understood that the death penalty was the law and "we need to uphold the law." (IVB CT 950-968.) Prospective juror number 62 said "yes, I think so" to the question of whether he could vote for the death penalty, and stated, "If the evidence exists, according to law, death penalty may be appropriate. It depends on the individual case." He further stated that heinous crimes may warrant death as opposed to life in prison, and that the purpose of the death penalty was avoidance of repeat offenses and cost savings. (IVB CT 1083-1101.)

Streeter claims prospective juror number 3 indicated a belief that the death penalty should be reserved for the most serious of crimes, and her

answer was similar in that respect to prospective jurors 2, 10, 12 and 52. (AOB 80.) Prospective juror number 3 stated that "maybe" the death penalty was appropriate in cases where a person of sound mind admits to death and acts of cruelty willingly - knowingly - such as executionist and gang murders. Prospective jurors 2, 10, 12 and 52 each explained that the death penalty should apply to the most egregious crimes, but none of them limited the application of the death penalty to narrow categories of crimes, or required a defendant's admission, before finding death to be the appropriate penalty. (IB CT 20-38, 153-171, 193-209, IIIB CT 893-911.) In *People v. Hamilton*, *supra*, 45 Cal.4th at p. 906, the prosecutor exercised peremptory challenges to excuse all six African American prospective jurors that were on the panel. This Court upheld the prosecutor's challenge of a prospective juror who might be sympathetic to a defendant who professed his innocence. (*Ibid.*) Here, prospective juror number 3's suggestion that she would require an admission before imposing the death penalty provided a race neutral justification for the prosecutor's challenge, especially because the prosecutor knew Streeter was likely to testify that he did not intend to kill Yolanda.

Streeter claims that like prospective juror number 3, prospective jurors 2, 10, 26, 61 and 62 explained their belief that not all intentional murders deserve the death penalty, such as acts of self-defense. (AOB 80-81.) Streeter overlooks an important distinction between those jurors and prospective juror number 3. Unlike prospective juror number 3, who felt the death penalty was appropriate only in very limited situations of intentional murder, the others specified limited situations of intentional murder where they felt the death penalty was *inappropriate*. Prospective juror number 62 somewhat agreed with the notion that everyone who intentionally kills another person should get the death penalty, with the only limitation being the possibility that a person was psychotic. (IVB CT

1094.) Others identified war, protecting family from immediate danger (Prospective juror number 61, IVB CT 1064-1082), self defense or mental illness (prospective juror number 2, IB CT 20-38) as possible examples of cases where death should not be imposed. While prospective juror number 26 indicated she strongly disagreed with the idea that everyone who kills another person intentionally should get the death penalty, she simply emphasized that it depends on the circumstances. (IIIB CT 457-475.) Likewise, prospective juror number 10 somewhat disagreed with that notion, indicating he must know the circumstances involved. (IB CT 153-171.) Again, prospective juror number 3 went further than the others, requiring that a person of sound mind admit to willful and knowing acts of cruelty.

(2) Prospective Juror number 44

Prospective juror number 44 was a 63-year-old widowed African American woman with three grown children. She was a social work supervisor, who indicated on her questionnaire that she had both spent time in prison and had visited prison, indicating she had served 30 days in custody 30 years earlier for committing credit card fraud, and had visited her husband who was in jail for drunk driving. She said she had read about the case in the newspaper before coming to court. She did not choose death or life in prison when asked which she thought was the harsher penalty, stating, "Never being able to plan a future - no freedom - no ability to make decisions - being in a close world forever is no life." She also indicated that some intentional murders can be so emotional, or a person temporarily insane, and those facts might affect her decision to impose the death penalty. (3B CT 760-778.)

Streeter asserts that prospective juror number 44's answer to question 35, which asked the jurors' level of agreement or disagreement with the statement that anyone who intentionally kills should always get the death

penalty, was similar to the answers given by prospective jurors 2, 26, 61 and 62. (AOB 83.) Streeter is wrong. Prospective juror number 44's answer to that question was different from the other jurors' answers in two important ways.

Prospective juror number 44 responded to question 35 by stating that some intentional murders can be very emotional, and the person temporarily insane, and those facts may alter the decision to give the death penalty. (IIIB CT 760-778.) None of the other prospective jurors identified by Streeter made any reference to the crime being "emotional" as a reason affecting the decision to give the death penalty. Further, while some of them referenced mental illness as a consideration, none identified "temporary insanity" as a factor affecting their ability to impose death. ("Not everyone kills for no reason. It could be self defense or the person could be mentally ill." [prospective juror number 2; IB CT 31]; "Depends on circumstances." [prospective juror number 26; IIB CT 468]; "There are circumstances which could justify intentionally killing someone, such as war, protecting family from immediate danger." [prospective juror number 61; IVB CT 1064-1082]; "But would also need to consider if the person is psychotic." [prospective juror number 62, IVB CT 1083-1101.)

Concerns about emotionally driven crimes, and temporary insanity, were unique to prospective juror number 44, as compared to others who expressed concerns about mental illness. Those are different concerns, and this is not a minor distinction. Streeter did not suffer from any mental illness but arguably tried to make a case of temporary insanity. Again, this was an intensely emotional case wherein Streeter was expected to defend himself on the basis that he was despondent and suicidal, and he "snapped." The record reveals ample, race-neutral reasons for the prosecutor to have concluded prospective juror number 44 was too great a risk as a juror on a death penalty case involving these facts.

The prosecutor's proffered race-neutral reasons for excusing prospective juror number 44 are borne out by the record. Streeter claims it was disingenuous for the prosecutor to point to this juror's aversion to murder as a reason she would not vote for death, and further that the prosecutor mischaracterized the juror's position on rehabilitation. (AOB 82-83.)

With respect to a prosecutor's reasons for exercising a peremptory challenge, his explanation need not be persuasive, so long as the reason was not inherently discriminatory. (*Rice v. Collins* (2006) 546 U.S. 333 [126 S.Ct. 969, 163 L.Ed.2d 824].) Indeed, it should be considered that the choice to use a peremptory challenge is "subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 238.) These principles should be considered in conjunction with the presumption that the prosecutor used peremptory challenges in a constitutional manner. (*People v. Morrison* (2004) 34 Cal.4th 698, 709.)

Other than the juror's demeanor, which was not captured in the record, the record bears out many of the prosecutor's concerns. There was nothing extreme in any of prospective juror 44's individual questionnaire responses, but considered in combination, this juror's answers provided legitimate cause for the prosecutor to conclude she was too great a risk to sit on a death penalty jury. The nature of her position as a social work supervisor, her own criminal experience and her husband's, and her statement differentiating between intentional murders that were emotional, or involved a person who was temporarily insane, paint a picture of a person who might have a heightened sensitivity towards people with emotional problems that would affect her willingness to impose the death penalty. Streeter was expected to portray himself as despondent and suicidal, so this prospective juror's reference to temporary insanity as a

factor affecting her decision about the death penalty was particularly significant, and the prosecutor's proferred justifications were genuine and legitimate.

(3) Prospective Juror number 46

Prospective juror number 46 was a 44 year old African American woman who was married with three children. She indicated she had not thought much about the death penalty, and could not think of a general purpose it would serve. She thought life was a harsher penalty than death, and stated her belief that not everyone should get the death penalty and few people do. She strongly disagreed that anyone who intentionally kills another person should automatically get the death penalty, and she answered "possibly" to the question of whether she could impose the death penalty in an appropriate case. (3B CT 798-816.)

Taken as a whole, this juror's responses suggest that she had never given much thought to her position on the death penalty and she was uncertain about her willingness to impose it. She stated she could "possibly" impose the death penalty in a case that warranted that punishment, revealing a person uncertain about her actual ability to follow through with that punishment even in the worst cases. In this way, prospective juror number 46's responses were similar to those of prospective juror S.B. in *Hamilton, supra*, whose answers revealed a naïve view of the criminal mind. (*People v. Hamilton, supra*, 45 Cal.4th at p. 904.) Her questionnaire alone contains adequate race-neutral reasons for the prosecutor to have excused her from this death penalty jury.

Streeter challenges the prosecutor's characterization of prospective juror number 46 as a loner, on the basis that the juror was married with three children. He further challenges this Court's reliance on that justification because the trial court did not make any findings as to that asserted reason. (AOB 84-85.) As set forth above, Streeter mistakenly

attributed the prosecutor's "loner" statements to prospective juror number 46, but the prosecutor was referring to prospective juror number 44. The prosecutor did not justify its challenge of prospective juror 46, and the court held that Streeter had failed to make a prima facie showing of discrimination.

Nonetheless, reversal is not required even if this Court determines the trial court erred in finding no prima facie case. As to prospective jurors 3 and 46, if this Court determines the record is inadequate to conclude the prosecutor exercised its peremptory challenges for genuine, race-neutral reasons, the matter should be remanded for a hearing to allow the trial court to make that determination. It is true that a substantial amount of time has passed since Streeter's trial, and the prosecutor may have no memory of his reasons for exercising those challenges. (See AOB 76-77.) But it is not a foregone conclusion that a remand would be an exercise in futility. The prosecutor stated at the time that he kept track of the jurors, understanding that these issues arise. (18 RT 1843.) The prosecutor did not offer his justifications for exercising peremptory challenges against prospective jurors 3 and 46 because the trial court found Streeter had not made a prima facie showing of discrimination. The record here contains no evidence of actual discrimination. This Court should not reverse a death judgment or effectively deem the prosecutor's actions discriminatory without first giving him an opportunity to explain.

The trial court properly denied Streeter's *Wheeler* motion at the first stage, finding he had not made a prima facie showing that the prosecutor exercised his peremptory challenges in a racially discriminatory manner. This Court should not conduct a comparative juror analysis, but if it does,

that analysis reveals that the three challenged jurors were excused for legitimate, race-neutral reasons.[21]

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING ADMISSION OF PHOTOGRAPHS, EXPERT TESTIMONY ABOUT THE NATURE AND DEGREE OF THE BURNS SUSTAINED BY THE VICTIM, AND A TAPE RECORDING OF HER SCREAMS OF PAIN AS SHE WAS BEING TRANSPORTED TO THE HOSPITAL, BECAUSE THAT EVIDENCE WAS RELEVANT TO THE ISSUES OF PREMEDITATION, DELIBERATION, AND INTENT TO TORTURE, AND WAS NOT UNFAIRLY PREJUDICIAL

Streeter contends the trial court committed prejudicial error by admitting autopsy and hospital photographs, a tape recording of Yolanda's screams during her transportation to the hospital, and expert testimony about the nature and extent of the burns she suffered. He claims the admission of those items of evidence violated California law as well as his federal constitutional rights to a fair trial and a reliable, non-arbitrary adjucation at all stages of a death penalty case. (AOB 86-104.) The evidence was properly admitted.

A. Relevant facts

At a pretrial hearing on Streeter's motion to limit the introduction of photographs of the victim, the prosecutor indicated his intent to introduce five photographs of the victim's injuries, exhibits 8 through 12. (5 RT 473.) Defense counsel objected on the grounds that the photographs were irrelevant and tended to inflame the jury. (5 RT 473.) The court ruled as follows:

> I will assume for the sake of this ruling that the purpose of these photographs, the relevancy, is to show the nature of the

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[21] If this Court finds error in the trial court's first stage denial of Streeter's *Wheeler* claim, the matter should be remanded to give the trial court an opportunity to rule on the prosecutor's justifications for excusing prospective jurors 3 and 46.

circumstances under which this body died and to illustrate through expert testimony what was likely to have caused those injuries and the effect of those injuries on the person as they were being inflicted. The effect being the degree of suffering, the extent of the suffering, period of suffering - - all going to the issue of the special circumstance of torture.

If there is no issue of identification and there is no issue as to cause of death, and there is no issue as to the circumstances leading up to the death, as to that I mean by the kinds of injuries that were inflicted on the body that lead to the death, then these photographs probably, at least as I now understand it, would not be particularly relevant.

On the issue of the degree of this pain and suffering, et cetera, towards torture, then it becomes an issue as to whether these are cumulative and whether all of them are really necessary to explain those issues.

It appears to me, without having some assistance from the expert who intends to use these photographs in his testimony, that photographs 8, 9 and 10 will be adequate for the purpose I have understood they are being offered. And in my opinion, they are adequate, because, although they all show basically the same type of injuries, No. 8 shows the lower portion of the torso on the front; No. 9 shows the injuries on the torso on the posterior or back portion; and No. 10 is showing anteriorly the upper torso and the face.

These three photographs show different areas of the body. Some duplication, but not a great deal. And it seems to me that those three photographs are sufficient for the expert to be able to cover the areas of injury on the body and use them for the purpose which has been offered.

11 and 12, in my opinion, do not add anything for the purpose that I have had given to me.

Now, if there are some other reasons why the expert needs these, he can tell me. But at least at this point I don't see how they add anything to what is shown in the other three. So at this juncture, I will limit the photographs to 8, 9, and 10. And 11 and 12 are not to be used.

(5 RT 476-477.)

Defense counsel also sought to prevent the People's burn expert from testifying about the pain and suffering Yolanda experienced after Streeter burned her. (6 RT 619.) Counsel argued the evidence was irrelevant, since Streeter admitted he caused her death, that the victim suffered a horrible death, and that she endured a lot of pain and suffering. (6 RT 619.) He argued the only purpose of the evidence was to inflame the passions of the jury. (6 RT 622.) The court ruled as follows:

> All I believe that he will be permitted to testify to is his professional evaluation of what happened as far as the injuries suffered.
>
> And I don't mean how they occurred, the circumstances of the conflict between - - the alleged conflict between the defendant and the victim, but simply to take the photographs and his other source of information describing the burns, severity of the burns, the possible source of infliction as to such burns, the severity of the pain that an individual would suffer receiving such burns and how long that suffering would, perhaps, continue and the ultimate cause of death.
>
> Now, as I ruled with Mr. Amador's experts, your individual - - and I'm sure you're aware of this - - is not going to be allowed to testify in his opinion the victim was tortured, and you're not going to be able to have him testify that in your opinion he thinks the burns were intentionally inflicted or that any state of mind of someone who inflicted those injuries, because this is no more competent evidence as far as your expert there as Mr. - - Dr. Kenya's opinions would be. . .

(6 RT 621.)

> I will deny [the defense motion to exclude expert testimony] on the basis of the offer of proof made by [the prosecutor], reserving, of course, the right to take whatever appropriate action I might need to take at such time as it becomes evident that maybe I should.

(6 RT 622-623.)

Pursuant to that ruling, Deputy Medical Examiner Steven Trenkle testified that the burns sustained by Yolanda Buttler were consistent with burns from a gasoline fire. He explained that the pain inflicted from these types of burns could be severe and potentially extreme. (7 RT 634-636.)

Dr. David Lee Vannix, the medical director at San Bernardino Medical Center and the attending surgeon at the burn center in charge of Yolanda's care, testified that Yolanda was admitted to the hospital on April 27, 1997 in critical condition with life-threatening burn injuries. (6 RT 640-644.) Defense counsel objected to the testimony of Dr. Vannix regarding the pain caused by burns. He claimed the evidence was cumulative and not a proper subject for expert testimony. The objection was overruled. (7 RT 645-646.)

Dr. Vannix explained that burns are classified as first, second and third degree. First degree burns involve redness to the skin, some pain, and do not blister or peel. Second degree burns from heat or flame usually look red, there may be some discoloration from ash or combustion, and the skin may be blackened until it is cleaned. The formation of blisters distinguishes first from second degree burns. Second degree burns involve injury to the deeper layer of dermis beyond the epidermis. If the dermis is injured nearly to its base and to the fatty tissue that underlies the skin, the burn is a third degree or full thickness burn. There may be blisters in a third degree burn, but in a very deep burn there may be none. Most commonly, a third degree burn is more white than red or pink, and there is a significant difference in the texture of skin that has suffered a third degree burn because the burn has denatured the protein structure, so the skin is thick and feels heavy and leathery, not elastic. (7 RT 648-649.) Wounds in the epidermis heal more quickly because the cells there build new cells and fill in the defect. Deeper and wider burns involve layers of skin that do not

have the cell type that makes more of itself to cover the wound. (7 RT 651.)

Nerve endings sense pain and transmit that information to our brains where it registers as pain. (7 RT 652.) Nerve endings in the dermis communicate information from the epidermis. Second degree burns are significantly more painful than first degree burns because they cause more injury to more nerve endings in the dermis than the epidermis. If there is a third degree burn and none of the nerve endings survive, the burn may not initially be painful. But that painlessness is a transient phenomenon because the nerve endings begin to regenerate, and within 24 hours a patient with third degree burns feels the pain associated with a second degree burn or worse. Dr. Vannix testified such pain is extreme, and "[i]t is among the most significant types of pain in human experience." (7 RT 653-654.)

With first and second degree burns, the onset of pain is immediate. With third degree burns, there is a delay in the onset of pain, but even with medication the pain will be felt within the first day. (7 RT 654.)

Dr. Vannix testified that paramedics are empowered to give narcotic medication during transportation because of the significant pain experienced by burn victims as they are taken from the scene to the hospital. The paramedics here were unsuccessful in administering pain medication to Yolanda although they tried to get an intravenous line started in three locations, and they placed a needle in the bone of Yolanda's leg. (7 RT 659, 661.) The burns were so deep and the skin was so thickened, the paramedics could not find or gain access to a vein. (7 RT 662.) Pain medications would have blunted the consciousness of pain but not to the point that Yolanda felt no pain or anxiety at all. (6 RT 668.)

Dr. Vannix testified that Yolanda sustained burns to 54 percent of her body surface. Although a small percentage of healthy 39 year old patients

might survive such burns, the injury to her lungs put her in a high risk category with a very low chance of survival. (7 RT 668.)

The last article of evidence challenged by Streeter is a tape recording of the events that occurred in the ambulance as Yolanda was transported to the burn center. The defense objected that the evidence was cumulative and unfairly prejudicial in violation of Evidence Code section 352. (7 RT 678-679.) The court overruled the objection.

> Okay. Well, it certainly is a vivid illustration of what was going on there. I can understand the defense position and to some extent it is cumulative. It's a different type of evidence and it is actually a presentation of what was going on at the time, rather than somebody's verbal recitation of what they recall.
>
> I suppose the degree of suffering which the victim was going through at that point does have some relevancy considering the issues which are going to be decided by the jury.
>
> We've certainly heard the - - a description by the doctors as to the type of injuries which she suffered and their opinions as to the degree of pain which such injury would result in.
>
> I cannot say, however, that it's not material and not relevant for them to actually hear from the victim's own mouth expressions of the kind of pain that she was sensing as it goes to the issues in the lawsuit.
>
> I find it relevant and it will be received and the prosecution will be allowed to play it.

(7 RT 679-680.)

B. Streeter's Federal Constitutional Claim Is Forfeited; In Any Event, There Was No Violation Of State Or Federal Law Because The Challenged Evidence Was Highly Relevant And Was Not Unfairly Prejudicial

Streeter's objections below were based on state evidentiary principles of relevance and unfair prejudice. (5 RT 473, 6 RT 619-622, 7 RT 678-679.) In *People v. Heard* (2003) 31 Cal.4th 946, this Court found the defendant had failed to preserve his federal constitutional claims on appeal

because he had not objected on those grounds in the trial court. (*People v. Heard*, *supra*, 31 Cal.4th at p. 972.) Here, too, Streeter's failure to raise his federal constitutional objections in the trial court forfeits the claims on appeal. To the extent his constitutional claims are merely a gloss on his objections in the trial court, they are preserved but without merit because the trial court did not abuse its discretion in admitting the evidence. (*People v. Riggs* (2008) 44 Cal.4th 248, 292, citing *People v. Partida* (2005) 37 Cal.4th 428, 437-438, and *People v. Prince* (2007) 40 Cal.4th 1179.)

Evidence Code section 352 provides,

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

A trial court's ruling in admitting evidence over an Evidence Code section 352 objection is reviewed for an abuse of discretion. The reviewing court determines whether 1) the evidence was relevant, and 2) the trial court abused its discretion in determining that the probative value of the evidence outweighed its prejudicial effect. (*People v. Ramirez* (2006) 39 Cal.4th 398, 453, citing *People v. Carter* (2005) 36 Cal.4th 1114, 1166.) Relevant evidence is any evidence having a tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, §210; *People v. Ramirez*, *supra*, 39 Cal.4th at p. 453.)

The challenged evidence was highly relevant. Streeter was charged with intentional, premeditated and deliberate murder, and the jury was instructed that

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

(11 RT 1119.)

Streeter was also charged with murder by torture, and as to that charge the prosecutor was required to prove

> the perpetrator committed the murder with a willful, deliberate and premeditated intent to inflict extreme and prolonged pain upon a living . . . human being for the purpose of revenge, extortion, persuasion or for any other sadistic purpose; and the acts or actions taken by the perpetrator to inflict extreme and prolonged pain were a cause of the victim's death.

(11 RT 1121.)

Streeter was also charged with a special circumstance of murder by torture, requiring proof that the murder was intentional, the defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose; and the defendant did, in fact, inflict extreme cruel physical pain and suffering upon a living human being no matter how long its duration. (11 RT 1130.)

People v. Cole (2004) 33 Cal.4th 1158 involved almost identical facts. There, the defendant doused the victim in gasoline and set her on fire. Like Yolanda, the victim in *Cole* sustained burns over 50% of her body and died ten days later from severe respiratory problems. Like Yolanda, she had been living in a violent, abusive relationship with a controlling man.

This Court rejected the defendant's argument that trial court erred by admitting evidence of the victim's suffering because it was irrelevant and violated Evidence Code section 352. The evidence was relevant because, at the time the defendant committed his crimes, the torture murder special circumstance required proof of the commission of an act calculated to cause extreme pain. This Court found evidence that the victim suffered extreme pain was relevant to prove the defendant committed an act calculated to cause extreme pain. (*Id.* at p. 1197.) Further, this Court found the trial

court acted within its broad discretion in concluding the probative value of the evidence was not substantially outweighed by its prejudicial effect, because although the evidence was disturbing, it was not unduly shocking or inflammatory, especially considering that proof of the torture murder special circumstance required proof of the commission of an act calculated to cause extreme pain. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1197.)

Although *Cole* was tried under a different version of the law regarding the special circumstance, its reasoning applies here with equal force. Proposition 115, effective June 6, 1990, eliminated "proof of the infliction of extreme physical pain no matter how long its duration" as an element of the special circumstance. But this Court held that evidence of the victim's pain and suffering was relevant proof of an act "calculated" to cause extreme pain. The torture murder special circumstance in effect at the time of Streeter's trial required proof of the intent to inflict extreme cruel physical pain and suffering (See 11 RT 1130) and evidence of Yolanda's pain and suffering was highly relevant to establish Streeter's state of mind.

In *People v. Washington* (1969) 71 Cal.2d 1061, the defendant poured gasoline on a bed in a room where several children were sleeping and lit a match, causing it to ignite. A 17-month old baby burned to death, and others were badly injured. The defendant was charged with murder by torture. Pictures of the child were excluded, but a doctor was permitted to testify that portions of the child's fingers came off when dressings were changed, that she cried out when she was touched, and that it was difficult to obtain nursing assistance because of the unpleasantness of the case. Another child was exhibited to the jury to demonstrate the nature and extent of her injuries. (*Id.* at p. 1072.) The doctor and a police officer described the nature and extent of the burns, and the doctor testified that the victim sustained third degree burns to 86 percent of her body, and pieces of her skin fell off when she was bathed. (*Id.* at p. 1083.)

This Court rejected the defendant's claim that the admission of this evidence was unduly prejudicial. The evidence was "clearly admissible in support of the prosecution's theory of murder by torture." The intent to inflict pain and suffering may be inferred from the condition of the decedent's body, and therefore it was proper for the prosecution to introduce evidence as to the extent of injuries to the victim. (*People v. Washington*, *supra*, 71 Cal.2d at 1083.)

The trial court here did not abuse its discretion in concluding that the photographs, the expert testimony and the tape recording of Yolanda's screams of pain helped paint a clear and accurate picture of Streeter's conduct on the day he murdered Yolanda. It was that conduct from which the jury was to draw inferences about Streeter's intent. As detailed below, each item of evidence clarified the manner in which Yolanda was killed and the severity of her injuries (See *People v. Ramirez*, *supra*, 39 Cal.4th at p. 453, citing *People v. Heard*, *supra*, 31 Cal.4th at pp. 946, 973; *People v. Crittenden* (1994) 9 Cal.4th 83, 132-133), and viewed independently or in conjunction with each of the other items of evidence, constituted important circumstantial evidence of Streeter's intent to kill Yolanda and his intent to inflict torturous pain.

The fact that Streeter acted in a way that caused Yolanda to sustain extremely painful burns is evidence that Streeter intended her to endure that pain. Streeter chose to pour gasoline on Yolanda and light her on fire. He did not shoot her with a gun, although he apparently had access to one, having used it shortly before the killing to pound on Victor's door. He did not run her down with his car or poison her or stab her. He did not choose a method of killing Yolanda which was likely to result in instant death, instead choosing to burn her from the outside in, using enough gasoline over enough of her body to make sure she died, and to make sure the last moments of her life were lived in excruciating, torturous pain.

The photographs of Yolanda's charred body gave meaning to expert testimony that the burns covered 55 to 60 percent of her body, and corroborated the testimony of witnesses who explained that her body was so charred the paramedics were unable to administer pain medications although they tried multiple times and used a last-resort method. (7 RT 659-662.). Through the tape recording, they heard Yolanda's terrorized screams of pain which otherwise would have defied description. And the expert witnesses explained the physical consequences of being burned which helped the jury understand exactly what Streeter had done to Yolanda and why it had killed her. (7 RT 630-638, 653-658.)

Streeter claims the evidence was irrelevant because it proved only that Yolanda suffered extreme pain. In support of his claim he cites *People v. Wiley* (1976) 18 Cal.3d 162, 173, for the proposition that a victim of murder by torture need not be aware of the pain inflicted upon her, and that knowledge of pain is not an element of the offense. (AOB 97-98.) But *Wiley* says nothing about the issue presented here: whether evidence of the victim's actual suffering is relevant to prove the defendant's intent to cause such suffering. And Streeter acknowledges that this Court has found such evidence is relevant to that issue. (See AOB 99, fn. 1, citing *People v. Cole, supra*, 33 Cal.4th at p. 1197.)

Especially viewed in the context of the rest of the evidence, evidence of Yolanda's pain was relevant to show Streeter's intent to cause it. The record contains ample evidence that Streeter knew that by pouring gasoline on Yolanda and lighting her on fire, she would sustain extensive burns and suffer extreme and torturous pain. The actual pain and suffering endured by Yolanda was the natural and predictable consequence of Streeter's actions. (See, e.g., *People v. Atkins* (2001) 25 Cal.4th 76 [holding that the crime of arson does not require a specific intent to burn, because the dangerous nature of the act contemplates the injury, such that one who sets

a fire under circumstances where the direct, natural and probable consequence is the burning of a structure or property is presumed to intend that result].) And further, Streeter's history as a welder's assistant, and his elaborate plan to die at the hands of another to avoid eternal fire as his own fate, reveal Streeter knew that burning Yolanda would inflict torturous pain. If, in contrast, Streeter shot a gun at Yolanda, the bullet unexpectedly ricocheted off a nearby gas tank, and an explosion resulted causing her to catch on fire, the pain she suffered would be less helpful in determining Streeter's intent. But here, with these facts, the trial court acted well within its discretion when it ruled Yolanda's pain and suffering tended to show Streeter intended to cause her pain and suffering.

Streeter argues his concessions during trial that he was the killer, that Yolanda suffered, and that she died a horrible death, removed these issues from the jury's consideration and rendered the evidence irrelevant. (AOB 86.) A defense offer to stipulate to the cause of death or manner of death does not negate the relevance of otherwise admissible evidence. (*People v. Scheid* (1997) 16 Cal.4th 1, 16.) The prosecutor is not obliged to prove relevant facts from testimony alone, or be compelled to accept an antiseptic stipulation. The jury is entitled to see how the victim's body supports the prosecution's theory, and photographs are one kind of physical evidence which may be introduced. (*People v. Pride* (1992) 3 Cal.4th 195, 243; *People v. Price* (1991) 1 Cal.4th 324, 433-435.) Nor may the prosecution be compelled to accept a defendant's offer to stipulate to the cause of death, in lieu of the disputed evidence, where the effect would be to deprive the state's case of its persuasiveness and forcefulness. (*People v. Arias* (1996) 13 Cal.4th 92, 131; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1007.) As one appellate court has explained:

> [A] defendant has no right to transform the facts of a gruesome real life murder into an anesthetized exercise where

> only the defendant, not the victim, appears human. Jurors are not, and should not be, computers for whom a victim is just an "element" to be proved, a "component" of a crime. A cardboard victim plus a flesh and blood defendant are likely to equal an unjust verdict.

(*People v. Thompson* (1992) 7 Cal.App.4th 1966, 1974.)

And finally, Streeter did not concede that he intended to inflict extreme physical pain upon Yolanda, and establishing that fact was the primary purpose of the evidence.

Having determined the evidence is relevant, the next inquiry is whether the trial court abused its discretion in concluding the the probative value of the evidence outweighed its prejudicial effect. (*People v. Ramirez*, *supra*, 39 Cal.4th at p. 453, citing *People v. Carter*, *supra*, 36 Cal.4th at pp. 1114, 1166.) With respect to the photographs, the trial court carefully described each photograph, the purpose for which it was offered, its relevance and whether or not it was cumulative. The court excluded two of the photographs. (5 RT 476-477.) With respect to the expert testimony, although the trial court did not expressly balance the probative value against the possible prejudice, the court clarified the limited scope of the evidence that would be admitted and impliedly found for that purpose, the evidence was not prejudicial. (6 RT 621-623.) Finally, as to the audiotape, the court expressly considered whether the evidence was cumulative and impliedly rejected the claim it was unfairly prejudicial. (7 RT 679-680.)

Here, as in *Cole*, the trial court acted well within its broad discretion in concluding the probative value of the evidence was not substantially outweighed by the danger of undue prejudice.

> The 'prejudice' referred to in Evidence Code section 352 is 'evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues.' [Citation.] Graphic evidence in murder cases is always disturbing and never pleasant.

(*People v. Cole*, *supra*, 33 Cal.4th at p. 1197.)

A court may admit even "gruesome" photographs if the evidence is highly relevant to the issues raised by the facts, or if the photographs would clarify the testimony of a medical examiner. (*People v. Ramirez*, *supra*, 39 Cal.4th at p. 453; *People v. Heard*, *supra*, 31 Cal.4th at p. 973; *People v. Crittenden*, *supra*, 9 Cal.4th at pp. 132-133; *People v. Coleman* (1988) 46 Cal.3d 749, 776.)

The evidence was not unfairly prejudicial. Streeter concedes the jury was properly instructed that his intent to commit torture was a necessary element of both torture murder and the torture murder special circumstance, and that no proof was required that the victim was actually aware of pain or suffering. (AOB 98, citing CT 213 (CALJIC No. 8.24), and CT 236 (CALJIC No. 8.81.18.)) If, as Streeter contends, the evidence of Yolanda's pain and suffering was irrelevant to prove his intent to kill and torture her, the jury simply would have dismissed it as extra information not pertinent to their ultimate decision.

That is true even though the evidence was extremely powerful and emotionally charged. That type of evidence is no more likely to be misused by a properly instructed jury than any other type of evidence. The jury was probably highly disturbed by the evidence. The evidence was extremely upsetting. But either it was highly relevant and the jury considered it for its proper purpose, or the jury dismissed the evidence as upsetting but irrelevant.

Streeter's argument that the dramatic sounds of Yolanda's screams in the ambulance, and the "gruesome" photographs and descriptions of her injuries, were likely to arouse the passions of the jury, is really just a claim that the trial court should have protected him from the horrific reality of what he had done. The true risk Streeter faced was not that the jury would

misuse the evidence but that they would properly use it to reach the conclusion they did.

Even if the admission of this evidence was error, it would not require reversal of the convictions because it is not reasonably probable the jury would have reached a different result had the evidence been excluded. (*People v. Heard*, *supra*, 31 Cal.4th at p. 978; *People v. Scheid*, *supra*, 16 Cal.4th at p. 21; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Even if the error violated Streeter's federal constitutional rights, it was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 18.) To overturn a conviction, the defendant must show that "the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

The evidence of Streeter's guilt was overwhelming, even in the absence of these items of evidence. Particularly since the evidence did not disclose information to the jury that was not presented in detail through the testimony of witnesses, and the evidence was no more inflammatory than the testimony of the witnesses, it is not reasonably probable that the admission of the evidence affected the jury's verdict, and any error was harmless beyond a reasonable doubt. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1199 [finding the admission of nine photographs of the victim's burns and injuries was not error, but would be harmless under either standard].)

Extensive evidence was presented detailing Streeter's violent, abusive relationship with Yolanda, in which he terrorized her, controlled her, alienated her from her family, acted violently in front of her children, raped her, and prevented her from seeking help. (8 RT 768-770, 10 RT 974-978, 10 RT 996-999.) When Yolanda finally planned and executed her dangerous escape, extensive evidence showed Streeter hunted her down, going from one member of her family to the next, angrily threatening to kill

them one by one and to make Yolanda pay for leaving him, as he pounded their homes and property with guns and rocks to make his point. (10 RT 1023-1035.) Once he found Yolanda, he carried out his threat in a horrific, catastrophic act of fiery rage. He poured gasoline on Yolanda's car where her disabled young niece was trapped inside, but she was heroically saved by the immediate response of Yolanda's 13-year- old son. (6 RT 526-527, 8 RT 756-757, 8 RT 769-770.) Then Streeter lit Yolanda on fire. All this in the middle of the afternoon, in the middle of a parking lot filled with people and children who watched as flames shot up 15 feet in the air from Yolanda's body. (6 RT 510-512, 523-524, 547, 552-553, 555, 590-591.)

Yolanda's children watched her burn. (6 RT 525-526, 539, 556-557, 7 RT 687-689, 8 RT 770.) Her skin seared and melted and charred as she screamed for her children and then begged to be killed. (7 RT 672, 687-690.) Streeter's plans were thought out to the last detail; to torture Yolanda and cause her death by fire while protecting himself from a fate of eternal burning by making sure his own death occurred at someone else's hands. (7 RT 633, 636, 653-654, 661, 758-759.)

Evidence of the extreme pain and suffering Yolanda endured was highly relevant evidence of Streeter's intent to cause such pain and suffering. The trial court acted well within its discretion in admitting the evidence, and in light of the overwhelming evidence of Streeter's guilt, any error was harmless.

V. THE ADMISSION OF YOLANDA'S DECLARATION IN SUPPORT OF A TEMPORARY RESTRAINING ORDER DID NOT VIOLATE THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT

Streeter contends the admission of Yolanda's declaration in support of a restraining order against him violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. (AOB 104-117.) The rule of forfeiture by wrongdoing prevents Streeter from raising this

challenge because Streeter killed Yolanda with the intent of making her unavailable as a witness. If the trial court erred in admitting Yolanda's declaration, the error was harmless beyond a reasonable doubt in both the guilt and penalty phases of Streeter's trial, because the declaration merely corroborated events that were fully presented to the jury through other admissible evidence, the declaration described events that were wholly separate from the charged incident, and the declaration was relevant only to establish Yolanda's fear of Streeter and his motive and intent for committing the crime, which were otherwise established by overwhelming evidence.

A. Relevant Facts

On August 14, 1998, the People filed a motion to admit a declaration filed by Yolanda in an application for a restraining order against Streeter, in which Yolanda set forth incidents in which Streeter had violently abused her. The People argued the statements were admissible pursuant to Evidence Code section 1370[22] and that the evidence was relevant. (1 CT 103-109.)

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[22] At the time of Streeter's trial, Evidence Code section 1370 provided, "(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all the following conditions are met: ¶ (1) The statement purports to narrate, describe or explain the infliction or threat of physical injury upon the declarant. ¶ (2) The declarant is unavailable as a witness pursuant to Section 240. ¶ (3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section. (4) The statement was made under circumstances that would indicate its trustworthiness. ¶ (5) The statement was made in writing, was electronically recorded, or made to a law enforcement official. ¶(b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following: ¶ (1) Whether the statement was made in contemplation of pending or

(continued...)

Streeter orally opposed the motion on the grounds that admission of the declaration would violate the Evidence Code and the Confrontation Clause. (3 RT 204-205.) On August 24, 1998, the motion was granted. (1 CT 114, 3 RT 207-211.)

The declaration was admitted at trial. It stated,

> On December 30th, 1996, Howard went crazy. He took my braids and wraped (sic) them around his hand. He had a very very tight grip on them. He kept pulling and pulling on my braids so hard he pulled my hair out of my head. When I would scream he told me to shut up and put his hand on my neck.
>
> All of this because I wouldn't have sex with him. When my daughter came to see what was happening he told her to leave, he said if she didn't leave she could stand there and watch.
>
> He would start drinking and get realy (sic) mean. He push (sic) me out the house and lock the door. He would throw things at me. One time he held me down because I wouldn't give him my bank card. He would push me around. He would call me bitches and hores (sic.) One time we went to Knotts Berry Farm he told me if I didn't leave with him, he would beat my ass and every one around us heard. Some times he would make me give him my money and he would make me have sex with him.

(1 CT 108-109; Ex. 21.)

(...continued)
anticipated litigation in which the declarant was interested. ¶ (2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive. ¶ (3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section. ¶ (c) A statement is admissible pursuant to this section only if the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement."

B. The Rule Of Forfeiture Prevents Streeter From Raising A Confrontation Clause Challenge

The Sixth Amendment Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (*Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177].) Prior to the decision in *Crawford*, the admission of an unavailable witness's out of court statement did not violate the Confrontation Clause if it had adequate indicia of reliability, meaning it fell within a firmly rooted exception to the hearsay rule or bore particularized guarantees of trustworthiness. (*Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597].) *Crawford* overruled *Roberts* and held, "Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Crawford v. Washington, supra*, 541 U.S. at p. 68.)

The declaration at issue is testimonial. Testimony is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." (*Crawford v. Washington, supra*, 541 U.S at p. 51, citing Webster, An American Dictionary of the English Language (1828).)

> An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.

(*Crawford v. Washington, supra*, 541 U.S. at p. 51.)

Crawford left for another day an effort to spell out a comprehensive definition of "testimonial," but its analysis made it clear certain types of statements were testimonial. (*Id.* at p. 68.) Examples of those classic types of testimonial statements include ex parte in court testimony or its functional equivalent, such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross examine, or similar

pretrial statements that declarants would reasonably expect to be used prosecutorially. (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 51-52.) Here, Yolanda Buttler's statement under penalty of perjury, made for the purpose of obtaining a judicial order against Streeter, is a solemn declaration akin to an affidavit and is therefore testimonial.

Streeter does not appear to have had an opportunity to cross examine Yolanda about the contents of her declaration. In *People v. Price* (2004) 120 Cal.App.4th 224, a domestic violence case, the trial court admitted evidence of statements made by the victim to police officers. The victim refused to testify at the defendant's trial so she was found to be unavailable, and the trial court applied the then controlling law of *Ohio v. Roberts* and found the statements sufficiently reliable that their admission did not violate the Confrontation Clause. *Crawford* was decided while the defendant's appeal was pending, and the Court of Appeal requested briefing on the applicability of *Crawford*. (*Id.* at p. 237.)

The parties agreed that *Crawford* applied to the case, based on the general rule that even a nonretroactive decision governs cases that are not yet final when the decision is announced. (*Id.* at pp. 238-239.) The question confronted by the Court of Appeal was whether Evidence Code section 1370, under which the victim's statements were admitted, survived the decision in *Crawford*. Reasoning that a statute must be construed in a manner that is consistent with applicable constitutional provisions and seeking to harmonize the Constitution and the statute, the court construed Evidence Code section 1370 along with *Crawford* and held, "we interpret the trustworthiness prong of subdivision (a)(4) of that statute to require a prior opportunity to cross-examine the declarant." (*Id.* at p. 239.) The court found the defendant not only had the opportunity for cross examination, but vigorously exercised that opportunity at his preliminary hearing. (*Ibid.*)

In this case, nothing in the record suggests that Yolanda was actually subjected to cross examination regarding the contents of her declaration, and there is no evidence that Streeter was given an opportunity to cross-examine her. Streeter points out his own testimony that he was never served with the restraining order and was unaware of it until the time of trial. (AOB 108.) There was no evidence contradicting his testimony to indicate that he was served, or that he was informed of his right to a hearing on the matter.

But that does not end the inquiry. Of course, Yolanda was unavailable to testify at Streeter's trial because she was dead. Streeter killed her, and by causing her unavailability with the intent of preventing her testimony, he forfeited his rights under the Confrontation Clause of the United States Constitution.

Crawford criticized the *Roberts* test as allowing a jury "to hear evidence, untested, by the adversary process, based on a mere judicial determination of reliability" thus replacing "the constitutionally prescribed method of assessing reliability with a wholly foreign one." However, the Court emphasized that

> [i]n this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. *For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds*; it does not purport to be an alternative means of determining reliability. See *Reynolds v. United States*, 98 U.S. 145, 158-159 (1879).

(*Id.* at p. 2955, italics added.)

In *Reynolds*, the Supreme Court asserted:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not

> guarantee an accused person against the legitimate consequences of his own wrongful act. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

(*Reynolds v. United States* (1879) 98 U.S. 145, 158.)

> The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony.

(*Id.* at p. 159; see also *United States v. Cherry* (10th Cir. 2000) 217 F.3d 811, 819-820 [a defendant may be deemed to have waived his or her confrontation clause rights if a preponderance of the evidence establishes, among other things, that he or she participated directly in planning or procuring the declarant's unavailability through wrongdoing].)

In *Giles v. California* (2008) __ U.S. __ [128 S.Ct. 2678, 171 L.Ed.2d 488] the United States Supreme Court made it clear that the rule of forfeiture only applies when the defendant's wrongful actions were conducted for the purpose of making the witness unavailable. In *Giles*, the defendant shot and killed his ex-girlfriend outside her grandmother's home. He claimed the shooting was in self-defense. Prosecutors introduced a statement made by the victim to police approximately three weeks before the shooting. Police had responded to a domestic violence call and found that the victim had been crying. She told the officers that the defendant had accused her of having an affair, they had argued, and he grabbed her shirt, lifted her off the floor and began choking her. She said she broke free and he punched her in the face and head, and when she broke free again, he held a knife three feet from her and told her he would kill her if she cheated again. These statements were admitted pursuant to Evidence Code section

1370 over the defendant's objection. The Court of Appeal upheld the conviction and the California Supreme Court affirmed, because *Crawford* had expressly recognized the doctrine of forfeiture by wrongdoing. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 2682.)

The United States Supreme Court reversed. It held the theory of forfeiture by wrongdoing applied when the defendant engaged in conduct designed to prevent the witness from testifying. The matter was remanded for the state courts to consider whether the defendant had the required intent. (*Id.* at p. 2693.)

It is noteworthy that the United States Supreme Court in *Giles* remanded the matter for a determination of whether the defendant's conduct was designed to prevent the victim from testifying. The Court did not rule out the possibility that the doctrine of forfeiture would apply if additional facts were developed revealing the defendant acted with the required intent. Those facts are present here.[23]

In describing the relevant considerations in the unique context of domestic violence, the Supreme Court noted that while the Confrontation Clause applies equally to all types of crimes, the context of domestic violence is relevant to a determination of whether a defendant acted with the purpose of preventing a witness's testimony.

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[23] *Giles* did not set forth any particular quantum of proof required for a finding that a defendant acted with the intent of making a witness unavailable. Nor did it imply that such an intent had to exist to the exclusion of all others, or even that it be the defendant's primary intent in committing the wrongful act. In fact, the Court's discussion, set forth below, suggests that an abusive relationship which is characterized by isolating the victim and preventing her from reporting abuse to authorities is sufficient in itself to establish an intent to make the victim unavailable when such a relationship culminates in murder. The evidence here established exactly that situation.

Acts of domestic violence often are intented to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution - - rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 2693.)

In contrast to *Giles*, where remand was necessary for the development of evidence on the aforementioned issues, both the guilt and penalty phase record here contain ample evidence of the type the Supreme Court deemed "highly relevant to this inquiry." During both phases of the trial, there was extensive testimony from Yolanda Buttler's children and family members about Streeter's violent acts against Yolanda spanning the last year of their relationship, and her bloody scalp and hair loss after the December 30th incident. Streeter dissuaded Yolanda and her children from seeking outside help. Lawanda Johnson testified that although she witnessed a horrible act of violence against her mother on December 30th, and such acts happened continuously over the last year of Streeter and Yolanda's relationship, she did not call the police because she had done so in the past, and this caused Streeter to become angrier and escalated the abuse. (10 RT 996-997 (guilt phase); 19 RT 1937-1939, 1948 (penalty phase.)) Lawanda testified that Streeter pulled the phone cord out of the wall so they would not be able to call the police, and that when she had called the police in the past, Streeter would stay home from work and watch every move they made. She did not

want that to happen because they had already planned an escape while Streeter was expected to be at work. (19 RT 1948-1949 (penalty phase.)) Lucinda Buttler testified that Streeter did not allow Yolanda to talk to her family, so when Streeter was at work, Yolanda would call Lucinda and Lucinda would call her right back so as to prevent the phone bill from showing the call. (10 RT 1004-1011 (guilt phase); 10 RT 2119-2120 (penalty phase).) Patrick testified that he went with his mother to Chuck E. Cheese that day because he was afraid for her and wanted to protect her. (8 RT 767-771 (guilt phase) 19 RT 2072-2073 (penalty phase.)) At the penalty phase, Lucinda testified Streeter would do things to Yolanda's car to prevent her from leaving the apartment. (19 RT 2121.)

This case had all the characteristics identified in *Giles*; an extremely abusive relationship in which Streeter isolated Yolanda and prevented her from seeking outside help, with conduct designed to prevent testimony to police officers or cooperation in a criminal prosecution. Streeter committed his final act of murder because Yolanda had escaped, and she had turned against him by seeking protection. The record contains sufficient evidence to conclude that Streeter killed Yolanda with the intent to prevent her from being a witness. The doctrine of forfeiture thus prevents Streeter from asserting his rights under the Confrontation Clause.

C. Any Error In Admitting The Declaration Was Harmless Beyond A Reasonable Doubt

Trial errors in violation of the federal constitution require reversal unless they are harmless beyond a reasonable doubt. This standard applies to violations of the Confrontation Clause. (*Harrington v. California* (1969) 395 U.S. 250, 288 [89 S.Ct. 1726, 23 L.Ed.2d 284], citing *Chapman v. California*, *supra*, 386 U.S. at p. 18.) Assuming arguendo the admission of Yolanda Buttler's declaration violated the Confrontation Clause, Streeter's conviction and death sentence should nonetheless be affirmed because the

error was harmless. The declaration merely corroborated events that were fully presented to the jury through other admissible evidence, the declaration was relevant only to establish Yolanda's fear of Streeter and his motive and intent for committing the crime which were otherwise established by overwhelming evidence, the declaration described events that were wholly separate from the charged incident, and the jury was instructed about the limited use of the evidence.

Where wrongfully admitted evidence is cumulative, and the evidence of a defendant's guilt overwhelming, a Confrontation Clause error may be harmless. (*Harrington v. California*, *supra*, at pp. 287-288.) That is undeniably the case here.

All the statements made by Yolanda in the declaration were thoroughly described to the jury through live witnesses. The most egregious events were described in great detail by eyewitnesses who testified about the events themselves and the injuries Yolanda sustained.

Lawanda provided far more vivid detail about the events set forth in the declaration than the declaration itself. Lawanda testified that Streeter threatened Yolanda, pushed Yolanda around and threw stuff at her. She identified herself as the daughter referred to in the restraining order application, which bears her mother's signature. Lawanda testified about the events referenced in the restraining order. It was after midnight and she woke up to her mother screaming. Streeter was pulling her mother's hair and dragging Shavonda by her leg brace in the presence of Little Howie. Yolanda was yelling at Streeter to stop because Little Howie was watching. Yolanda was screaming as Lawanda came to see what was happening. Streeter told Lawanda, "if you want to watch, then I'll just pull harder." Lawanda stopped watching because Yolanda began screaming louder. Streeter did not stop. He got on top of Yolanda and tried to do something sexually to her. He was on top of her and both their pants were down. He

did not care that Little Howie was present. Shavonda woke up but she was too scared to get up. Streeter tortured Yolanda for hours. The next day, Yolanda's head was sore on the back and the sides. These incidents happened over the course of the last year of Streeter and Yolanda's relationship. Lawanda testified she knew about all of the incidents mentioned in the restraining order. (10 RT 993-999 (guilt), 19 RT 1937-1949 (penalty).)

Other witnesses provided further detail about the events that occurred in December. Lucinda Buttler, Yolanda's sister, testified that Yolanda told her Streeter was abusive during the last two years of their relationship, and that Yolanda told her about the incidents in the restraining order. She witnessed Streeter push Yolanda out the door when Yolanda did not want to leave their mother's house after her father's funeral. (10 RT 1004-1011 (guilt); 20 RT 2131 (penalty).)

During the guilt phase, Quentin Buttler, Yolanda's brother, testified that he observed and photographed blood, scars and scabs on Yolanda's head in December 1996 which Yolanda said had occurred when Streeter beat her up and pulled her hair out. (10 RT 974-975.) Yolanda told her siblings about the beatings and they agreed to help her move and tried to convince her to move in with them to protect her. (10 RT 974-975.) Quentin testified that he advised Yolanda to seek the restraining order after she told him what Streeter had been doing. (10 RT 974-975.) Quentin testified Yolanda told him she was scared and she wanted to leave Streeter because he was beating her. She was so afraid she refused to live with her siblings so she and her children stayed in a motel to make her feel safer. (10 RT 977-980.)

The declaration merely corroborated the detailed testimony of these witnesses. The declaration described events wholly separate from the charged incident, and all of this background evidence was relevant only to

the extent it showed Streeter's malice and intent at the time he committed the charged crime. The jury was so instructed.

> During the trial, certain evidence was admitted for a limited purpose and you're not to consider that evidence for any other reason beyond that purpose.
>
> Evidence was offered and received concerning the contents of a declaration and made by the deceased, Yolanda Buttler, made in connection with the issuing of a restraining order by a court against the defendant.
>
> . . .
>
> This evidence was received for the limited purpose of showing intent and/or malice at the time of the killing of Yolanda Buttler. You are admonished that you are not to consider this evidence as showing that the defendant is a bad person, of bad character, prone to commit acts of violence or to show that he committed other offenses on these prior occasions.

(11 RT 1111-1112.)

Moreover, at the guilt phase trial, the prosecutor went to great lengths to make sure none of the evidence of Streeter's prior conduct would be misused by the jury. At the beginning of his closing argument during the guilt phase, the prosecutor said,

> And I know we've put on a lot of evidence that may make the defendant sound like a bad guy. But you should not think of him as a bad guy. In making your decision, you should follow the law and don't just convict him because you may not like him, may not think he's a good guy.

(11 RT 1063.)

Finally, considering the overwhelming evidence against Streeter, there is no reasonable doubt that the same result would have been reached had the declaration not been admitted. Extensive evidence was presented at both phases of the trial detailing Streeter's violent, abusive relationship with Yolanda, in which he terrorized her, controlled her, alienated her from her family, acted violently in front of her children, and prevented her from

seeking help. (8 RT 768-770, 10 RT 974-978, 10 RT 996-999 (guilt), 19 RT 1937-1939, 1942-1944, 20 RT 2119-2121, 2124 (penalty.) When Yolanda finally planned and executed her dangerous escape, extensive evidence showed Streeter hunted her down, going from one member of her family to the next, angrily threatening to kill them one by one and to make Yolanda pay for leaving him, as he pounded their homes and property with guns and rocks to make his point. (10 RT 1023-1035 (guilt), 19 RT 1947-1948, 1960-1971, 2005-2016, 2018, 20 RT 2124-2130 (penalty.) Once he found Yolanda, he carried out his threat in a horrific, catastrophic act of fiery rage. He poured gasoline on Yolanda's car where her disabled young niece was trapped inside, who was heroically saved by the immediate response of Yolanda's 13-year-old son. (6 RT 526-527, 8 RT 756-757, 8 RT 769-770 (guilt), 19 RT 2069-2070, 2075-2076 (penalty.)) Streeter wanted to ruin Yolanda's life because she had ruined his. (24 RT 2561-2562 (penalty.) Then he lit her on fire. All this in the middle of the afternoon, in the middle of a parking lot filled with people and children who watched as flames shot up 15 feet in the air from Yolanda's body. (6 RT 510-512, 523-524, 547, 552-553, 555, 590-591(guilt), 19 RT 2064-2065, 2068, 21 RT 2173-2182, 2186, 24 RT 2566 (penalty.))

Her children watched her burn. (6 RT 525-526, 539, 556-557, 7 RT 687-689, 8 RT 770 (guilt), 19 RT 2076-2079, 21 RT 2186. (penalty.)) Her skin seared and melted and charred as she screamed for her children and then begged to be killed. (7 RT 672, 687-690 (guilt), 19 RT 1990-2003 (penalty.)) His plans were thought out to the last detail; to torture Yolanda and cause her death by fire while protecting himself from a fate of eternal burning by making sure his own death occurred at someone else's hands. (7 RT 633, 636, 653-654, 661, 758-759 (guilt), 20 RT 2108, 2112-2113 (penalty.)

The judgment against Streeter was unaffected by the admission of Yolanda's declaration. His conviction and death sentence should be affirmed

VI. STREETER'S CONVICTION FOR FIRST DEGREE MURDER WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

Streeter contends his conviction for first degree murder was not supported by sufficient evidence of any of the three theories offered by the prosecution. For this reason, he claims, the jury was improperly instructed on each of those three theories. (AOB 117-147.) Streeter is wrong. Substantial evidence supports his conviction on all three theories; that the murder of Yolanda was deliberate and premeditated, that Streeter carried out his plan to murder Yolanda by lying in wait, and that he committed the murder by means of torture.

> The standard of appellate review of the sufficiency of the evidence to support a jury verdict is settled. "In assessing a claim of insufficiency of the evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) . . . The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) '"Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment."' [Citations.]"' (*Id.* at pp. 792-793.)" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

(*People v. Story* (2009) 45 Cal.4th 1282, 1296.)

The standard of review for challenges to the sufficiency of the evidence is the same under the California and the federal constitutions. (*Jackson v. Virginia* (1979) 443 U.S. 307, 314 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Cole, supra*, 33 Cal.4th at pp. 1158, 1212.) Streeter correctly notes that the issue of instructional error as it pertains to each of the three theories of murder involves essentially the same inquiry. (AOB 118.)

> A trial court must instruct the jury on every theory that is supported by substantial evidence, that is, evidence that would allow a reasonable jury to make a determination in accordance with the theory presented under the proper standard of proof.

(*People v. Cole, supra*, 33 Cal.4th at p. 1206, citations omitted.)

The trial court's decision regarding jury instructions is reviewed de novo, following a determination as to the sufficiency of the evidence.

> Stated differently, we must determine whether a reasonable trier of fact could have found beyond a reasonable doubt that defendant committed murder based on the [relevant] theory.

(*Ibid.*, citations omitted.)

Streeter was convicted of murder in the first degree. Murder is the unlawful killing of a human being with malice aforethought. (Pen. Code, §187, subd. (a).) Murder that is willful, deliberate and premeditated, or which is perpetrated by means of lying in wait or by torture, is murder of the first degree. (Pen. Code, §189.)

The jury was instructed on the law of first degree murder generally, as follows:

> Every person who unlawfully kills a human being with malice aforethought is guilty of the crime of murder in violation of section 187 of the Penal Code.
>
> A killing is unlawful if it is neither justifiable nor excusable.

In order to prove this each (sic) crime following elements must be proved: One, a human being was killed; two, the killing was unlawful; and three, the killing was done with malice of (sic) aforethought.

Malice may be either express or implied.

Malice is express when there is a manifested - - when there is manifested an intention unlawfully to kill a human being.

Malice is implied when the killing resulted from an intentional act; the natural consequences of the act are dangerous to human life; and the act was deliberately performed with the knowledge of the danger to, and with conscious disregard for, human life.

When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought.

The mental state constitutes - - constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

The word "aforethought" does not imply deliberation or lapse of considerable time. It only means that the required mental state must precede rather than follow the act. (11 RT 1118-1119, 1 CT 209, CALJIC No. 8.10.)

The jury was also instructed on the lesser included offenses of second degree murder and voluntary manslaughter. (11 RT 1122-1126, 1 CT 214, 218, CALJIC Nos. 8.30, 8.42.)

The prosecutor explained the three theories of first degree murder during his closing argument.

In this case you have three choices, three paths to first degree murder. The first choice would be premeditated and deliberate murder, like I have just kind of explained here.

. . .

> We don't have the Felony Murder Rule here, but we do have something like it, and I am going to cross it out. We do have "Lying in Wait Murder." L.I.W. for lying in wait.
>
> I will express or explain it to you in a minute. It is another way to get to first degree. Or torture murder is another way.
>
> So there are three paths to first degree murder. 1. Premeditated, deliberate. 2. Lying in wait, and 3. Torture murder.
>
> You don't have to have all three of these by any means. You can have just one of them and get to first degree murder.

(11 RT 1067-1068.)

A. Deliberate and Premeditated Murder

A murder that is premeditated and deliberate is murder in the first degree. (Pen. Code, § 189.) "Premeditated" means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." (*People v. Mayfield* (1997) 14 Cal.4th 668, 767, quoting CALJIC No. 8.20 (5th ed. 1988.) An intentional killing is premeditated and deliberate "if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.)

This Court has explained that the reflection need not take place over a particular period of time.

> The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity, and cold, calculated judgment may be arrived at quickly."

(*People v. Mayfield*, *supra*, 14 Cal.4th at p. 767, quoting *People v. Thomas* (1945) 25 Cal.2d 880, 900.)

The jury was instructed on premeditated, deliberate murder as follows:

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

The word "willful" as used in this instruction means intentional. The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditate" means considered beforehand.

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

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

The true test is not in the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation so as to fix an unlawful killing as murder of the first degree.

(11 RT 1119-1120, 1 CT 211, CALJIC No. 8.20.)

Streeter claims the evidence was insufficient to establish a premeditated, deliberate killing. (AOB 122-129.) Where an appellate court reviews the sufficiency of the evidence to support a jury's finding of premeditation, the reviewing court need not be convinced beyond a reasonable doubt that the defendant premeditated the murder; the relevant inquiry is whether any rational trier of fact could have been so persuaded. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1020; see also *People v. Wharton* (1991) 53 Cal.3d 522, 546.)

A reviewing court typically considers three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported: preexisting motive, planning activity, and manner of killing. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 543; *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) However, these factors "are not exclusive, nor are they invariably determinative" (*People v. Combs* (2005) 34 Cal.4th 821, 850), and they "need not be present in any particular combination to find substantial evidence of premeditation and deliberation." (*People v. Stitely*, *supra*, 35 Cal.4th at p. 543; *People v. Silva*, *supra*, 25 Cal.4th at pp. 345, 368.) The aforementioned three factors serve to

> guide an appellate court's assessment of whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse.

(*People v. Bolin* (1998) 18 Cal.4th 297, 331-332.)

In fact,

> the method of killing alone can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder.

(*People v. Memro* (1995) 11 Cal.4th 786, 863-864.)

In conducting this analysis, a reviewing court draws all reasonable inferences necessary to support the judgment. (*People v. Stitely, supra*, 35 Cal.4th at p. 543.)

The evidence in all three categories was overwhelming. Streeter had a clear and classic motive for murdering Yolanda; she had left him, and taken their child. He wanted her back, and when she refused, he wanted revenge. He planned every detail of the murder, including arranging for the care of their son, and arranging for his own death at the hands of police. The manner of killing and the circumstances surrounding the murder

provide compelling evidence that Streeter reflected and deliberated on his intentions prior to killing Yolanda.

1. Substantial Evidence Of Motive Demonstrates Premeditation and Deliberation

While motive is *not* required to support a conviction for first degree murder (*People v. Orozco* (1993) 20 Cal.App.4th 1554, 1567) and "'[a] senseless, random, but premeditated, killing supports a verdict of first degree murder'" (*Ibid.*, quoting *People v. Thomas* (1992) 2 Cal.4th 489, 519), there was substantial evidence Streeter here had a clear and classic motive for killing Yolanda. [24] Streeter was angry that she had left him, and that she had betrayed him by turning to her family for assistance and support. He was angry that he could not convince her to give him another chance, and he wanted revenge.

The evidence revealed that Yolanda told her siblings about the beatings and they helped devise a plan for her to move out while Streeter was working. (9 RT 974-975.) Yolanda detailed prior incidents of violence in a restraining order application. (9 RT 974-975, Ex. 21.) Lucinda Buttler testified that Streeter did not like Yolanda to talk on the phone or visit, so they talked secretly. Over the past two years, Yolanda told Lucinda she wanted to leave Streeter, and she said that he was abusive during the last year. Lucinda helped Yolanda to move. Lucinda testified that Streeter threatened to kill members of their family one by one when he was trying to find Yolanda and Little Howie. (9 RT 1004-1010.)

Patrick testified that Yolanda and the children left Streeter and went into hiding in Victorville. (8 RT 761-762.) Streeter began calling the

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[24] The jury was instructed that although motive was not an element of the crimes charged in the case, presence of motive may tend to establish the defendant's guilt, and absence of motive may tend to show the defendant is not guilty. (11 RT 1115.)

house quite often. When Yolanda agreed to meet Streeter at Chuck E. Cheese, Patrick went along to try to protect her. (8 RT 767-768.) By stipulation, the parties agreed Patrick would testify that Yolanda was nervous because Streeter had been calling to get back together with her. (8 RT 771.)

Victor Buttler testified Streeter pounded on his door in the middle of the night, broke the windows of his wife's van, and threatened that people in the family were going to start dropping like flies if Victor did not tell Streeter where Yolanda was. Streeter was carrying a gun when he came to Victor's house. (9 RT 1026, 1034.) Streeter called and threatened Victor over the next several weeks. (9 RT 1030.)

Edward Jasso testified that as Streeter was fighting with Yolanda, he called her a "fucking bitch." (6 RT 596.) He looked angry and called her names. (6 RT 605-606.)

Streeter himself admitted that he was in shock and hurt when Yolanda left him. (9 RT 868-870.) He admitted calling Victor in Fontana, going to his house, and breaking his car windows with a bat. Then he went to Rallin's house in Rancho Cucamonga, yelled that he wanted his wife and kids back, and threw a rock through a window. (9 RT 870-873, 935.) Streeter then went to Yolanda's sister's house in Los Angeles, and told her something bad would happen to Yolanda's family if they tried to keep his family from him. (9 RT 874, 935.) Streeter returned to Fontana but testified he was too hurt to go to work. (9 RT 874-875.) He was arrested after he called Victor, and Victor tricked him into thinking that Yolanda and Little Howie were there. (9 RT 875-877.)

Streeter testified that when he was released from jail, he did not know where Yolanda and the children were. He lost his apartment. When he finally found Yolanda he told her he wanted her back but she would not give him a second chance. (9 RT 882.) During the two to three weeks

between their initial meeting and the meeting at Chuck E. Cheese, Streeter called Yolanda almost daily to tell her he wanted her back, but she refused. He told her that if she did not come back to him, he might do something to himself, and he could not live without her. (9 RT 885-887.)

The foregoing constitutes substantial evidence of Streeter's motive to kill Yolanda.

2. Substantial Evidence Of Planning Activity Demonstrates Premeditation and Deliberation

Even if the murder was not planned weeks and months in advance, premeditation and deliberation can occur in a brief interval, and the test is not time, but reflection, as "'[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'" (*People v. Osband* (1996) 13 Cal.4th 622, 697, quoting *People v. Memro*, *supra*, 11 Cal.4th at pp. 862-863; see also *People v. Bloyd* (1987) 43 Cal.3d 333, 348.) In other words, the absence of protracted and elaborate planning activity is not fatal to finding sufficient evidence of premeditation. (*People v. Millwee* (1998) 18 Cal.4th 96, 134.)

Overwhelming evidence established Streeter planned Yolanda's murder down to the last detail, even providing for his own death at the hands of another, and making provisions for the care of his son. Fontana Police Officer Julie Hoxmeier testified she found a suicide/homicide note in Streeter's car. (6 RT 613-618.) The note said,

> to mom and pop, I hate to do you gys (sic) like this but I don't like living (sic) the way I am so I don't know what to say but I love you both and I am very sorry to have to put you though (sic) this but my life is over I don't have any thing to live for any more. I know it going to cost a lot to berrie (sic) me but I am sorry I hope you both understand and I know what I did to Youlanda (sic) is worng (sice) but she don't dersive (sic) to live like me. P.S. If you can get my son Baby Howie and raise him to the best of your abbilty (sic). Tell him his dady (sic) is sorry for what I did but I will alway (sic) love him and to don't never

fall in love with a women (sic). Love alyaw (sic) Howie. (Ex. 5, I CT 84.)

Fontana Police Officer Michael Stark testified the club locking device was secured on the steering wheel of Streeter's car, and the gas cap was laying on the bumper. (8 RT 740-742.) Streeter's suicide/homicide note concluded with Streeter asking his parents to raise Little Howie, foreshadowing his knowledge that Yolanda would soon be unavailable to raise her own son.

Streeter asks this Court to draw different inferences from the note, relying on his own testimony to support the reasonableness of those inferences. Specifically, he argues that the reference to what he did to Yolanda referred to the prior incident where he pulled her braids, rather than the murder. And he claims the statement, "she don't deserve to live like me" does not mean they both deserved to die, but rather that she deserved a better life than the one he could provide. (AOB 125.) Streeter's request for this Court to accept his interpretation is in direct conflict with the standard of review, which requires a reviewing court to presume the existence of every fact in support of the judgment that the jury "could reasonably infer from the evidence." (*People v. Bloyd*, *supra*, 43 Cal.3d at pp. 333, 346-347.)

The foregoing evidence demonstrates Streeter carefully planned Yolanda's murder. He wrote an apology even before he acted, and directed his parents to care for Little Howie since his expectation was that both of Little Howie's parents would soon be dead. His final words of advice to his son were to be delivered by his parents, telling Little Howie never to fall in love with a woman.

3. The Manner Of Killing Demonstrates Premeditation and Deliberation

"[T]he method of killing alone can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder." (*People v. Memro*, *supra*, 11 Cal.4th at. pp. 786, 863-864.) John Robert Martinez testified that Yolanda was yelling for help as Streeter was beating her up and pulling her hair. He hit Yolanda three or four times. After he poured gasoline on Yolanda, Streeter tried to drag her to his car because he had nothing to light her with. Streeter slammed Yolanda to the ground, and then went to his car and retrieved a yellow container. He poured something from the container on to Yolanda's car and then onto her. Then he lit her on fire. (6 RT 522-543.)

Anzerita Chonnay testified that she heard a couple yelling, and saw Streeter hitting Yolanda. Then she saw Streeter retrieve something from the trunk of his car and pour something, and then she saw Yolanda on fire. (6 RT 549-553.)

Edward Jasso said that he saw two people he initially believed were engaged in a water fight, but then saw Streeter push Yolanda to the ground and begin hitting and kicking her. Streeter dragged Yolanda by the hair, and then he let go of her and went to his car. (6 RT 577-579, 9 RT 824-825.) Streeter reached inside to get something and then came towards them with a lighter in his hand. Jasso tried to grab it from him but his hand slipped off Streeter's arm. Yolanda was wet from the substance Streeter had poured on her. Jasso told Streeter to get away from her. Streeter was three or four inches from Yolanda when he lit the lighter and Yolanda went up in flames right away. Jasso tried to grab Streeter but he grabbed Yolanda and his arm caught on fire. (6 RT 588-592.) Jasso testified that the events leading up to Yolanda's burning probably lasted about five minutes, but felt like 15 or 20 minutes. (9 RT 817-818, 822-827.)

Patrick's testimony, presented by stipulation, established that Streeter was waiting when they arrived. He grabbed Little Howie from the car and walked towards his own car. Yolanda followed and asked where he was going. They argued as Yolanda tried to get Little Howie out of Streeter's car, and Streeter pushed her away. (8 RT 768-769.) Patrick pounded on the window and yelled to Little Howie to get out. Streeter got a plastic can of gasoline from the trunk of his car. Yolanda began to run away when she saw this. (8 RT 769.)

Streeter chased Yolanda and poured gas on her car, and then on Yolanda. Patrick was scared because he smelled the gas and Shavonda was in the car, so he jumped in and drove it around the corner and then ran back. (8 RT 769-770.) When he returned, the plastic can was on the ground and Streeter was hitting Yolanda who was on the ground. A man was trying to help. Yolanda got up and ran around the cars. Streeter chased her and pulled a lighter out of his pocket. He lit the lighter, and lit Yolanda on fire. Streeter ran away as Yolanda was on fire. (8 RT 770.)

Deputy Medical Examiner Steven Trenkle testified that Yolanda died from pulmonary failure caused by the effects of subcutaneous burns, having sustained burn injuries to 55 to 60 percent of the surface area of her body. (7 RT 624-640.) Dr. David Lee Vannix testified she sustained burn injuries to 54% of her body surface. (7 RT 666.)

Firefighter Jeffrey Gordon Boyles testified that there were dozens of people in the area at the time of the burning, including children, because it happened in the parking lot of a Chuck E. Cheese establishment. Two children, including a girl about 10 years old, and a boy between five and seven years old, appeared to be Yolanda's. (7 RT 687-689.)

The parties stipulated that Shavonda Buttler would testify she was six years old on April 27, 1997. Streeter took Little Howie out of Yolanda's car while Shavonda was in the back seat. She had to wear leg braces. After

taking Little Howie out of the car, Streeter poured gasoline on the car while she was still in the back seat. (8 RT 756-757.)

The manner of killing detailed in the testimony set forth above reveals that Streeter had many opportunites to consider and reflect on his actions, and he did just that. The suicide note was placed in his glove compartment before Yolanda arrived at the scene, and the gas cap had recently been placed on the bumper, indicating his plan was in place and set into motion prior to her arrival. When she got there, Streeter placed Little Howie in the safety of his own car, to keep him safe as he put his plan into action. He beat Yolanda up to make her more vulnerable and incapacitate her, and then went back to his car to retrieve the gasoline. He poured the gasoline on her car, and then on Yolanda, and then tried to drag Yolanda to his car to get the lighter. He released her, retrieved the lighter and then chased her down and set her on fire. Each interval of time provided Streeter with an opportunity to reflect on, and abandon his plan, and each subsequent action demonstrated a premeditated and deliberate commitment to carry it out. Substantial evidence established a premeditated, deliberate murder.

B. Murder Perpetrated By Means Of Lying-In-Wait

To prove first degree murder premised on a lying-in-wait theory, the prosecution must prove the elements of concealment of purpose together with

> a substantial period of watching and waiting for an opportune time to act, and . . . immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.

(*People v. Stanley* (1995) 10 Cal.4th 764, 795-796; see also *People v. Gurule* (2002) 28 Cal.4th 557, 630.)

Moreover, the defendant need not strike at the first available opportunity, but may wait to maximize his position of advantage before

taking the victim by surprise. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 501.)

The determination of whether the trial court properly instructed the jury regarding lying in wait, both as a theory of first degree murder and as a special circumstance, depends upon whether there was substantial evidence presented at trial to support such jury verdicts. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139, fn. 1.)

The jury was instructed on the law of murder perpetrated by means of lying in wait as follows:

> Murder which is immediately preceded by lying in wait is murder of the first degree.
>
> The term "lying in wait" is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or some other secret design to take the other person by surprise even though the victim is aware of the murder's (sic) presence.
>
> The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to the premeditation or deliberation.
>
> The word "premeditation" means considered beforehand. The word "deliberation" means formed or arrived at or determined upon as a result of careful thought and weighing and considerations for and against the proposed course of action.

(11 RT 1120-1121, 1 CT 212, CALJIC No. 8.25.)

In *People v. Cole, supra*, 33 Cal.4th at p. 1206, this Court found sufficient evidence to warrant an instruction on first degree murder by means of lying in wait where the victim told an arson investigator that she was asleep when the defendant began to pour gasoline on her. The arson investigator had concluded that the defendant poured gasoline on the victim's back while she was sleeping, and that the gasoline had dripped from her back to the floor. From this evidence, this Court held a reasonable

trier of fact could have found beyond a reasonable doubt that the defendant had watched and waited until the victim was sleeping and helpless before he poured the flammable liquid on her and ignited it. Therefore, substantial evidence supported the jury instruction on first degree murder by lying in wait. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1206.)

Here, the substantial period of watching and waiting occurred when Streeter watched and waited for Yolanda's arrival. He lured her to the restaurant under the false pretense of meeting with their son, as part of a well thought out plan to kill her. Streeter launched a surprise attack from a position of advantage, after rendering Yolanda helpless by beating her and holding her young child in his car. As Streeter acknowledges, the concealment that is required is the concealment of a defendant's true intent and purpose, not that he literally be concealed from view. (AOB 131, citing *People v. Morales* (1989) 48 Cal.3d 527, 554-555.)

The parties agreed that if called as a witness, Patrick would testify that when they arrived at the Chuck E. Cheese restaurant, Streeter was standing there clapping his hands, and appeared nervous. Streeter grabbed Little Howie and took him to his car. (8 RT 768.)

Fontana Police Officer Michael Stark testified the club locking device was secured on the steering wheel of Streeter's car, and the gas cap was laying on the bumper. (8 RT 740-742.)

Streeter's detailed suicide/homicide note was placed in the glove compartment of his car while he waited for Yolanda to arrive. (Ex. 5, 1 CT 84.) The note foreshadowed Streeter's expectation that both he and Yolanda would be dead by the time it was found. His plans were spelled out in that note even as he stood in front of Chuck E. Cheese awaiting Yolanda's arrival, under the pretext of reuniting with her and meeting with their son.

Streeter claims this was a "tragic domestic dispute that escalated out of control, rather than any kind of planned killing," and that his actions were the unplanned consequences of his anger and frustration after waiting for Yolanda for 30 to 45 minutes and believing she was not going to show up. (AOB 118-119.) Once again, Streeter's characterization of the evidence is based solely on his own testimony, which stood in stark contrast to the overwhelming, credible evidence that Streeter's actions were the manifestation of a well thought out plan. Streeter's claim is inconsistent with the standard of review, which requires a reviewing court to presume the existence of every fact in support of the judgment that the jury "could reasonably infer from the evidence." (*People v. Bloyd*, *supra*, 43 Cal.3d at pp. 333, 346-347.)[25] Substantial evidence supported Streeter's conviction on a theory of lying in wait.

C. Murder Perpetrated By Means Of Torture

Murder which is perpetrated by means of torture is murder of the first degree. (Pen. Code, §189; *People v. Hindmarsh* (1986) 185 Cal.App.3d 334, 346.) The essential elements of murder-torture require 1) the act or acts that caused death to involve a high probability of death, and 2) an intent by the defendant to cause cruel pain and suffering for the purpose of revenge, extortion, persuasion, or any other sadistic purpose. (*People v. Wiley*, *supra*, 18 Cal.3d at pp. 162, 168.) Murder by torture is murder committed with a willful, deliberate and premeditated intent to inflict extreme and prolonged pain. (*People v. Steger* (1976) 16 Cal.3d 539, 546.) A defendant need not intend to kill the victim. The malice element may be supplied by an intentional act involving a high degree of probability of

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[25] Even Streeter's testimony that he arrived shortly before 4:00 for their planned 4:00 meeting, and then waited 30 to 45 minutes, conflicted with evidence that the 911 call reporting a person on fire was received at 3:21 in the afternoon (10 RT 972-973).

death in conscious disregard for human life. (*People v. Davenport* (1985) 41 Cal.3d 247, 267-268.)

The jury was instructed on murder perpetrated by means of torture as follows:

> Murder which is perpetrated by torture is murder of the first degree. The essential elements of murder by torture are: One person murders another person; the perpetrator committed the murder with a willful, deliberate and premeditated intent to inflict extreme and prolonged pain upon a living being – pardon me – upon a living human being for the purpose of revenge, extortion, persuasion or for any other sadistic purpose; and the acts or actions taken by the perpetrator to inflict extreme and prolonged pain were a cause of the victim's death.
>
> The crime of murder by torture does not require any proof that the perpetrator intended to kill his victim or of any proof that the victim was aware of pain or suffering.
>
> The word "willful" as used in this instruction means intentional. The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.

(11 RT 1121, 1 CT 213, CALJIC No. 8.24.)

In *People v. Cole, supra*, 33 Cal.4th at p. 1212, the defendant argued the evidence was insufficient to establish the intent to inflict extreme pain. Like Streeter here, the defendant in *Cole* argued his case fell into the "explosion of violence" category. (*Ibid.*; see AOB 140.) This Court rejected his claim, finding there was substantial evidence from which a jury could have found beyond a reasonable doubt the defendant had the requisite intent to inflict extreme pain.

> Verbal abuse and excessive drinking characterized defendant and [the victim's] five-year relationship, and all accounts indicated that they were functional alcoholics. Placed against this background, the prosecution also presented evidence that defendant was jealous and possessive of [the victim],that

> she planned to move out of their residence without him, that she discussed battered women's shelters with [her mother's neighbor], and that defendant believed [the victim] was cheating on him. Such evidence, when considered with evidence of the manner in which defendant had poured a flammable liquid on two distinct places – on [the victim] and on the floor near the bedroom door – the resulting condition of [the victim's] body, defendant's statement to [the victim] when he ignited the fire that he hoped she burned in hell, and his statements thereafter that he was angry at her and wanted to kill her, permit an inference that defendant's purpose in setting [the victim] on fire was to inflict extreme pain. Moreover, the prosecution proved in rebuttal that, a week before the fire, defendant said he would burn the house down if [the victim] tried to leave him and that he telephoned [the victim's] mother numerous times – each time more agitated than the last—and at one point mentioned that he thought [the victim] was seeing someone else. This evidence further supported the inference that defendant intended to inflict extreme pain.

(*People v. Cole*, *supra*, 33 Cal.4th at p. 1214.)

The facts in this case are almost identical to *Cole*. As in *Cole*, the evidence here established Streeter had a history of alcohol abuse and violence against Yolanda. He was possessive of her, and prevented her from contacting her family or the police. She had secretly moved away and enlisted the assistance of family members in escaping from Streeter. (8 RT 768-770, 10 RT 974-978, 10 RT 996-999.)

Like the defendant in *Cole*, Streeter poured gasoline in two distinct places - - on Yolanda, and on the car in which her six-year-old niece was trapped inside. Streeter called Yolanda a "fucking bitch" as he beat her. He telephoned Yolanda's family members and threatened them. As in *Cole*, this evidence was sufficient to permit an inference that the defendant's purpose in setting the victim on fire was to inflict extreme pain. (6 RT 526-527, 8 RT 756-757, 769-770, 10 RT 1023-1035.)

It is true that the severity of a victim's wounds does not necessarily indicate an intent to torture because severe wounds may be as consistent

with "an explosion of violence" as with torture. (*People v. Crittenden*, *supra*, 9 Cal.4th at pp. 83, 140; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1239.) Even gruesome murder-torture convictions will not be affirmed where the evidence showed that the killing resulted from either an explosion of violence or an act of animal fury produced when inhibitions were removed by alcohol. (*People v. Davenport*, *supra*, 41 Cal.3d at p. 268; *People v. Hindmarsh*, *supra*, 185 Cal.App.3d at p. 346.) However, the intent to torture is a state of mind which frequently must be proved by the circumstances surrounding the commission of the crime, including the nature and severity of the victim's wounds. (*People v. Crittenden, supra*, 9 Cal.4th at p. 141; *People v. Proctor* (1992) 4 Cal.4th 499, 531.) As explained in Argument IV, *supra*, the actual injuries sustained by Yolanda constituted compelling evidence of Streeter's intent to inflict severe pain and suffering.

This was not a case of alcohol induced fury. (See *People v. Davenport*, *supra*, 41 Cal.3d at p. 268.) In spite of Streeter's odor of alcohol and his appearance of being under the influence, Streeter's blood tested negative for drugs and alcohol. (7 RT 697-698, 702-703, 712-713, 722-723.)

The callousness of Streeter's prior acts of violence against Yolanda provided additional evidence of an intent to cause tremendous pain and suffering. Quentin Buttler, Yolanda's brother, testified that he observed and photographed Yolanda's injuries following Streeter's assault on her in December. Streeter had pulled Yolanda's hair out of her head and beaten her up. Yolanda had blood, scars and scabs on her head. (9 RT 974-975, Ex. 7.) Yolanda detailed Streeter's prior acts of violence in a restraining order application. (Ex. 21.) Lawanda Johnson testified that Streeter threatened Yolanda, pushed her around and threw things at her. (9 RT 994.) Lawanda testified that on December 30th, she woke up after

midnight to her mother screaming. Streeter was pulling Yolanda by the hair. Streeter said, "if you want to watch, then I'll just pull harder." Yolanda began screaming louder, and Streeter did not stop even though she and Little Howie were present. Streeter sexually assaulted Yolanda and tortured her for hours. The next day, Yolanda's head was sore on the back and the sides. These kinds of incidents went on for the last year of the relationship. (9 RT 996-999.)

Streeter argues his case is distinguishable from the many cases in which this Court has found sufficient evidence of an intent to cause pain and suffering. (AOB 139-145.) In *People v. Proctor*, *supra*, 4 Cal.4th at pp. 499, 517, in addition to inflicting blows to the face and other parts of the victim's body, the defendant inflicted knife "drag" marks. This Court held the wounds revealed a slow, methodical approach to the infliction of injuries rather than sudden, explosive violence, and considered with the circumstance that the victim was prevented from escaping, this evidence established the defendant's intent to torture. (*Id.* at pp 531-532.) Similarly, in *People v. Elliot* (2005) 37 Cal.4th 453, 467-468, this Court found that the infliction of 81 stab and slash wounds, with only three being potentially fatal, suggested a meticulous, controlled approach indicative of an intent to inflict pain. (*Ibid.*) Streeter also distinguishes *People v. Steger*, *supra*, 16 Cal.3d at p. 548, in which this Court found sufficient evidence of murder by torture where the defendant bound and gagged the victim before stabbing him. (*Ibid.*) He cites other cases in which this Court considered the defendant's callous indifference to the victim after inflicting the lethal acts (AOB 142, citing *People v. Cook* (2006) 39 Cal.4th 556, and *People v. Chatman* (2006) 38 Cal.4th 344) and argues the absence of these factors in his case demonstrates the absence of an intent to inflict pain.

Streeter's argument misses the point. In the first place, he is wrong to distinguish himself from those defendants who inflicted non-lethal wounds

prior to the infliction of lethal wounds. Streeter hit and kicked Yolanda repeatedly, forced her to the ground and dragged her by the hair before he killed her.

> The finding of murder-by-torture encompasses the totality of the brutal acts and the circumstances which led to the victim's death. [Citations.] The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused death; rather, it is the continuum of sadistic violence that constitutes the torture. [Citation.]

(*People v. Proctor*, *supra*, 4 Cal.4th at pp. 530-531.)

Secondly, while these cases make it clear that the infliction of non-lethal wounds, tying and binding a victim, and callous behavior after the infliction of a lethal wound may be sufficient to establish an intent to torture, the absence of those factors by no means implies the absence of such an intent. Cases involving similar facts are much more helpful in making this fact-specific determination.

As set forth above, *People v. Cole*, *supra*, involved facts almost identical to the instant case. Similarly, in *People v. Martinez* (1952) 38 Cal.2d 556, the defendant had a long history of difficulties with his wife. Much like the threats Streeter made to Yolanda's relatives, the defendant in *Martinez* announced that some day he would do something bad to his wife. The day before the killing he threatened her with a deadly weapon. He filled a can with gasoline, went to the victim's house, pursued her despite her frantic efforts to escape, covered her with gasoline, struck a second match after the first failed to ignite, and failed to aid in rescue attempts and actively hindered those who tried to rescue her after the fire started. This Court found the evidence sufficient to support his conviction for first degree murder on theories of premeditation, and murder by torture. (*Id.* at p. 561.) Thus, as in *Cole* and *Martinez*, substantial evidence supported Streeter's conviction for murder by torture.

D. Assuming Arguendo This Court Finds Any One Of The Prosecutor's Theories Of Murder Was Not Supported By Substantial Evidence, Reversal Is Not Required Because Substantial Evidence Supported The Other Theories

Assuming arguendo this Court finds any of the three theories of first degree murder were not supported by substantial evidence, reversal is not required because the remaining theories were supported by substantial evidence.

> If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground.

(*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

Where this Court determines that one theory of murder is valid, it need not address the factual sufficiency of the other theories of murder that were submitted to the jury. (*People v. Lewis* (2008) 43 Cal.4th 415, 507.)

As set forth above, substantial evidence supported each of the three theories of murder offered by the prosecution. Streeter's suicide/homicide note alone demonstrates the murder was premeditated and deliberate. But even if this Court were to find the evidence insufficient as to premeditation and deliberation, the jury's true findings on the special circumstances of lying in wait and murder by torture affirmatively demonstrate their verdict did not rest on an inadequate theory. (See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1034.) The judgment should be affirmed.

VII. THE JURY WAS NOT REQUIRED TO UNANIMOUSLY AGREE ON THE THEORY OF FIRST DEGREE MURDER, BUT THE TRUE FINDINGS ON THE SPECIAL CIRCUMSTANCES SHOW THAT THEY DID

Streeter contends his federal constitutional rights, and his state statutory and constitutional rights, were violated by the trial court's failure

to instruct the jury that they had to unanimously agree on the theory of first degree murder. (AOB 148-155.) Since the jury need not unanimously agree on the theory of first degree murder, Streeter's rights were not violated by the absence of a unanimity instruction. In any event, the true findings on the special circumstances of torture murder and lying in wait murder show the jury's unanimous agreement that Streeter committed first degree murder by each of these means.

Streeter's jury was instructed on first degree premeditated and deliberate murder, first degree murder by torture, and first degree murder perpetrated by means of lying in wait. (11 RT 1118-1122.) The jury was also instructed,

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by the defendant, but you are unanimously - - but you unanimously agree that you have a reasonable doubt whether the murder was of the first or second degree, you must give the defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree as well as a verdict of not guilty of murder of the first degree.

(11 RT 1121-1122, 1 CT 217, CALJIC No. 8.71.)

Further, the jury was told,

> Before you may return a verdict in this case, you must agree unanimously not only as to the whether the defendant is guilty or not guilty, but also, if you should find him guilty of an unlawful killing, you must agree unanimously as to whether he is guilty of murder of the first degree or murder of the second degree or voluntary manslaughter.

(11 RT 1127, 1 CT 224, CALJIC No. 8.74.)

Streeter did not request an instruction that the jury unanimously agree on a theory of first degree murder. The prosecutor informed the jury that while they had to unanimously agree that Streeter committed first degree

murder, they need not unanimously agree on the theory of first degree murder. (11 RT 1068.)

Streeter claims that lying in wait murder and torture murder have different elements than premeditated and deliberate murder, which need to be proved beyond a reasonable doubt in order to convict. (AOB 149-154.) The identical claim was rejected in *People v. Cole*, *supra*, 33 Cal.4th at p. 1158. In *Cole*, the jury was instructed on first degree murder on the same theories as Streeter; premeditated, deliberate murder, murder by torture, and murder perpetrated by means of lying in wait.[26] This Court summarily rejected the defendant's claim that his constitutional rights were violated by the trial court's failure to require unanimous agreement as to the theory of guilt. (*Id.* at p. 1221.) Streeter acknowledges that this Court has rejected this argument but "submits the issue deserves reconsideration in light of the charges and facts of this case." (AOB 148.) But *Cole* involved nearly identical facts; the defendant poured gasoline on the victim and then set her on fire. And *Cole* involved the same theories of murder at issue here.

Streeter also cites *Schad v. Arizona* (1991) 501 U.S. 624 [111 S.Ct. 2491, 115 L.Ed.2d 555] to support his contention his due process rights were violated when the trial court failed to require unanimity as to the theory of first degree murder. (AOB 149-150.) *People v. Box*, *supra*, 23 Cal.4th at pp. 1153, 1212, cited in *Cole*, *supra*, rejected the defendant's claim that Schad required the jury to unanimously agree on the theory of first degree murder.

In *Schad*, the United States Supreme Court held that federal due process did not require the jury to agree on one of two alternative statutory theories of first degree murder, i.e., premeditated murder and felony

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[26] The jury in *Cole* was also instructed on a fourth theory of first degree murder, felony murder (arson.) (*Ibid.*)

murder. Although the majority agreed that due process imposes some limits on the degree to which different states of mind may be considered merely alternative means of committing a single offense, the Court did not agree on the application or extent of such limits. (*Schad v. Arizona*, *supra*, 501 U.S. at pp. at pp. 632, 651, 656.)

In writing for the plurality in *Schad*, Justice Souter explained there exists no single test for determining when two means are so disparate as to exemplify two inherently separate offenses. (*Id.* at pp. 633-637, 643.) The relevant mental states must be considered to determine whether they demonstrate comparable levels of culpability. In addressing the culpability level of premeditated murder and felony murder, Justice Souter concluded:

> Whether or not everyone would agree that the mental state that precipitates death in the course of robbery is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental element of a single offense.

(*Id.* at pp. 642-644.)

Thus, the plurality held that unanimous agreement as to the underlying theory of first-degree murder was unwarranted. (*Id.* at p. 645.)

Similarly, the mental state that precipitates murder by torture and murder perpetrated by means of lying in wait could "reasonably be found" to be the moral equivalent of premeditation and deliberation. As Streeter acknowledges, torture murder requires acts causing death that involve a high probability of the victim's death, and a willful, deliberate and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose. (AOB 151, citing *People v. Cook*, *supra*, 39 Cal.4th at pp. 566, 602.) And lying in wait murder requires concealment of purpose, together with a substantial period of watching and waiting for an opportune time to act, and immediately

thereafter a surprise attack on an unsuspecting victim from a position of advantage. (AOB 151, citing *People v. Stanley*, *supra*, 10 Cal.4th at pp. 764, 795, quoting *People v. Morales*, *supra*, 48 Cal.3d at pp. 527, 557.) That is "enough to rule out the argument" that they cannot be considered as alternative means to satisfy the mens rea requirement of first degree murder. (See *Schad v. Arizona*, *supra*, 501 U.S. at pp. 642-644.) No unanimity instruction was required.

In any event, any alleged instructional error in this case was harmless, as the jury's true findings on the special circumstance allegations demonstrates that it unanimously agreed that Streeter committed the crime of first degree murder on both theories of torture murder and lying in wait murder. (See, e.g., *People v. Lewis*, *supra*, 25 Cal.4th at pp. 610, 654 [omission of unanimity instruction was, at most, harmless error where jury's true findings on robbery-murder and burglary-murder special circumstances signified unanimous agreement as to both first-degree felony murder theories.]) Streeter's conviction must be affirmed

VIII. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S TRUE FINDING ON THE SPECIAL CIRCUMSTANCE OF LYING IN WAIT

Streeter contends the evidence was legally insufficient to support the jurors' true finding on the special circumstance of lying in wait. Specifically, he claims the murder was not committed "while" lying in wait, that Streeter's true concealed purpose was to take Yolanda's son and not to murder her, and the lethal act did not immediately follow the period of watchful waiting or there was no continuous flow of events from the time of waiting to the lethal acts. If the special circumstance does apply to these fact, he contends, then it is unconstitutionally vague and overbroad. (AOB 156-164.) Streeter is wrong.

The law governing "sufficiency of the evidence" claims is well established, and applies to special circumstance findings as well as guilty verdicts. (*People v. Mayfield*, *supra*, 14 Cal.4th at pp. 668, 790-791.) When reviewing a claim of insufficient evidence, this Court, like all appellate courts, must view the evidence in the light most favorable to the judgment of conviction and presume in support of that judgment the existence of every fact the jury could have reasonably deduced from the evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) The oft-repeated rule is that, when a verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it. When two or more inferences are reasonably deducible from the facts, a reviewing court is without power to substitute its deductions for those of the trier of fact. It is of no consequence that the reviewing court, believing other evidence, or drawing different inferences, might have reached a conclusion contrary to the one reached by the trier of fact. (*Ibid.*)

To the extent the prosecution relied upon circumstantial evidence, the standard of review is the same. (*People v. Bean* (1988) 46 Cal.3d 919, 932; *People v. Towler* (1982) 31 Cal.3d 105, 118.) Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, "it is the jury, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Bean*, *supra*, 46 Cal.3d at pp. 932-933.) Indeed, if the circumstances reasonably justify the trier of fact's findings,

> 'the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'

(*People v. Bean*, *supra*, 46 Cal.3d at p. 933, quoting *People v. Hillery* (1965) 62 Cal.2d 692, 702.)

The standard of review mandated by the federal Constitution is the same as the state standard articulated above. That is, the critical inquiry is to determine whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. The reviewing court does not determine whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt, but whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at pp. 307, 318.)

At the time of Streeter's crime, the lying in wait special circumstance required

> 'proof of 'an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.'

(*People v. Lewis*, *supra*, 43 Cal.4th at pp. 415, 515, citing *People v. Jurado* (2006) 38 Cal.4th 72, 119, quoting *People v. Morales*, *supra*, 48 Cal.3d at pp. 527, 557.)

At the time of Streeter's crime, the special circumstance required that the murder be committed "while lying in wait."[27] (Pen. Code, §190.2,

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[27] In March 2000, the language of the lying-in-wait special circumstance was changed to delete the word "while" and substitute the phrase "by means of." (*People v. Lewis*, *supra*, 43 Cal.4th at p. 512, n. 25.)

former subd. (a)(15); *People v. Lewis*, *supra*, 43 Cal.4th at pp. 511-512.) The jury was instructed according to these principles. (11 RT 1127-1130.)

As detailed above in Argument VI, substantial evidence supported the jury's true finding on the lying in wait special circumstance. Streeter intended to kill Yolanda, as evidenced by his planning activity including the note he left for his parents, asking them to raise her son. He concealed his purpose by luring Yolanda to the restaurant under the pretext of an attempted reconciliation and familial visit. Streeter engaged in a substantial period of watching and waiting for an opportune time to act, as he filled the gasoline can and secured his car, and then stood outside of the Chuck E. Cheese restaurant awaiting Yolanda's arrival. Immediately thereafter, Streeter launched a surprise attack from a position of advantage, by snatching Yolanda's child and confining him in his car while he beat Yolanda to incapacitate her. The murder was committed "while" lying in wait because immediately following the period of watchful waiting, Streeter commenced a continuous chain of activities, which started with Streeter immobilizing Yolanda, and culminated in his lethal act of lighting her on fire.

Whether there is sufficient evidence of the special circumstance of lying in wait is a highly fact specific inquiry, and substantial evidence supporting the special circumstance has been found in a wide variety of factual situations. For example, in *People v. Cruz*, *supra*, 44 Cal.4th at p. 636, this Court found sufficient evidence of the lying in wait special circumstance based upon evidence that the defendant, who had been arrested and was in the back seat of a patrol car, discovered a fanny pack belonging to the officer and retrieved it through the seat while in handcuffs. Then he secreted the gun on the seat behind him, and waited until the officer got back into the car and had driven two miles to a secluded area of highway before he removed the weapon from its hidden location and shot

the officer in the back of the head. (*People v. Cruz*, *supra*, 44 Cal.4th at pp. 679-680.)

In *People v. Gutierrez* (2002) 28 Cal.4th 1083, this Court found sufficient evidence of lying in wait murder and the lying in wait special circumstance where, viewing the evidence in the light most favorable to the judgment, it established the defendant planned a trip with the intent to harm two victims. He waited in a van for several hours near the house for the victims to arrive home. When they arrived home, he surprised them by wearing masks to gain entry into the home by ruse. Once inside, he subdued one victim by having a companion hold a gun to her head while he went to the bathroom and shot the other victim in the shower. This evidence "plainly established" that defendant intentionally murdered the victim under circumstances that included a concealment of purpose, a substantial period of watching and waiting for an opportune time to act, and immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. (*Id.* at p. 1150.)

The facts of Streeter's case are similar to those in *People v. Sims* (1993) 5 Cal.4th 405. In *Sims*, this Court found sufficient evidence of the special circumstance of lying in wait where the defendant and his companion purchased a clothesline and a knife, then rented a motel room, telephoned a pizza restaurant and lured the pizza delivery person to the room on the pretext of ordering a pizza, concealing their true intent to rob and murder him. They waited for his arrival, overpowered him, bound him and gagged him, and left him either dead or to drown in a tub of water. (*Id.* at p. 433.) Here, too, Streeter lured Yolanda to meet with him under a pretext, prepared the instruments of her killing prior to her arrival, waited for her to show up, and immediately overpowered her, maximizing his position of advantage and committing the lethal act.

Substantial evidence existed from which a rational juror could conclude Streeter concealed his murderous purpose by convincing Yolanda to meet with him to try to reconcile with her and to visit with Little Howie. As Streeter acknowledges, the concealment that is required is the concealment of a defendant's true intent and purpose, not that he literally be concealed from view. (AOB 131, citing *People v. Morales*, *supra*, 48 Cal.3d at pp. 554-555.) Patrick testified that Streeter had been calling Yolanda, claiming he wanted to reconcile with her. (8 RT 767-768, 771.) Streeter testified that he had convinced Yolanda to bring the children to meet with him once before, and the meeting had occurred without incident. (9 RT 885-886.) Streeter himself testified that he told Yolanda he wanted to get back together with her, and when she refused, he told her he might do something to himself, so she agreed to meet him at Chuck E Cheese. (9 RT 882, 887.)

In *People v. Jurado*, *supra*, 38 Cal.4th at p. 72, this Court found substantial evidence the defendant concealed his murderous purpose where a rational juror could infer that he formed the intent to kill when he obtained a cord to be used for strangulation, then lured the victim into the back seat of a car and positioned himself in the seat behind her in order to catch her off guard and strangle her. (*Id.* at p. 120.) Here, similarly, a rational juror could conclude Streeter formed the intent to kill Yolanda some time before he wrote the suicide/homicide note, and then prepared the instruments of her killing as he waited for Yolanda's arrival, having lured her to the restaurant for the pretextual reason of facilitating a visit with their child. Streeter's actions in concealing his purpose are similar to the defendant's actions in *People v. Carasi*, *supra*, 44 Cal.4th at p. 1263, where this Court upheld the validity of the lying in wait special circumstance on evidence that the defendant lured his ex-wife and her mother to a secluded

spot on a pretext, by inviting them to meet him for a Mother's Day dinner. (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1310.)

Streeter argues that while the evidence supports an inference that he concealed his true purpose, there is no evidence his concealed purpose was a murderous one. Rather, he claims, Streeter's pretextual request of Yolanda asking for a visit with his son concealed his true purpose of taking his son from her. (AOB 157.) Streeter's theory is so far-fetched, he did not even present it to the jury.

The testimony of both Patrick and Streeter made it clear that Streeter had the opportunity to leave after he secured Little Howie in his car, but he did not leave, weighing heavily against his claim that his true concealed purpose was to take his son. (8 RT 769, 9 RT 895.) More importantly, the note Streeter left in his glove compartment foreshadowed his true concealed purpose to kill Yolanda. (Ex. 5, 1 CT 84.)

Even assuming there was evidentiary support for Streeter's inference that his true concealed purpose was to take Little Howie from Yolanda, that does not change the result because this Court does not reweigh the evidence. Indeed, if the circumstances reasonably justify the trier of fact's findings,

> 'the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'

(*People v. Bean*, *supra*, 46 Cal.3d at p. 933, quoting *People v. Hillery*, *supra*, 62 Cal.2d at pp. 692, 702.)

Clearly, the evidence cited above reasonably justified the jury's finding that Streeter's concealed purpose was to murder Yolanda.

The evidence also established that Streeter engaged in a substantial period of watching and waiting. A defendant who lures his victim into a vulnerable position by creating or exploiting a false sense of security

engages in the watching and waiting conduct contemplated by the lying in wait provisions. (See *People v. Stevens* (2007) 41 Cal.4th 182, 203.) "Watchful" does not require actual watching; it can include being alert and vigilant in anticipation of the victim's arrival in order to take him or her by surprise. (*People v. Sims*, *supra*, 5 Cal.4th at p. 433.)

Fontana Police Officer Michael Stark testified the club locking device was secured on the steering wheel of Streeter's car, and the gas cap was perched on the bumper. (8 RT 740-742.) This evidence leads to a reasonable inference that Streeter was at the restaurant long enough to secure his car and remove gasoline from his gas tank to fill up the container he had in his trunk. The parties agreed that if called as a witness, Patrick would testify that when they arrived at the Chuck E. Cheese restaurant, Streeter was standing there clapping his hands, and appeared nervous. (8 RT 768.) Streeter himself testified that he waited for Yolanda and the children for 30 to 45 minutes, and became angry and frustrated. (9 RT 891.)

In *People v. Lewis*, *supra*, this Court found sufficient evidence of a substantial period of watching and waiting as to two of the three murder victims. As to one victim, this Court concluded the jury reasonably could have found the victim was targeted because he had money, that defendant waited until the victim emerged into an alley, then surprised him by quickly riding up in a car and shooting him. This was so even though the victim was not shot immediately upon entering the alley alone; instead, he was shot after a period of time during which he waited for his wife and then walked her to her car.

As to the second victim, this Court found substantial evidence of watching and waiting where the victim and her husband stopped at the mall to run an errand. The husband went into the mall while the victim stayed in the car to tidy up the back seat. The defendant admitted he went to the mall

with the intent to rob a jewelry store, but after observing the victim he decided it would be easier to rob her. The defendant waited until the victim was doing something in the back seat and at that point, he took her by surprise, forced his way into the car and drove it away.

In contrast, as to the third victim, this Court found there was insufficient evidence of a substantial period of watching and waiting where eyewitness accounts of the aftermath of the shooting were not helpful on the lying in wait issue, the defendant's statements admitted demanding the victim's keys before the shooting and taking property from the victim after the shooting, but supplied no evidence that the victim was followed for that purpose, there was no admissible evidence that the property found in the defendant's possession was anything more than an afterthought that arose after the confrontation with the victim, and the physical evidence of the manner of killing did not supply the missing "watching and waiting" evidence. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 508.)

Here, as detailed above, Streeter was waiting for Yolanda in the front of the restaurant and clapping his hands nervously when she arrived. His steering wheel was secured with a locking device, the gas cap was on top of the bumper, and his car was parked in the parking lot, leading to the reasonable conclusion Streeter engaged in a substantial period of watching and waiting prior to Yolanda's arrival.

Substantial evidence also supported a reasonable inference that immediately after the period of watching and waiting, Streeter launched a surprise attack from a position of advantage.

> Lying in wait does not require that a defendant launch a surprise attack at the first available opportune time. [Citations.] Rather, the defendant 'may wait to maximize his position of advantage before taking his victim by surprise.'

(*Id.* at p. 510.)

Where a victim knows the defendant, she may not immediately suspect she is in danger upon seeing him, but may subsequently be taken by surprise. (*People v. Moon* (2005) 37 Cal.4th 1, 24.)

Here, immediately after watching and waiting, when Yolanda arrived, Streeter maximized his position of advantage before launching a surprise attack. He immobilized Yolanda both by taking her young son and placing him in his car, and then beating Yolanda to the ground in order to physically restrain her while he doused her with gasoline and lit her on fire. Patrick testified that when they arrived at Chuck E. Cheese, Streeter grabbed Little Howie and took him to his car. (8 RT 768.) The parties stipulated that if called to testify, Shavonda would testify that when they arrived at Chuck E. Cheese, Streeter took Little Howie out of her mother's car. (8 RT 756-757.) John Robert Martinez testified that Streeter beat Yolanda and slammed her to the ground before going back to his car to get the gasoline and returning to pour it on her. (6 RT 523.) Streeter poured gas on Yolanda's car and Yolanda, and then tried to drag her to his car to get something to light her with. (6 RT 529, 535.) Anzerita Chonnay also saw Streeter beat Yolanda and push her down before retrieving the gasoline and lighting her on fire. (6 RT 551-553, 566-567.) Edward Jasso testified that he saw Streeter push Yolanda to the ground and hit her and kick her. (6 RT 577-578.) Streeter dragged Yolanda by her hair, then went to his car and retrieved a lighter. He chased Yolanda and lit the lighter, setting her on fire. (6 RT 586-591.)

Streeter contends the evidence was insufficient to support a lying in wait special circumstance, because at the time of Streeter's trial, the prosecutor had to prove the killing was contemporaneous with, or followed directly on the heels of, the watchful waiting, meaning the murder occurred with no "cognizable interruption" following the period of lying in wait. (AOB 159, citing *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000,

1011.) He claims the prosecutor's theory included a cognizable interruption, and in support of this argument, he identifies seven "stages" through which this "domestic dispute" allegedly escalated. (AOB 161.)

At the time of Streeter's trial, the special circumstance lying in wait was distinguishable from lying in wait first degree murder because lying in wait murder required only that the murder be perpetrated "by means of" lying in wait, while the special circumstance required that the killing take place during the period of concealment and watchful waiting. (*People v. Lewis*, *supra*, 43 Cal.4th at pp. 511-512, citing Pen. Code, §§ 189, 190.2, former subd. (a)(15), *People v. Gutierrez*, *supra*, 28 Cal.4th at pp. 1083, 1149; *People v. Sims*, *supra*, 5 Cal.4th at p. 434.) This Court noted in *Lewis* that it had not defined the parameters of a murder committed during the period of concealment and watchful waiting. However, this Court approved the meaning supplied to that phrase by CALJIC No. 8.81.15 (1989 rev.), which states,

> Thus, for a killing to be perpetrated while lying in wait, both the concealment and watchful waiting as well as the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment the concealment ends. If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved.

(*People v. Lewis*, *supra*, 43 Cal.4th at p. 512.)

Streeter's jury was instructed with this language. (11 RT 1127-1129, 1 CT 234, CALJIC No. 8.81.15.)

The language of this instruction comes from *Domino v. Superior Court*, *supra*, 129 Cal.App.3d at p. 1000. There, the victim was captured while the defendants were lying in wait but was not killed until hours later. The Court of Appeal held the term "while" gave meaning to the distinction

between first degree murder and circumstances calling for the death penalty. (*Domino*, *supra*, 129 Cal.App.3d at p. 1011.) As stated in *Lewis*, *supra*, this Court has sometimes assumed the viability of the *Domino* formulation, and other times declined to decide whether *Domino's* interpretation of the special circumstance is correct, choosing instead to conclude that the standard was satisfied on the facts of a particular case. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 513, citations omitted.)

The *Domino* standard is satisfied where the lying in wait is followed immediately by a "murderous and continuous assault" that leads to the victim's death. (*People v. Morales*, *supra*, 48 Cal.3d at pp.527, 558.) There is no cognizable interruption between the lying in wait and the killing where there is "no lapse in the culpable mental state of the defendant." (*People v. Carpenter* (1997) 15 Cal.4th 312, 389, superceded by statute on other grounds as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106.)

Clearly, the *Domino* standard is met on these facts. Streeter's case is similar to *People v. Morales*, *supra*, 48 Cal.3d at p. 558. There, the defendant climbed in the back seat of a car driven by his accomplice. The victim was in the front seat. Defendant had armed himself with a belt, a knife and a hammer. He had told his girlfriend he was going to "hurt" a girl. Once the car drove to a more isolated location, defendant reached over the seat and attempted to strangle the victim. The belt broke and he began to beat her with a hammer. Her cries for help indicated she was taken by surprise and was previously unaware of any plan to harm her. This Court found the *Domino* standard was clearly met, because although the victim survived the initial attempt to strangle her and beat her to death, there was no "cognizable interruption" between the period of watchful waiting and the commencement of the murderous and continuous assault which

ultimately caused her death. (*People v. Morales*, *supra*, 48 Cal.3d at p. 558.)

The same is true here. Streeter's murderous and continuous assault commenced with Streeter maximizing his position of advantage, and then engaging in a continuous assault that ended in Yolanda's death. As set forth above, Streeter took steps to immobilize Yolanda immediately upon her arrival. Eyewitness Edward Jasso was asked about the chronology of events leading up to Yolanda being ignited. He testified that the passage of time between each discrete event was minutes or seconds, and then acknowledged, "It felt like it was happening for a long time, but I guess I was wrong." (9 RT 822-826.) He clarified that it was probably five minutes but it felt like 15 or 20 minutes. (9 RT 827.) As set forth above, the chronology following Yolanda's arrival was corroborated by several witnesses. Notably, even Streeter's own testimony failed to establish any break in the chain of events that led to her death. He did not drive away with his son, or attempt to persuade Yolanda to stay with him, or do anything other than incapacitate her and act upon his plan to kill her from the moment she arrived on the scene, and carry his plan out to the end.

Streeter also contends if this Court finds the lying in wait special circumstance is supported by sufficient evidence, then the special circumstance is unconstitutional as applied to his case. Specifically, he argues a finding of sufficient evidence would require this Court to conclude that the requirement of a concealment of purpose does not have to be a murderous purpose and need not be contemporaneous with watchful waiting, that the watchful waiting does not have to be for an opportune time to attack, and that there does not have to be a surprise attack immediately after the period of watching and waiting. Such a construction, he claims, fails to narrow the class of persons eligible for the death penalty. (AOB 163-164.) This Court has previously rejected this claim with respect to

analogous facts and circumstances. (*People v. Sims*, *supra*, 5 Cal.4th at p. 434.) Streeter's claim is simply another way to state his facial attack on the statute, which should be rejected for the reasons stated in Argument X. (See *People v. Lewis*, *supra*, 43 Cal.4th at p. 517.)

Finally, assuming arguendo this Court finds insufficient evidence of the lying in wait special circumstance, reversal is not required because the error was harmless. The jury properly considered another valid special circumstance finding, all the facts and circumstances underlying Yolanda's murder, and Streeter's history in determining death to be the appropriate penalty. There is no likelihood the jury's consideration of the mere existence of the lying in wait special circumstance tipped the balance towards death. This Court has frequently rejected similar contentions. (See *People v. Mungia* (2008) 44 Cal.4th 1101, 1139.)

IX. THE JURY WAS PROPERLY INSTRUCTED ON THE LYING IN WAIT SPECIAL CIRCUMSTANCE

Streeter contends his state and federal constitutional rights were violated because the lying in wait instructions omitted key elements, and were erroneous, internally inconsistent, and confusing. He further claims that additional instructions, given at the prosecutor's request, misled and confused the jury and lightened the prosecutor's burden of proof. (AOB 164-177.) Streeter is wrong.

The jury was instructed pursuant to CALJIC No. 8.81.15 as follows:

> To find that the special circumstance, referred to in these instructions as murder while lying in wait, is true, each of the following facts must be proved: One, the defendant intentionally killed the victim; and two, the murder was committed while the defendant was lying in wait.
>
> The term "while lying in wait" within the meaning of the law of special circumstances is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take

the person by surprise even though the victim is aware of the murderer's presence.

The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.

Thus, for a killing to be perpetrated while lying in wait, both the concealment and watchful waiting as well as the killing must occur during the same time period, or in and (sic) uninterrupted attack commencing no later than the concealment ends.

If there is a clear interruption separating the period of lying in wait during the period in which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted act - - uninterrupted lethal act, the special circumstance is not proved.

A mere commencement of purpose concealment of purpose is not sufficient to meet the requirement of concealment set forth in this special circumstance.

However, when a defendant intentionally murders another person under circumstances which includes a concealment of purpose, a substantial period of watching and waiting for an opportune time to act, and immediately thereafter a surprise attack on an unsuspecting victim from a position of advantage, the special circumstance murder lying in wait has been established.

The word "premeditated" means considered beforehand. And the word "deliberation" means formed at or arrived at or determined upon as a result of the careful thought and weighing of considerations for and against the proposed course of conduct.

(11 RT 1129-1130, 1 CT 234-235, CALJIC No. 8.81.15.)

The jury was also given three special instructions offered by the prosecution. Streeter's objection to two of the instructions was overruled. The court explained the purpose of the special instructions was to clarify the distinction between first degree murder and the special circumstance of

lying in wait. The instructions were given in addition to, not instead of, the instructions setting forth the elements of both the crime of lying in wait murder, and the elements of the special circumstance. (CT 231-233, 11 RT 1059.) The jury was instructed as follows:

> You have received an instruction that defines murder which is immediately preceded by lying in wait as murder in the first degree. The following instruction concerns the special circumstance - - pardon - - a special circumstance of murder committed while lying in wait. There is a distinction.
>
> While you may find that this murder was of the first degree because it was immediately preceded by lying in wait, it does not necessarily follow that the murder was committed while the defendant was lying in wait so as to constitute a special circumstance.
>
> The special circumstance requires that the killing be committed while lying in wait, whereas first degree murder by lying in wait requires that the killing be immediately preceded by a period of lying in wait.
>
> In the instructions regarding lying in wait, both for first degree murder and for the special circumstance, the term "concealment" is used.
>
> Actual physical concealment is not required. Concealment of purpose is sufficient. Physical concealment from, or actual ambush of, the victim is not necessary and is not necessarily an element of the offense of lying in wait murder.
>
> The use of the word "while" in the special circumstance of lying in wait means that the killing must take place during the period of concealment and watchful waiting or the lethal act must begin at and flow continuously from the moment the concealment and watchful waiting ends.
>
> If a cognizable interruption separates the period of lying in wait from the period during which the killing takes place, the special circumstance does not exist.
>
> A brief interval of time between the killer's first appearance and the acts inflicted which caused the killing do not

> necessarily negate a surprise attack, so long as there is a continuous flow in the culpable state of mind between the period of watchful waiting and the homicide.

(11 RT 1127-1129, 1 CT 231-233.)

Streeter raises a threefold challenge to these instructions. First, he claims the instructions failed to explain to the jury that the concealed purpose must be a concealed intent to kill, and the watchful waiting must be waiting for a time to launch a lethal attack. Second, he claims the instructions eliminated the requirement of immediacy. Third, he claims the additional language added at the request of the prosecutor further complicated the matter, confusing the issue and lightening the prosecutor's burden of proof.

Streeter's claim can be quickly rejected. As this Court has repeatedly held, CALJIC No. 8.81.15 correctly sets forth the elements of the special circumstance of lying in wait. (*People v. Stevens*, *supra,* 41 Cal.4th at pp. 182, 203-204; *People v. Cruz*, *supra*, 44 Cal.4th at pp. 636, 678.) Regarding the special instructions, those instructions accurately stated the law, and worked to Streeter's advantage by emphasizing the greater degree of proof required for a true finding on the special circumstance than for first degree murder on a theory of lying in wait.

This Court has rejected challenges to CALJIC No. 8.81.15 on the very grounds raised by Streeter. In *People v. Bonilla*, *supra*, 41 Cal.4th at p. 313, the defendant argued that CALJIC No. 8.81.15 provided contradictory and confusing descriptions of the time elements associated with the special circumstance, and provided contradictory and confusing descriptions of the concealment elements associated with the special circumstance. (*Id.* at p. 333.) This Court expressly rejected those claims and found the instruction correctly conveyed the elements of the special circumstance. (*Ibid.*)

Here, as in *Bonilla*, CALJIC No. 8.81.15 conveyed to the jury that the concealed purpose must be a concealed intent to kill, and that the watchful waiting had to be for a time to launch a lethal attack. Streeter argues the evidence supported a conclusion that his true concealed intent was to take his son, and the instructions as given would have permitted a true finding if the jury found that to be so. (AOB 166-167.) Streeter is wrong. Even assuming arguendo the evidence supported an inference that he concealed his purpose to take his son, the jury necessarily found that he also concealed his intent to kill Yolanda. Those purposes are not mutually exclusive, the jury instructions required the latter, and therefore, there was no error.

A similar argument was rejected in *People v. Carpenter*, *supra*, 15 Cal.4th at p. 312. There, the defendant argued the evidence established only an intent to rape his victim, and not a concealed intent to kill, and that the instructions on lying in wait murder and the lying in wait special circumstance failed to require a concealed intent to kill. This Court stated that although the defendant did intend to rape, the two intents are not mutually exclusive, and the evidence established the defendant's dual intent. Further, this Court found the instructions made it clear that more than an intent to rape was necessary for lying in wait murder, even where the instruction on the special circumstance contained additional language that if the defendant merely intended to rape during a period of watchful waiting and concealment, the special circumstance was not established, and the instruction on lying in wait murder omitted that language. (*Id.* at p. 390.) Similarly, in *People v. Sims*, *supra*, 5 Cal.4th at pp. 405, 434, this Court upheld the instruction against a challenge that it suggested that a concealment of purpose satisfied the concealment element. CALJIC No. 8.81.15 adequately informed the jury that the concealed purpose had to be

an intent to kill, and the watchful waiting had to be for an opportune time to commit a lethal act.

As to Streeter's second claim, that the instruction failed to convey the requirement of immediacy, that claim has also been rejected by this Court. (*People v. Michaels* (2002) 28 Cal.4th 486, 516.) CALJIC No. 8.81.15 clearly conveyed the immediacy requirement. At the time of Streeter's crime, the special circumstance required that the murder be committed "while lying in wait." (Pen. Code, §190.2, former subd. (a)(15); *People v. Lewis*, *supra*, 43 Cal.4th at pp. 511-512.) CALJIC No. 8.81.15 informed the jury they had to find an intentional killing, and also that the lying in wait need not continue for any particular period of time as long as it was sufficient to show a state of mind equivalent to premeditation and deliberation; that the concealment, watchful waiting and killing must occur in the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends. The jury was further told that if there was a clear interruption between the period of waiting and the killing, so that there was neither an immediate killing nor a continuous flow of uninterrupted lethal events, the special circumstance was not proved. (11 RT 1129-1130, 1 CT 234.) Considered as a whole, this instruction made it clear that the concealed purpose had to be a murderous one, the watching and waiting had to be for a time to launch a lethal attack, and the killing had to occur immediately.

In addition, the special instructions given by the court at the prosecutor's request emphasized the very principles Streeter contends were lacking in CALJIC No. 8.81.15, and worked to his advantage. Special instruction 1 reminded the jury there was a distinction between lying in wait murder and the special circumstance of lying in wait, and that the special circumstance required a finding that the killing was committed "while" lying in wait. (CT 231.) Special instruction 3 elaborated on that

distinction by correctly stating the law, defining the term "while," and explaining that if a "cognizable interruption" separated the period of lying in wait from the time period in which the killing occurred, the special circumstance did not exist. (CT 233.)

Streeter challenges the final paragraph of special instruction 3, claiming that "it is not clear to what culpable mental state the instruction refers," and that the jury would not have understood the surprise attack had to occur contemporaneous with the watchful waiting. (AOB 171-172.)

A single jury instruction is not to be considered in isolation, but must be viewed in the context of the overall charge. Even when there is an ambiguity, inconsistency or deficiency in a jury instruction, there is no due process violation unless there is a reasonable likelihood the jury misapplied the instruction in a manner that violates the Constitution. (*People v. Huggins*, *supra*, 38 Cal.4th at pp. 175, 192.) Streeter's argument disregards the entire first paragraph of instruction 3, and the other instructions which directly addressed both the requirement that the culpable mental state was an intent to kill, and the requirement that the killing occur during the period of watchful waiting.

The arguments of counsel are relevant to determining whether the jury misunderstood the instructions. (*Ibid.*, citing *People v. Kelly* (1992) 1 Cal.4th 495, 526–527.) During closing argument, the prosecutor explained the difference between lying in wait murder, and the lying in wait special circumstance. For the special circumstance, he explained, "You kick it up a notch." (11 RT 1075-1083.) The prosecutor clearly explained the relevant principles at length, stating:

> To find a special circumstance, it is a little tougher, as I say, more stringent requirements. You have to in addition to this over here, you have to have intent to kill and you have to commit the murder while lying in wait.

Can you see the distinction? It's a little bit different. You notice in the first one, murder under lying in wait, in the first degree, you don't have that "while" requirement; you just have immediately preceding stuff . . .

Here we have these requirements: The defendant intentionally killed the victim; the murder was committed while the defendant was lying in wait. And the term "while lying in wait" within the meaning of the law of special circumstances now is defined as a waiting and watching for an opportune time to act together with a concealment by ambush or, like the other instruction, or by some other secret design, take the other person by surprise, even though the victim is aware of the murderer's presence . . .

Pretty much the same thing in both instructions, right, except that it has to be "while" lying in wait for the special.

And I have a couple of other instructions to show you there. For a killing to be perpetrated while lying in wait, both the concealment and the watching and waiting, as well as the killing, must occur during the same time period or in an uninterrupted attack commencing no later than the moment concealment of the purpose ends.

In other words, he didn't start telling or showing his real purpose until he started beating up on Yolanda, going and getting the gas and so forth. While I'm out here, I'm just going to go (unintelligible) all the while knowing it was not his intent to do otherwise . . .

If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved.

A mere concealment of purpose is not sufficient to meet the requirement of concealment set forth in this special circumstance. However, when a defendant intentionally murders another person under circumstnaces which include, 1, a concealment of purpose; 2, a substantial period of watching and waiting for an opportune time to act; and 3, immediately thereafter a surprise attack on an unsuspecting victim from a

position of advantage, the special circumstance of murder while lying in wait has been is established. . . .

(11 RT 1077-1080.)

The prosecutor further explained,

> Use of the word "while" in the special circumstance of lying in wait means that the killing must take place during the period of concealment - - remember the words of purpose - - and watchful waiting or the lethal acts must begin and flow continuously from the moment of concealment of the purpose and watchful waiting ends. If a cognizable interruption separates the period of lying in wait from the period during which the killing takes place, the special circumstance does not exist.

(11 RT 1080-1081.)

The prosecutor then went on to explain the *Domino* case, and the factual distinctions between that case and the facts in this case.

> You know, we talked about having a surprise attack. So long as there is a continuous flow in the culpable state of mind between the homicide and the period of watchful waiting. Again, makes sense, right?
>
> In this case we have that situation. We have Mr. Streeter in his lying in wait, his waiting and watching for a time, to be able to commit this attack, and he does certain other things before he actually finally gets the gas and does it. Always a continuous flow of what he had in mind.
>
> He started off thinking he was going to kill her. Brought the gas. Had the lighter ready to do it. Wrote the note. So his culpable state of mind is a continuous flow until he finally did this act, right? . . .

(11 RT 1081-1082.)

The prosecutor's argument fully addressed the distinction between lying in wait murder and the lying in wait special circumstance. It made clear that Streeter's concealed intent was the intent to kill Yolanda, that the watchful waiting was undertaken for that purpose, and that there was a

continuous flow of the murderous assault immediately after the period of watchful waiting.

Finally, if there was any error in the instruction, it was harmless. Under state law, the instructional error is harmless if there is no reasonable probability the outcome of the defendant's trial would have been different had the jury been properly instructed. (*People v. Cole*, *supra*, 33 Cal.4th at pp. 1158, 1208-1209, citing *People v. Flood* (1998) 18 Cal.4th 470, Cal. Const., art. VI, §13, *People v. Watson*, *supra*, 46 Cal.2d at pp. 818, 836-837.) Under federal law, the error requires reversal unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Cole*, *supra*, 33 Cal.4th at pp. 1208-1209, citing *Neder v. United States* (1999) 527 U.S. 1, 8–16 [119 S. Ct. 1827, 144 L. Ed. 2d 35]; *Chapman v. California*, *supra*, 386 U.S. at p. 18; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *People v. Flood*, *supra*, 18 Cal.4th at pp. 502–504.)

As set forth extensively in Argument VIII, the overwhelming evidence established that Streeter concealed his purpose to kill Yolanda when he lured her to the Chuck E. Cheese restaurant on the pretext of reconciling and visiting his son. He prepared the instruments of her murder and then watched and waited for Yolanda to arrive. Upon her arrival, he immediately maximized his position of advantage by immobilizing her in two different ways; by taking her son from her, and by physically beating her while he commenced his lethal assault.

The jury was properly instructed on the special circumstance of lying in wait. Assuming arguendo the instructions were erroneous, the error was harmless. Finally, if this Court reverses the lying in wait special circumstance, the judgment of death should nonetheless be affirmed, as the penalty jury properly considered another valid special circumstance finding, all the facts and circumstances underlying Yolanda's murder, and Streeter's

history. There is no likelihood the jury's consideration of the mere existence of the lying in wait special circumstance tipped the balance towards death. This Court has frequently rejected similar contentions. (See *People v. Mungia*, *supra*, 44 Cal.4th at pp. 1101, 1139.)

X. THE LYING IN WAIT SPECIAL CIRCUMSTANCE IS CONSTITUTIONAL

Streeter contends the lying in wait special circumstance is unconstitutional, because it fails to narrow the class of death eligible defendants and fails to meaningfully distinguish death eligible defendants from those not death eligible. (AOB 178-187.) Specifically, Streeter argues this Court's expansive interpretation of the elements of the lying in wait special circumstance have eliminated any distinction between the special circumstance and premeditated, deliberate murder. (AOB 179-182.) He also claims this Courts' decisions have weakened the distinction between lying in wait murder and the lying in wait special circumstance. (AOB 182-186.) Finally, he argues the special circumstance fails to provide a meaningful basis for distinguishing death eligible defendants from those not death eligible. (AOB 186-187.) Streeter's claims have consistently been rejected by this Court, and he offers no reason for a different result in his case.

In *People v. Stevens*, *supra*, 41 Cal.4th at p. 182, this Court rejected the claim raised by Streeter that the special circumstance fails to distinguish between premeditated, deliberate murder and the lying in wait special circumstance. This Court stated,

> In distinction with premeditated first degree murder, the lying-in-wait special circumstance requires a physical concealment or concealment of purpose and a surprise attack on an unsuspecting victim from a position of advantage. [Citations.] Thus, any overlap between the premeditation element of first degree murder and the durational element of the lying-in-wait special circumstance does not undermine the

> narrowing function of the special circumstance. [Citation.] Moreover, contrary to Justice Moreno's concurring and dissenting opinion, concealment of purpose inhibits detection, defeats self-defense, and may betray at least some level of trust, making it more blameworthy than premeditated murder that does not involve surprise. [Citation.]

(*People v. Stevens*, *supra*, 41 Cal.4th at pp. 203-204; see also *People v. Gutierrez*, *supra*, 28 Cal.4th at pp. 1083, 1148-1149.)

In *People v. Gutierrez*, *supra*, 28 Cal.4th at pp. 1148-1149, this Court rejected the claim raised by Streeter that the special circumstance fails to distinguish between lying in wait murder and the lying in wait special circumstance. This Court stated,

> [M]urder by means of lying in wait requires only a wanton and reckless intent to inflict injury likely to cause death. [] In contrast, the lying-in-wait special circumstance requires "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage . . . ." [] Furthermore, the lying-in-wait special circumstance requires "that the killing take place *during the period of concealment and watchful waiting*, an aspect of the special circumstance distinguishable from a murder perpetrated by means of lying in wait, or following premeditation and deliberation.
>
> The distinguishing factors identified in *Morales* and *Sims* that characterize the lying-in-wait special circumstance constitute "clear and specific requirements that sufficiently distinguish from other murders a murder committed while the perpetrator is lying in wait, so as to justify the classification of that type of case as one warranting imposition of the death penalty."

(*People v. Gutierrez*, *supra*, 28 Cal.4th at pp. 1148-1149, internal citations omitted, emphasis in original; see also *People v. Cruz*, *supra*, 44 Cal.4th at pp. 636, 678.)

In *People v. Nakahara* (2003) 30 Cal.4th 705, 721, this Court rejected the claim raised by Streeter that the special circumstance fails to meaningfully distinguish between death eligible defendants and non-death eligible defendants. This Court stated,

> Defendant next argues that the lying-in-wait special circumstance (§190.2, subd. (a)(15)) is invalid for failure to sufficiently narrow the class of persons eligible for death and to provide a meaningful basis for distinguishing the few cases in which death is imposed from the many cases in which it is not. (See *Furman v. Georgia* (1972) 408 U.S. 238, 313 [92 S.Ct. 2726, 2764, 33 L.Ed.2d 346] (conc. opn. of White, J.).) We have repeatedly rejected this contention, and defendant fails to convince us the matter warrants our reconsideration. (See *People v. Hillhouse* [(2002) 27 Cal.4th 469, 510; *People v. Frye* (1998)18 Cal.4th 94, 1029, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421; *People v. Crittenden* (1994) 9 Cal.4th 83, 154-156; *People v. Morales*, *supra*, 48 Cal.3d at pp. 557-558 [257 Cal.Rptr. 64, 770 P.2d 244].)

(*People v. Nakahara*, *supra*, 30 Cal.4th at p. 721; see also *People v. Greier* (2007) 41 Cal.4th 555, 617-618; *People v. Moon*, *supra*, 37 Cal.4th at p. 1, 44; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 312, 419.)

Streeter's contention must therefore be rejected, as this Court has previously considered the issue and Streeter presents no new or persuasive reason to revisit the matter.

XI. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S TRUE FINDING ON THE SPECIAL CIRCUMSTANCE OF TORTURE MURDER

Streeter contends the evidence was legally insufficient to support the true finding on the special circumstance of torture murder. (AOB 188-189.) Streeter is wrong.

The standards for reviewing a claim of insufficient evidence previously discussed in Arguments VI and VIII apply here. Thus, this Court must review the evidence in the light most favorable to the judgment

to determine whether there is substantial evidence to support the jury's true finding on the torture murder special circumstance. (*Jackson v. Virginia*, *supra*, 443 U.S. at pp. 307, 318; *People v. Johnson*, *supra*, 26 Cal.3d at pp. 557, 576-578.)

To prove the torture-murder special circumstance, the jury must find the murder was intentional and involved the infliction of torture. (Pen. Code, §190.2, subd. (a)(18); *People v. Chatman*, *supra*, 38 Cal.4th at pp. 344, 391.) As he did in Argument VI, Streeter claims the evidence was insufficient to establish he intended to torture Yolanda. For the same reasons set forth in Argument VI, respondent disagrees.

> [T]he requisite torturous intent is an intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose. A premeditated intent to inflict prolonged pain is not required.

(*People v. Elliot*, *supra*, 37 Cal.4th at pp. 453, 479.)

In *People v. Cole*, *supra*, 33 Cal.4th at p. 1158, this Court upheld a jury's true finding on the special circumstance of murder by torture where the issue was sufficiency of the evidence to show an intent to inflict extreme pain. The defendant murdered his girlfriend Mary Ann Mahoney by pouring gasoline on her while she was in bed and lighting her on fire. (*Id.* at p. 1172.) There was a history of strife between the couple, who were functional alcoholics. (*Id.* at pp. 1171, 1214.) Before the murder, Mary Ann planned to move out. (*Id.* at p. 1214.) The defendant was jealous and possessive, and believed Mary Ann was cheating. (*Ibid.*) This Court held that this evidence — in conjunction with (1) the manner in which defendant had poured a flammable liquid on two distinct places, *i.e.*, on Mary Ann and on the floor near the bedroom door, (2) the resulting condition of Mary Ann's body, (3) the defendant's statement to Mary Ann when he ignited the fire that he hoped she burned in hell, and (4) his statements thereafter that he was angry at her and wanted to kill her — permitted "an inference that

defendant's purpose in setting Mary Ann on fire was to inflict extreme pain." (*People v. Cole*, *supra*, 33 Cal.4th at p. 1214; see also *People v. Baker* (2002) 98 Cal.App.4th 1217, 1223-24 [reaching a similar conclusion].)

The facts in this case are almost identical to *Cole*. As in *Cole*, the evidence here established Streeter had a history of alcohol abuse and violence against Yolanda. He was possessive of her, and prevented her from contacting her family or the police. She had secretly moved away and enlisted the assistance of family members in escaping from Streeter. (8 RT 768-770, 10 RT 974-978, 10 RT 996-999.)

Like the defendant in *Cole*, Streeter poured gasoline in two distinct places - - on Yolanda, and on the car in which her six-year-old niece was trapped inside. Streeter called Yolanda a "fucking bitch" as he beat her. He telephoned Yolanda's family members and threatened them. As in *Cole*, this evidence was sufficient to permit an inference that the defendant's purpose in setting the victim on fire was to inflict extreme pain. (6 RT 526-527, 8 RT 756-757, 769-770, 10 RT 1023-1035.)

Streeter claims that construing the torture murder special circumstance in a manner which would encompass the facts of this case would result in a special circumstance that is vague and overbroad in violation of the Eighth and Fourteenth Amendments. (AOB 189.) To the contrary; the facts of this case reveal that Streeter is among the worst of the worst, and falls squarely within the narrow definition of torturous murderers deemed statutorily eligible for the death penalty.

Finally, if the torture murder special circumstance is found deficient, the death judgment need not be reversed. The jury found the lying in wait special circumstance true, and in determining the appropriate penalty, the jury properly considered all of the facts and circumstances underlying the entire event, as well as Streeter's history. (*Brown v. Sanders* (2006) 546

U.S. 212, 223- 225 [126 S.Ct. 884, 163 L.Ed.2d 723].) There is no likelihood the jury's consideration of the mere existence of the torture murder special circumstance tipped the balance towards death. This Court has frequently rejected similar contentions. (*People v. Mungia*, *supra*, 44 Cal.4th at pp. 1101, 1139.)

XII. THE TORTURE MURDER SPECIAL CIRCUMSTANCE IS NOT VAGUE OR OVERBROAD, AND THE JURY WAS PROPERLY INSTRUCTED ON ITS ELEMENTS[28]

Streeter contends the torture murder special circumstance is unconstitutional, and the instructions given to his jury failed to adequately inform them of the elements of the special circumstance. Specifically, he claims the phrases "extreme cruel physical pain" and "any sadistic purpose," were vague and overbroad, and further argues the instructions "omitted and obfuscated the elements of first degree murder and the torture murder special circumstance." (AOB 190-195.) Streeter acknowledges these claims have been repeatedly rejected by this Court. There is no reason for a different result here.

The jury was instructed on the special circumstance of murder by torture according to CALJIC No. 8.81.18 as follows:

> To find the special circumstance referred to in these instructions as murder following infliction of torture is true each of the following facts must be proved: The murder was intentional; and the defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose; and the defendant did, in fact, inflict extreme cruel

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[28] Streeter claims this Argument applies with equal force to his conviction for first degree murder by torture, and asks this Court to reverse both his conviction and the special circumstance. (AOB 191, 195.) For the reasons set forth herein, Respondent requests both the conviction and the special circumstance be affirmed.

physical pain and suffering upon a living human being no matter how long its duration.

Awareness of pain by the deceased is not a necessary element of torture.

(11 RT 1130-1131, 1 CT 236, CALJIC No. 8.81.18.)

This standard instruction correctly and sufficiently defines the special circumstance of torture murder. (*People v. Barnett*, *supra*, 17 Cal.4th at pp. 1044, 1160-1161.) In *People v. Chatman*, *supra*, 38 Cal.4th at pp. 344, 394, this Court rejected a claim that the torture murder special circumstance was vague and overbroad because the term "extreme physical pain" was too imprecise. The defendant in *Chatman* argued the phrase was analogous to the language, "heinous, atrocious or cruel," which the United States Supreme Court has found void for vagueness. (*People v. Chatman*, *supra*, 38 Cal.4th at p. 394, citing *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-364 [108 S.Ct. 1853, 100 L.Ed.2d 372].) This Court disagreed, citing *People v. Mincey* (1992) 2 Cal.4th 408, 454, which held that since the torture murder special circumstance requires proof that the defendant intended to kill and torture the victim, and inflict extreme pain upon a living victim, the torture special circumstance has been narrowly construed and its constitutionality has been upheld. (*People v. Chatman*, *supra*, 38 Cal.4th at p. 394.) The term "extreme" was not vague because it has a commonsense meaning which the jury would be expected to apply. (*Ibid.*, citing *People v. Arias*, *supra*, 13 Cal.4th at pp. 92, 189.)

Like the defendant in *Chatman*, Streeter argues the use of the term "cruel" is vague because it was found to be so in the context of a special circumstance for crimes that are "heinous, atrocious and cruel." (AOB 192, citing *People v. Superior Court* (*Engert*) (1982) 31 Cal.3d 797, 802.) Streeter claims, "[t]he language of *Engert* has yet to be reconciled with the

use of the phrase "cruel pain and suffering" in the torture-murder special circumstance." (AOB 192-193.)

Streeter's analysis is flawed, because the constitutional rule applied in *Engert* was a rule against vaguely worded *statutes*; that is, those statutes that are not definite enough to provide a standard of conduct for those whose activities are proscribed, or a standard for courts to apply in ascertaining guilt. A jury instruction is not subject to scrutiny under this rule because it does not define a crime, but merely attempts to explain a statutory definition. An instruction may be so inadequate or confusing that it violates due process, but the consequence is not that the instruction is void for vagueness; the question is whether there is a reasonable likelihood the challenged instruction has been applied in a way that violates the Constitution. (*People v. Raley* (1990) 2 Cal.4th 870, 899-901, citations omitted.)

There is no such likelihood here. Like the jury in *Chatman*, Streeter's jury was instructed that the special circumstance required proof that the defendant intended to kill and torture the victim, and inflicted extreme pain upon a living victim.[29] (11 RT 1131.) These instructions gave the special circumstance a narrow construction which comported with constitutional requirements. And the term "extreme" has a commonsense meaning. (*People v. Chatman*, *supra,* 38 Cal.4th at p. 394; see also *People v. Tafoya* (2007) 42 Cal.4th 147, 197 [referring to the words "extreme" and "substantial"].)

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[29] The third requirement, involving the infliction of extreme pain upon a living victim, was eliminated with the enactment of Proposition 115 in 1990, which preceded the offense in this case, but the instruction in this case included that requirement. (*People v. Elliot*, *supra*, 37 Cal.4 that pp. 453, 476-477; 11 RT 1131.)

Streeter claims the instruction contained contradictory language in the last two paragraphs, because it required proof of the infliction of extreme cruel and physical pain and suffering, but then told the jury the awareness of pain was not a necessary element of torture. Streeter argues the instruction was nonsensical, because a defendant cannot inflict pain if no one feels it. (AOB 193.) To the contrary; while there may be some scientific merit to the argument that the extent of pain can only be measured by reference to something that occurs in the mind, the statute requires the infliction of extreme physical pain, emphasizing the concern with the physical rather than the mental experience of the victim, and making it clear that the purpose of the statute is to encompass killings in which the perpetrator intentionally performed acts which were calculated to cause extreme physical pain to the victim. (*People v. Davenport*, *supra*, 41 Cal.3d at pp. 247, 271.) Even assuming the infliction of extreme and cruel pain requires an awareness of pain so that the provisions were contradictory, the error could only have worked to Streeter's benefit. Streeter acknowledges the infliction of pain is not required for the special circumstance of murder by torture (AOB 193, fn. 27) so the only risk was that the instruction added an additional element not required by statute. In that case, Streeter's jury found the special circumstance to be true even under a more stringent standard than what was required by law.

Streeter also challenges the phrase, "any sadistic purpose," claiming it may have a settled meaning but it has no application to this case. (AOB 194.) This Court rejected a challenge to that language in *People v. Raley*, *supra*, 2 Cal.4th at pp. 899-901. In doing so, this Court cited several prior decisions which have consistently approved the challenged language, and noted the phrase "sadistic purpose" has been approved as "'a "precise and correct statement of the law.'" (*Id.* at pp. 899-900, citing *People v. Bittaker* (1989) 48 Cal.3d 1046, 1100-1101, *People v. Davenport*, *supra*. 41 Cal.3d

at pp. 247, 267, and *People v. Talamantez* (1985) 169 Cal.App.3d 433, 455.)

Streeter argues the term "sadistic purpose" has no application to this case because there was no sexual aspect of this case, and Streeter did not witness any pain he caused. (AOB 194.) However, as this Court noted in *Raley*, the instruction adequately informs the jury that the defendant's intent to cause cruel suffering may be induced by any number of nefarious purposes, including sadism. (*People v. Raley*, *supra*, 2 Cal.4th at pp. 870, 900.) Moreover, Respondent disagrees with Streeter's conclusion that there was no sexual aspect to this case. While it is true that the evidence reveals Streeter's primary purpose in burning Yolanda was revenge, that does not exclude the possibility that he also obtained some sexual pleasure from dominating and hurting Yolanda, as evidenced by the fact that only months before the burning incident, Streeter had violently raped her.

The torture murder special circumstance is constitutional, and the instructions properly defined the elements of that special circumstance. Streeter's claim should be rejected

XIII. THE TORTURE MURDER SPECIAL CIRCUMSTANCE PROPERLY NARROWS THE CLASS OF DEATH ELIGIBLE MURDERERS

Streeter contends the torture murder special circumstance is unconstitutional, because it fails to perform the narrowing function required by the Eighth Amendment and fails to insure there is a meaningful basis for distinguishing those cases in which the death penalty is imposed from those in which it is not. (AOB 196-201.) The special circumstance is constitutional.

The special circumstance in Penal Code section 190.2, subdivision (a), subsection (18), applies to murders that are intentional and involve the infliction of torture. This Court has specifically found that "the special

circumstance of intentional murder involving the infliction of torture sufficiently channels and limits the jury's sentencing discretion consistent with Eighth Amendment principles, and meaningfully narrows the group of persons subject to the death penalty. (*People v. Barnett*, *supra*, 17 Cal.4th at pp. 1044, 1162-1163, citing *People v. Raley*, *supra*, 2 Cal.4th at pp. 870, 898, 900; *People v. Davenport*, *supra*, 41Cal.3d at p. 247, internal citations omitted.) As this Court explained, torture murder is "particularly reprehensible because the defendant intends to cause cruel suffering." (*People v. Raley*, *supra*, 2 Cal.4th at p. 900.)

This Court has rejected Streeter's argument that the definition of murder by torture fails to narrow the class of death eligible murderers. (*People v. Chatman*, *supra*, 38 Cal.4th at pp. 344, 394, citing *People v. Mincey*, *supra*, 2 Cal.4th at pp. 408, 454; *People v. Bemore* (2000) 22 Cal.4th 809, 843-844;*People v. Barnett*, *supra*, 17 Cal.4th at pp. 1044, 1061 [statute provides sufficiently narrow and rational basis on which to base death penalty, therefore satisfies Eighth and Fourteenth amendments].)

Streeter argues this Court's interpretation of the torture murder special circumstance in *People v. Elliot*, *supra*, 37 Cal.4th at pp. 453, 477, finding there was no requirement of a willful, deliberate and premeditated intent to inflict extreme and prolonged pain, renders the provision the functional equivalent of first degree murder by torture, and results in a special circumstance that broadens, rather than narrows, death eligibility. (AOB 199-200.) While he acknowledges that unlike first degree torture murder, the special circumstance requires an intent to kill, he claims the requirement is illusory and theoretical. (*Ibid.*)

Streeter is wrong. In *People v. Davenport*, *supra*, 41 Cal.3d at pp. 271-272, this Court held the special circumstance was distinguishable from murder by torture because the special circumstance required that the defendant act with the intent to kill. Streeter uses an example, that the jury

could have found the special circumstance true while rejecting a first degree murder torture conviction if they found the absence of a willful, premeditated and deliberate torture, to support his claim that the special circumstance is broader than the requirements for first degree murder. But his example misses the point. It is true that the special circumstance does not require a premeditated, deliberate intent to inflict extreme and prolonged pain, but it is also true that the special circumstance adds the requirement of an intentional killing. The additional requirement of an intent to kill narrows the class of persons eligible for the death penalty. (See *People v. Davenport*, *supra*, 41 Cal.3d at pp. 271-272.)

Streeter's claim that the torture murder special circumstance fails to perform the narrowing function required by the Eighth Amendment has been consistently rejected by this Court. His claim should be rejected.

XIV. THE JURY WAS PROPERLY INSTRUCTED ON THE CONCEPT OF REASONABLE DOUBT

Streeter contends the jury instructions impermissibly undermined and diluted the requirement of proof beyond a reasonable doubt. He challenges the standard jury instructions on circumstantial evidence (CALJIC Nos. 2.90 [PRESUMPTION OF INNOCENCE – REASONABLE DOUBT – BURDEN OF PROOF], 2.01 [SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE - - GENERALLY], 2.02 [SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE TO PROVE SPECIFIC INTENT OR MENTAL STATE], 8.83 [SPECIAL CIRCUMSTANCES - - SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE - - GENERALLY], and 8.83.1 [SPECIAL CIRCUMSTANCES - - SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE TO PROVE REQUIRED MENTAL STATE]), several other general instructions (CALJIC Nos. 1.00 [RESPECTIVE DUTIES OF JUDGE AND JURY], 2.21.1 [DISCREPANCIES IN TESTIMONY], 2.21.2 [WITNESS WILLFULLY

FALSE], 2.22 [WEIGHING CONFLICTING TESTIMONY], 2.27 [SUFFICIENCY OF TESTIMONY OF ONE WITNESS], and 8.20 [DELIBERATE AND PREMEDITATED MURDER]) and the motive instruction (CALJIC No. 2.51.) (AOB 201-217.) Streeter acknowledges these instructions have been found not to undermine or dilute the concept of reasonable doubt, but asks this Court to reconsider its prior rulings. This Court should decline to do so.

This Court has recently rejected identical challenges to every one of these instructions. In *People v. Parson* (2008) 44 Cal.4th 332, 358, the defendant argued that several standard jury instructions individually and collectively undermined and lessened the requirement of proof beyond a reasonable doubt; specifically, CALJIC Nos. 1.00, 2.01, 2.21.1, 2.22, 2.27, 2.51, 2.90 and 8.83. This Court cited and followed its many prior decisions finding the instructions unobjectionable when accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof. (*Id.* at p. 358, citing *People v. Kelly* (2007) 42 Cal.4th 763, 792 and cases cited; *People v. Howard*, *supra*, 42 Cal.4th at pp. 1000, 1025-1026 & fn. 14, and cases cited; *People v. Carey* (2007) 41 Cal.4th 109, 129-131, and cases cited; *People v. Crew* (2003) 31 Cal.4th 822, 847-848, and cases cited.) CALJIC Nos. 8.83.1, 2.21.2 and 2.51 were upheld in *People v. Kelly*, *supra*, 42 Cal.3d at p. 792, *People v. Howard*, *supra*, 42 Cal.4th at pp. 1025-1026 & fn. 14, and *People v. Whisenhunt* (2008) 44 Cal.4th 174, 220. CALJIC No. 2.02 was also upheld in *People v. Howard*, *supra*, and *People v. Whisenhunt*, *supra*.

The same conclusion should be reached here, because the challenged instructions were accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof. The jury was instructed pursuant to CALJIC No. 2.90 as follows:

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

(11 RT 1134.)

The constitutionality of this instruction has been "conclusively settled." (*People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 220, citing *People v. Hearon* (1999) 72 Cal.App.4th 1285, 1287.) The instruction properly guided the jury on the concepts of proof beyond a reasonable doubt and the presumption of innocence.

Streeter argues the instructions on circumstantial evidence compelled the jury to find him guilty if they found an incriminatory interpretation of the evidence to be more reasonable. (AOB 203-204.) He further argues the instructions created a mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless he rebutted the presumption by producing a reasonable exculpatory explanation. (AOB 204.)

As to this specific challenge, this Court should follow its many decisions rejecting that claim. (See *People v. Parsons*, *supra*, 44 Cal.4th at p. 358, citing *People v. Morgan* (2007) 42 Cal.4th 593, 620; *People v. Stewart* (2004) 33 Cal.4th 425, 521; *People v. Nakahara*, *supra*, 30 Cal.4th at pp 705, 713-714.) As to Streeter's more general claim, that the

instructions undermined the presumption of innocence and the requirement of proof beyond a reasonable doubt, the claim fails because it relies on the faulty presumption that the jury *misinterpreted* the instructions. This Court presumes that jurors *followed* the instructions. (See *People v. Hamilton*, *supra*, 45 Cal.4th at pp. 863, 937.)

Streeter's interpretation requires a distortion of the clear meaning of the instructions and their context. The challenged instructions do not even purport to address the concept of reasonable doubt; i.e., the level of confidence the jury was required to have in its overall determination regarding Streeter's guilt. They deal with an entirely different subject matter. For example, the circumstantial evidence instructions speak directly and solely to the manner in which the jury was to resolve conflicting factual inferences based on circumstantial evidence. As to the burden of proof and the concept of reasonable doubt, the jury was specifically and correctly instructed pursuant to CALJIC No. 2.90. Thus, Streeter's claim that the more specific instructions were likely to have prevailed over the more general instructions (see AOB 214-215) misses the point; the challenged instructions were not more specific at all; they were altogether irrelevant to the issue of reasonable doubt.

Streeter's reference to the prosecutor's closing argument illustrates this point. He challenges the prosecutor's argument that "the defendant's explanation is simply unreasonable, isn't it?" and suggests this violates the rule that the accused has no burden of proof or persuasion, even as to his defenses. (AOB 206, citing 11 RT 1104-1105.) Clearly, however, the prosecutor's argument was a reference to the manner in which the jury should resolve factual questions based on circumstantial evidence, and not a reference to the burden of proof required once the factual issues were resolved. The prosecutor's argument was simply another way to say the factual inferences Streeter was asking the jury to draw from the

circumstantial evidence were unreasonable. Nothing about the prosecutor's argument implied that the jury was required to find Streeter guilty if they agreed.

Assuming arguendo there was any error in these instructions, it was harmless, so reversal is not required. In addition to the overwhelming evidence of Streeter's guilt as set forth in Argument IV, the prosecutor ended his opening argument by reminding the jury he had the burden of proof beyond a reasonable doubt. (11 RT 1087.) The jury was instructed that proof based on circumstantial evidence required a finding beyond a reasonable doubt as to each fact essential to complete a circumstance. (11 RT 1111.) There is no reasonable likelihood the jury misunderstood the burden of proof beyond a reasonable doubt. The judgment should be affirmed.

XV. STREETER'S CLAIM THAT THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY ON FLIGHT PURSUANT TO CALJIC NO. 2.52 IS FORFEITED; IN ANY EVENT, THE INSTRUCTION WAS PROPER

Streeter contends the trial court deprived him of his constitutional rights by instructing the jury on flight pursuant to CALJIC No. 2.52. He argues the instruction improperly duplicated the circumstantial evidence instructions, it was unfairly argumentative, and it permitted the jury to draw an irrational permissive inference. He further argues the error requires reversal of his conviction and the special circumstance findings. (AOB 218-228.) Streeter's claim is forfeited. In any event, the instruction was properly given, and even assuming arguendo it was error, it was clearly harmless so reversal is not required.

The jury was instructed as follows:

> The flight of a person immediately after the commission of a crime or after he is accused of a crime is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in

> deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(11 RT 1115, 1 CT 201, CALJIC No. 2.52.)

Trial counsel did not object. (See 9 RT 800-814, 11 RT 1056-1060.) The failure to object to a flight instruction forfeits any complaint that the instruction was given. (*People v. Loker* (2008) 44 Cal.4th 691, 705-706; see *People v. Farnam*, *supra*, 28 Cal.4th at pp. 107, 165; *People v. Bolin*, *supra*, 18 Cal.4th at pp. 297, 326; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223; but see *People v. Smithey* (1999) 20 Cal.4th 936, 982, fn. 12 [claim that flight instruction was not warranted by the evidence was not forfeited by failure to object].)

Even if it is not forfeited, Streeter's claim fails. Streeter first claims the flight instruction was duplicative of the general instructions regarding circumstantial evidence. (AOB 218-219, citing CALJIC Nos. 2.00, 2.01, 2.02.) Streeter is wrong. CALJIC Nos. 2.00, 2.01, and 2.02 instructed the jurors regarding the definition of circumstantial evidence and the sufficiency of circumstantial evidence to establish facts leading to a finding of guilt. On the other hand, CALJIC No. 2.52 was a cautionary instruction which benefitted the defense by "admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*People v. Jackson*, *supra*, 13 Cal.4th at p. 1224.)

Moreover, Streeter's argument misses the point. In support of his claim, Streeter cites cases which stand for the proposition that a trial court does not abuse its discretion in declining to read a defendant's proposed instructions if such instructions are duplicative of standard instructions. (AOB 219.) These cases are not relevant to whether the trial court erred in giving a standard instruction. Further, the flight instruction must be given where evidence of flight is relied upon by the prosecution. (*People v.*

Howard, *supra*, 42 Cal.4th at pp. 1000, 1020; *People v. Abilez* (2007) 41 Cal.4th 472, 521-522; *People v. Turner* (1990) 50 Cal.3d 668, 694; *People v. Cannady* (1972) 8 Cal.3d 379, 391.) Here, the instruction was properly given because evidence was presented that Streeter fled the scene immediately after lighting Yolanda on fire, while she was still burning. Indeed, Streeter does not contest that the evidence was sufficient to support giving the instruction. Accordingly, the trial court was required to give the flight instruction regardless of the general instructions on circumstantial evidence.

Streeter next claims that the flight instruction was argumentative and focused the jury's attention on evidence favorable to the prosecution. (AOB 219-224.) Streeter's claims have been repeatedly rejected by this Court. (*People v. Howard*, *supra*, 42 Cal.4th at p. 1021; *People v. Mendoza* (2000) 24 Cal.4th 130, 180-181; *People v. Jackson*, *supra*, 13 Cal.4th at p. 1224 [noting that the cautionary nature of the instruction benefits the defense].) Streeter urges this Court to reconsider its holdings in light of *People v. Mincey*, *supra*, 2 Cal.4th at pp. 408, 437, which he contends rejected as argumentative an instruction analogous to CALJIC No. 2.52. (AOB 220-221.) However, this Court recently rejected the identical claim with regard to CALJIC No. 2.03, a similar consciousness of guilt instruction:

> [Bonilla] is correct that the rejected instruction in *Mincey* was structurally identical to CALJIC No. 2.03: both contained the propositional structure 'If certain facts are shown, then you may draw particular conclusions.' But it was not the structure that was problematic in *Mincey*. Rather it was the way the proposed instruction articulated the predicate 'certain facts': 'If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may . . . .' (*Mincey*, [*supra*, 2 Cal.4th] at p. 437, fn. 5 [].) This argumentative language focused the jury on defendant's version of the facts, not his legal theory of the case;

> this flaw, not the generic 'if/then' structure, is what caused us to approve the trial court's rejection of the instruction. (*Id.* at p. 437 [].) Any parallels between that instruction and CALJIC No. 2.03 are thus immaterial. [Citations.] We adhere to our prior decisions rejecting the argument that CALJIC No. 2.03 is impermissibly argumentative.

(*People v. Bonilla*, *supra*, 41 Cal.4th at p. 330, original brackets omitted.)

The same logic applies to CALJIC No. 2.52, as both are similarly structured consciousness of guilt instructions. (See *People v. Morgan*, *supra*, 42 Cal.4th at pp. 593, 621 [treating claims relating to CALJIC Nos. 2.03 and 2.52 uniformly]; accord, *People v. Thornton* (2007) 41 Cal.4th 391, 438; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439; *People v. Jackson*, *supra*, 13 Cal.4th at pp. 1223-1224.) Accordingly, this Court should follow its previous holdings and reject Streeter's claim.

Lastly, Streeter contends the flight instruction permitted the jury to draw irrational inferences regarding Streeter's state of mind at the time the offenses were committed. (AOB 224-227.) Respondent disagrees. As this Court has repeatedly held, CALJIC No. 2.52 does not permit the jury to draw such irrational or impermissible inferences. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1160 ["We have explained that the flight instruction, as the jury would understand it, does not address the defendant's specific mental state at the time of the offenses, or his guilt of a particular crime, but advises of circumstances suggesting his consciousness that he has committed some wrongdoing."]; accord, *People v. Howard*, *supra*, 42 Cal.4th at p. 1021; *People v. Thornton*, *supra*, 41 Cal.4th at p. 438; *People v. Bolin*, *supra*, 18 Cal.4th at p. 327; see also *People v. Mendoza*, *supra*, 24 Cal.4th at pp. 179-180.)

Streeter argues since there was no dispute that Streeter caused Yolanda's death, the only issue was his mental state at the time the charged crimes were committed. Therefore, he argues, the instruction improperly

permitted the jury to use the evidence that Streeter fled the scene to prove that he had the mental states required for conviction of first degree murder. (AOB 225.)

But such use would not necessarily be improper. To the extent the jury found Streeter's flight after the crime provided insight into his state of mind when he committed the crime, they were permitted to consider it. This case allowed for such a finding. For example, Streeter was charged with first degree murder by torture, and with the special circumstance of murder by torture. The prosecutor was required to prove that Streeter acted with the intent to torture. Streeter fled the scene while Yolanda was on fire, while she was still screaming in fear and in pain and while others were frantically trying to put out the flames. Streeter's flight under those circumstances has a tendency in reason to establish that he acted with an intent to torture.

Second, the instruction did not require the jury to draw such an inference or even suggest that they should. The gist of the instruction was to warn the jury against using evidence of flight improperly. The instruction permitted the jury to consider such evidence only to the extent they found it relevant. The instruction begins by informing the jury that flight is not sufficient in itself to prove guilt. It goes on to inform the jury they may consider evidence of flight "in the light of all other proved facts," but that the weight to give to such evidence is a matter for them to decide.

Streeter has raised no persuasive basis for reconsideration of this Court's prior decisions. Accordingly, the trial court properly instructed the jury pursuant to CALJIC No. 2.52.

Any error in giving the flight instruction was harmless. It is not reasonably probable Streeter would have achieved a more favorable result had the instruction not been given. (See *People v. Turner*, *supra*, 50 Cal.3d at p. 695 [error in giving flight instruction at guilt phase is reviewed under

People v. Watson, *supra,* 46 Cal.2d at p. 836]; accord, *People v. Silva*, *supra*, 45 Cal.3d 604, 628.) The instructions as a whole informed the jury that the prosecution had the burden of proof beyond a reasonable doubt regarding every fact establishing Streeter's guilt. (See, 11 RT 1107-1140; [CALJIC No. 1.01, CALJIC No. 2.01, CALJIC No. 2.90, CALJIC No. 8.71; see *People v. Frye* (1998)18 Cal.4th 894, 957 [appellate court looks to the entire charge to the jury to determine whether there is a reasonable probability the jury improperly applied a challenged instruction].) The instructions also made it clear to the jury that the flight instruction might not apply. ([CALJIC No. 17.31 ["All Instructions Not Necessarily Applicable"]]; see *People v. Richardson* (2008) 77 Cal.Rptr.3d 163, 211.)

Moreover, as set forth fully in Argument IV, the evidence of Streeter's flight was a very small portion of the overwhelming evidence of his guilt. Accordingly, it is not reasonably probable Streeter would have achieved a more favorable result had the flight instruction not been given. For the same reasons, any error was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 18.)

XVI. THE JURY WAS NOT MISLED AS TO THE WEIGHING PROCESS FOR DETERMINING THE APPROPRIATE PENALTY

Streeter contends his constitutional rights were violated by the trial court's failure to instruct the jury on the process of weighing the aggravating and mitigating factors to determine the appropriate penalty. Specifically, he contends the omission of CALJIC No. 8.88 from the jury instructions prevented the jury from understanding the weighing process, their responsibility to make a personal decision with regard to the appropriate penalty after assigning moral or sympathetic value to the relevant factors, and that they could only vote to impose death if the aggravating circumstances were "so substantial" in comparison to the mitigating circumstances that death was warranted. He further argues that a

note from the jury reveals they were given insufficient guidance on these principles, and that the court's response to the note compounded the problem. He claims the error requires automatic reversal, but under any standard, the error was not harmless. (AOB 229-256.)

Streeter is wrong. CALJIC No. 8.88 (formerly CALJIC No. 8.84.2) is a prophylactic instruction. It was designed to avoid the potential for confusion which might result from providing juries with nothing more than the statutory language setting forth the weighing process. Here, that risk of confusion did not exist, because Streeter's jury was not instructed in the potentially misleading language of Penal Code section 190.3. Moreover, the trial court's instructions and the arguments of counsel fully informed the jury about the nature of the weighing process and their responsibility to individually determine the appropriate penalty. The court's answer to the jury note reaffirmed the breadth of the jurors' discretion, and the jury's subsequent conduct reveals they correctly interpreted the court's response. The jury instructions did not mislead the jury as to their sentencing discretion, so there was no error. The death judgment should be affirmed.

CALJIC No. 8.88 is the concluding instruction to be given in penalty trials. It states,

> It is now your duty to determine which of the two penalties, death or imprisonment in the state prison for life without possibility of parole, shall be imposed on [the] [] defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating

circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

[. . .]

You shall now retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations or you may choose a new foreperson. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.

As a preliminary matter, Respondent disagrees with Streeter's assertions that 1) CALJIC No. 8.88 was entirely and inexplicably stricken, and 2) that such omission requires automatic reversal of the death penalty. (AOB 229, 250-256.) At the beginning of the discussion on jury instructions, the trial court stated it was going to list the instructions it intended to give, and pointed out portions of those instructions which it intended to delete. (22 RT 2376-2377.) The court proceeded to list the instructions it intended to give, and among them listed "8.88 down to the last paragraph - - " The prosecutor interrupted, asking, "Did your honor

say .88?" and the court then finished its sentence and answered the prosecutor, by saying, "- - which is stricken. 8.88." Omitting the interruption, and viewed in context, the import of the trial court's statement was that it intended to give CALJIC No. 8.88 down to the last paragraph, and only the last paragraph would be stricken (with the stricken portion to be read later in the instructions, as described below.) Then the court stated, "That's all the penalty phase instructions I would give." (22 RT 2380.)

From these comments it appears clear that the court and the parties intended for the full text of CALJIC No. 8.88 to be read to the jury, albeit in two separate parts, with the last portion of the instruction to be read at the very conclusion of the instructions. That interpretation of the record is corroborated by the trial court's subsequent statements, setting forth the final concluding instructions it intended to give,

> And then, finally, the modified version of 8.88, which you have a copy of regarding 'you shall now retire and select one of your number to act as foreperson,' et cetera, et cetera.

(22 RT 2381.)

That portion of the instruction (the final two paragraphs, which was the portion "stricken" from the original instruction) was, in fact, read to the jury (22 RT 2635) and is identified in the Clerk's Transcript as CALJIC No. 8.88 (Modified). (2 CT 461.) Thus, the omission of the first several paragraphs of CALJIC No. 8.88 from the final reading of the jury instructions appears to have been inadvertent, with neither the parties nor the court noticing its omission from the final instructions.

Moreover, respondent disagrees with Streeter's assertions that the instruction was omitted in its entirety, and that reversal is automatic without evaluating the effect of the omission on the outcome of his trial. As detailed below, the trial court read portions of the instruction, and summarized other portions, at various points in the proceedings. Either

way, the relevant question is whether, considering the totality of instructions and arguments, there was a reasonable likelihood the failure to instruct misled the jurors as to the scope of their sentencing discretion. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1062, citing *People v. Brown* (1985) 40 Cal.3d 512, 541.) The clear answer on this record is no.

CALJIC No. 8.84.2, the predecessor to CALJIC No. 8.88, was developed as a prophylactic instruction after this Court found the language of Penal Code section 190.3, standing alone, could cause jurors to be confused about the process required for weighing aggravating and mitigating circumstances to determine penalty. In *People v. Brown*, *supra*, this Court addressed the constitutionality of Penal Code section 190.3, which provided that "if the jury finds that 'the aggravating circumstances *outweigh* the mitigating circumstances; it '*shall*' impose a sentence of death." (*People v. Brown*, *supra*, 40 Cal.3d at p. 538, emphasis in original.) In *Brown*, the defendant argued the statute impermissibly limited the jury's consideration of all mitigating evidence, required a death verdict on the basis of an arithmetical formula, and forced a jury to impose death for reasons other than its own judgment that such a verdict was appropriate under all the facts and circumstances of an individual case. This Court held that Penal Code section 190.3 should not be so interpreted.

> In this context, the word 'weighing' is a metaphor for a process which by its nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary 'scale' or the arbitrary assignment of 'weights' to any one of them.

(*Id.* at p. 532.)

Thus, this Court found the statute was constitutional. However, this Court agreed there was a potential for confusion in the law which called for prophylactic instructions. (*People v. Brown*, *supra*, 40 Cal.3d at p. 538.)

Brown and the cases applying *Brown* are not directly applicable here. The "problem" in those cases was that the jury was instructed on the "unadorned" language of Penal Code section 190.3, which stated,

> the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances.

This Court determined such an instruction created the potential for confusion as to two issues.

> One danger is that the jury will perform the weighing process in a mechanical fashion by comparing the number of factors in aggravation with the number in mitigation, or by the arbitrary assignment of weights to the factors. [Citation.] The other danger is that the jury will fail to understand that our statutory scheme does not require any juror to vote for the death penalty unless, as a result of the weighing process, the juror personally determines that death is the appropriate penalty under all the circumstances.

(*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 983, citing *People v. Allen* (1986) 42 Cal.3d 1222, 1277, *People v. Brown*, *supra*, 40 Cal.3d at p. 541.)

That "problem" did not exist in this case, because the jury was not instructed on the unadorned language of Penal Code section 190.3. The jury was not told they "shall" impose a sentence of death if they concluded the aggravating circumstances outweighed the mitigating circumstances. Thus, the risks of confusion stemming from that language were not present here; the jury could not have misconstrued an instruction that was not given.

For that reason, Respondent here stands on stronger ground than the defendants in the aforementioned cases. Since the jury here was not misled by a confusing instruction, additional instructions were not needed to disabuse the jury of false impressions that may have been created had such

an instruction been given. Thus, the issue here is not whether the jury was affirmatively misled by an instruction, but whether they were provided with adequate guidance to perform their sentencing function.

Notwithstanding that distinction, Respondent agrees that *Brown* and the cases following *Brown* are helpful in answering that question. In *Brown*, this Court directed that cases tried before the *Brown* decision should be examined on their own merits to determine "whether, in context, the sentencer may have been misled to defendant's prejudice about the scope of its sentencing discretion . . . ." (*People v. Myers* (1987) 43 Cal.3d 250, 276, citing *People v. Brown*, *supra*, 40 Cal.3d at pp. 538-545.)

With respect to the weighing process, *Brown* explains the primary purpose of CALJIC No. 8.88, and the analysis that must be conducted to determine whether the jury understood the concepts contained in that instruction in cases where the instruction was not given. Accordingly, those cases provide a useful analytical framework for the question presented here, because if the omission of CALJIC No. 8.88 was not reversible error even in cases where the jury was affirmatively misled about its sentencing discretion, it follows that such omission does not require reversal here.

In *Myers*, *supra*, this Court explained the *Brown* decision, stating the concern was that the unadorned statutory instruction might lead the jury to misapprehend its discretion and responsibility in two ways. First, the jury might be confused about the nature of the weighing process. Second, the language, "shall impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances" might mislead a jury as to the ultimate question it was called on to answer, because it could be understood as requiring a juror to determine whether the aggravating factors outweigh the mitigating factors without regard to the juror's personal views as to the appropriate sentence, and then to impose a

sentence of death if aggravation outweighs mitigation even if the juror does not personally believe that death is the appropriate sentence under all the circumstances. (*People v. Myers*, *supra*, 43 Cal.3d at p. 275.)

In *Myers*, the trial court did not give any supplemental instructions clarifying or expanding on the ambiguous statutory language. Nonetheless, as to the first *Brown* concern, this Court found it was unlikely the jury was misled into believing the instruction called for a mechanical counting of factors. This was so because both counsel told the jury they could attach whatever weight was appropriate to each of the relevant factors. (*Ibid.*)

With respect to the second area of potential confusion identified in *Brown*, this Court held in *Myers* that there was no question the jury may have been misled to defendant's prejudice. The prosecutor described the process as a fact-finding process, and said the law dictated what penalty should be imposed depending on the total weight of each aggravating or mitigating factor. The prosecutor said the result was determined by that process, and it would be inappropriate to determine the result and then adjust the weight they gave to any of the factors. (*Ibid.*) The prosecutor later reiterated this theme, saying the jury's function was solely a fact-finding one, they should not make up their mind about their preference for penalty, and the penalty was determined by law. (*Ibid*, fn. 14.)

This Court reversed the defendant's death sentence, finding the prosecutor's argument was a misstatement of the law. The jury was not simply to determine whether aggravating factors outweigh mitigating factors and then impose the death penalty as a result of that determination, but rather to determine, after considering all the relevant factors, whether death was the appropriate penalty under all the circumstances. Since the prosecutor's argument misstated the law, and the court's instructions did not clear up the misstatement, the jury may have been misled as to its

ultimate duty at the penalty phase. (*People v. Myers*, *supra*, 43 Cal.3d at p. 276.)

In contrast, in *People v. Allen*, *supra*, 42 Cal.3d at p. 1222, this Court found the arguments of counsel sufficient to overcome any confusion that might have resulted from the absence of a *Brown* instruction. In *Allen*, the jury was not given the expanded factor (k) instruction (*People v. Easley* (1983) 34 Cal.3d 858), was not otherwise instructed to consider "sympathy" factors favoring the defendant, and was instructed to impose a sentence of death if it found aggravating circumstances outweighed mitigating circumstances, without further instruction clarifying the scope of its discretion pursuant to *Brown*. (*Id.* at p. 1276.)

This Court found the prosecutor did nothing to mislead the jury about its weighing discretion, and that the prosecutor left the jury with an understanding that the value to be assigned to the aggravating and mitigating factors was a matter to be decided by each individual juror. The prosecutor properly argued the jury should consider and be persuaded by the character of the aggravating factors, and never suggested it was a mechanical function. (*Id.* at pp. 1277-1278.) This Court also found the record precluded a finding that the jury was misled about its sole responsibility to determine, based on its individualized weighing discretion, whether death was appropriate. The exclusive focus of the prosecutor's argument was aimed at convincing the jury that death, and not life in prison without the possibility of parole, was the appropriate penalty for this defendant. The prosecutor's message was that the jury, and the jury alone, was responsible for determining whether life without parole or death was the appropriate punishment under all the circumstances. Considered in context, the jury was not misled, notwithstanding the prosecutor's emphasis on the mandatory wording of the statute, stating,

> If you conclude that the aggravating evidence outweighs the mitigating evidence, you shall return a death sentence.' . . Shall, not may, might, not maybe. It is very explicit. If the aggravating evidence outweighs the mitigating evidence you shall return a verdict of death.

(*People v. Easley*, *supra*, 34 Cal.3d at p. 1279.)

In *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 983, another pre-*Brown* case, the jury was given an instruction which described the process substantially in the uadorned language of Penal Code section 190.3. The jury was also given a supplemental instruction informing them that in considering, taking into account and being guided by the circumstances, they may not decide the effect of the circumstances by the simple process of counting the number of circumstances on each side. They were instructed the weight of the circumstances is not determined by their relative number, but by their convincing force on the ultimate question of punishment. However, the trial court did not give a properly worded instruction that one mitigating circumstance may be sufficient to support a decision that death is not the appropriate punishment, and that the weight to be given each factor was to be decided by each juror individually. (*Id.* at p. 1036.)

As in *Meyers* and *Allen*, this Court in *Edelbacher* placed great weight on the arguments of counsel in evaluating whether the jury was misled with respect to either of the potential sources of confusion identified in *Brown*. As to the first issue, this Court found the arguments of counsel were not seriously misleading regarding the nature of the weighing process. As to the second issue, this Court found there was a substantial danger the jury was misled with respect to the context of the weighing process and the nature of the determination it was intended to achieve. No instruction was given informing the jury of its sole responsibility to determine whether death was appropriate based on its individualized weighing discretion.

Since no such instruction was given, the entire record, including the arguments of counsel, had to be evaluated to determine whether the jury may have been misled to defendant's prejudice as to the proper scope of its sentencing discretion. (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1037.)

In conducting that evaluation, this Court cited the prosecutor's opening argument, in which he informed the jury their function was "just" to weigh the circumstances, he stressed that a verdict of death was mandatory if the aggravating circumstances outweighed the mitigating circumstances, and he failed to explain that the jurors were to make a difficult moral decision on the appropriateness of the punishment. He informed the jurors there was no discretion after the weighing process. He said all they had to do was weigh the circumstances. Further, the prosecutor told the jury to base its decision on the evidence and not on their general philosophy about the death penalty, an argument which improperly presented two essential components of the process as mutually exclusive. (*Id.* at p. 1038.) The prosecutor failed to use the word "appropriate" or inform the jury they were to exercise their moral judgment. He "gravely" misled the jury by telling them not to consider in general whether the death penalty should be applied in this case, but simply to weigh the aggravating and mitigating factors. (*Ibid.*) He told the jury it was "simply" a weighing process of good against bad, rather than life against death. (*Id.* at pp. 1039-1040.)

In *People v. Brasure*, *supra*. 42 Cal.4th at p. 1037, this Court reaffirmed *Brown* and articulated the two primary concerns the *Brown* instructions were intended to address; specifically, 1) that Penal Code section 190.3's references to weighing of aggravating and mitigating circumstances is metaphorical, connoting "a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary 'scale'", and 2) that the statutory "shall impose"

direction "should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances." (*People v. Brasure*, *supra*, 42 Cal.4th at p. 1062, citing *People v. Brown*, *supra*, 40 Cal.3d at pp. 541-542.)

In *Brasure*, a post-*Brown* case, the trial court substituted its own instruction for CALJIC No. 8.88. Unlike CALJIC No. 8.88, the trial court's version of the instruction told the jury it "shall impose a sentence of death if the jury concludes that the aggravating circumstances outweigh the mitigating circumstances." It omitted the language in CALJIC No. 8.88 providing that to return a verdict of death, each juror "must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (*Id.* at pp. 1060-1061.)

The defendant in *Brasure* had objected to this instruction in the trial court, claiming that *Brown, supra*, required the court to instruct using the language of CALJIC No. 8.88. The trial court overruled the objection and instructed the jury pursuant to the "shall impose" language of the sentencing statute, Penal Code section 190.3, based on its belief that *Brown* was doubtful authority after the United States Supreme Court decision in *Boyde v. California* (1990) 494 U.S. 370, 376-377 [110 S.Ct. 1190, 108 L.Ed.2d 316.] This Court held the trial court should have followed *Brown*, that *Brown* had not been overruled, and that *Brown* involved an interpretation of state law provisions and was therefore not affected by the United States Supreme Court's decision on constitutional issues in *Boyde*. (*People v. Brasure*, *supra*, 42 Cal.4th at p. 1062.) Nonetheless, this Court found that considering the totality of instructions and arguments, there was no reasonable likelihood the trial court's failure to instruct as directed in

Brown misled the jurors as to the scope of their sentencing discretion. (*People v. Brasure*, *supra*, 42 Cal.4th at p. 1062.)

The same is true here. This case is factually much more like *Brasure* and *Allen* than *Myers* and *Edelbacher*. Throughout the trial, Streeter's penalty jury was immersed in two themes; that their responsibility to weigh aggravating and mitigating factors involved a responsibility to assign moral and sympathetic value to each factor, which was a qualitative (not a quantitative) assessment, and that they were individually responsible for determining which penalty was appropriate under all the circumstances. Those themes were pervasive throughout the trial and aptly guarded against the concerns expressed in *Brown*.

As to the first *Brown* concern, the jury fully understood the weighing process did not involve a mechanical counting of aggravating and mitigating factors. Prospective jurors were informed by the court:

> The jury determines the penalty in the second phase by weighing and considering certain enumerated aggravating and mitigating factors, bad and good things that relate to the facts of the crime and to the background and character of the defendant, including a consideration of mercy.
>
> . . .
>
> In weighing these factors - - pardon me - - the weighing of these factors is not quantitatively, but qualitative. In order to fix the penalty of death, the jury must be persuaded that the aggravating factors are so substantial in comparison to the mitigating factors that death is warranted instead of life imprisonment without parole.
>
> . . .
>
> In this case here, you are going to be hearing these aggravating and mitigating factors. When it comes around for you to make a decision, you will be weighing those facto (sic) in making this determination which I have just read to you and you will be instructed about this later on . . ."

(17 RT 1724-1725, emphasis added.)

Those terms were defined for the jury.

> And an aggravating factor is any fact, condition or event attending the commission of a crime that increases his guilt or enormity or adds to the injurious consequences that is above and beyond the elements of the crimes itself.
>
> A mitigating circumstance is any such fact, justification, or excuse for the crime in question that may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

(17 RT 1724-1725.)

Additionally, the jury was twice informed of their responsibility to "consider, take into account, and be guided by" the relevant factors pursuant to CALJIC No. 8.85.

> In determining what penalty is to be imposed on the defendant, you shall consider all the evidence which has been and will be received during any part of the trial in this case. You shall consider, take into account and be guided by the following factors, if applicable:
>
> The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances which were found to be true.
>
> The presence or absence of criminal activity by the defendant, other than the crime for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> The presence or absence of any prior felony convictions, other than the crimes for which the defendant has been tried in the present proceedings.
>
> Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

Whether or not at the time of the offense the capacity of the defendant was appreciably - - "pardon me" - - the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect or the effects of intoxication.

The age of the defendant at the time of the crime.

Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

And any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(19 RT 1911-1913; 25 RT 2630-2631, emphasis added.)

In addition, the arguments of both counsel made it abundantly clear the weighing process was not a mechanical, quantitative process, but involved the assignment of moral or sympathetic value to each of the factors. In *Myers*, *supra*, this Court found the first *Brown* concern was alleviated where both counsel told the jury they could attach whatever weight was appropriate to each of the relevant factors. (*People v. Myers*, *supra*, 43 Cal.3d at p. 275.) Here, the prosecutor argued,

In this phase, you must consider any sympathetic aspect of the defendant's character or anything else that he has coming to him for mitigation. You must consider that and weigh it. That's only fair. So go ahead and do that.

(25 RT 2598.)

He also stated,

If Mr. Streeter deserves any sympathy, again, then give it to him. If he is sincere about finding God, then good for him. But what he has done is simply not sufficient to override - - I'm sorry - - what he feels about sympathy is simply not sufficient to override all this horrible stuff he's done here. The aggravating factors clearly and substantially outweigh any of that.

And none of you, in your jury questionnaires, said "Well, you know, I don't care what a guy's done or how bad it is, as long as he's said he's sorry. If he says he's sorry, then I'll give him a pass. I'll let him have LWOP." None of you said that. And you shouldn't, of course. I mean, you take it into account, but you're supposed to weigh it. If the aggravating outweighs the mitigating, that's what you do.

His soul may belong to God, but under our law, his life belongs to the State because our system of justice, which requires that you weigh and consider both. And if the aggravating substantially outweighs the mitigating, death penalty. That's the way our law is. And that's what you must follow.

(25 RT 2604-2605.)

The prosecutor here never suggested or implied that the jury should or was required to engage in a mechanical weighing process. Rather, he properly argued the jury should consider and be persuaded by the character of the aggravating factors, and never suggested it was a mechanical function. (*People v. Allen*, *supra*, 42 Cal.3d at pp. 1277-1278.)

That theme was reinforced by defense counsel, whose argument similarly emphasized the concept that the weighing function was not a mathematical, quantitative assessment. Counsel stated,

> Now, you are free to assign your own sympathetic or moral value to each one of these factors. The law doesn't - - doesn't require you to set certain values. You do this on your own your own values.

(25 RT 2615.)

Defense counsel further explained,

> Now, here factor k, any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of defendant's character that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(25 RT 2619-2620.)

In *People v. Brasure*, *supra*, 42 Cal.4th at p. 1066, this Court found the jury's understanding of factor (k) was relevant to the conclusion that it was not misled as to to the first Brown concern.

Additionally, defense counsel here argued,

> And also you must - - the law will tell you that to return a judgment of death, each of you must be persuaded that the aggravated circumstances, 8.85, that instruction on the board, are so substantial in comparison to the mitigating circumstances it warrants the death instead of life without possibility of parole. So the factors in aggravation have to be so substantial in your mind in comparison to the mitigating factors that you are going to kill this man.
>
> When you go back there and decide and think of this and look at this, remember that the letter of the law allows you as an individual, as a person, to decide whether or not you are going to accept a factor or you are going to apply some less value to one factor than you will the other factor. That is you, as individuals, must do that in your own conscience, your own way.

(25 RT 2620-2621.)

Based on the foregoing, Streeter's penalty phase jury was fully aware of the fact that the weighing process required an individualized assessment

of the moral and sympathetic value to be assigned to each factor, and was not a mathematical, quantitative determination.

Similarly, as to the second *Brown* factor, Streeter's jury was fully aware of its responsibility to make an individualized determination as to the appropriateness of the death penalty. The questionnaires themselves introduced this notion. Question 34 stated,

> There are no circumstances under which a jury is instructed by the court to return a verdict of death. No matter what the evidence shows, the jury is always given the option in the penalty phase of choosing life without the possibility of parole.

This theme continued through the jury selection process. Each of three panels of prospective jurors was separately told that the law provided for two possible penalties, those penalties were life without parole or death, and their responsibility if selected would be to decide which penalty was appropriate. Prospective jurors were told that the law did not favor one punishment over the other, and that it would be up to them to make the choice. (16 RT 1626, 1649, 1688-1689.) The court stated,

> Again, it is not a question of finding guilt or innocence, not beyond a reasonable doubt. It applied in the other phase. It is a weighing process for you to make that decision in your own mind individually and collectively. . .

(17 RT 1741.)

The court's instructions also emphasized the duty of each juror to individually assess the appropriateness of the death penalty under all the circumstances. Pursuant to CALJIC No. 8.84, the jury was instructed:

> It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstance alleged in this case has been especially found to be true.

> Under the law of this state, you must determine which of these penalties shall be imposed. The law expressly states that it voices no opinion as to which penalty is preferred.

(25 RT 2628-2629.)

The jury was given further guidance on how to approach this task through the repetition of certain guilt phase instructions. The jury was told:

> The People and the Defendant each are entitled to the individual opinion of each and every juror. Each of you must consider the evidence for the purpose of reaching a verdict, if you can do so. *Each of you must decide the case for yourself*, but should do so only after discussing the evidence and instructions with the other jurors.
>
> Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors or any of them favor that decision. Do not decide any issue in this case by the flip of a coin or by any other chance determination.

(25 RT 2633, emphasis added.)

The arguments of counsel further reinforced the responsibility of the jurors to reach an individualized determination regarding the appropriateness of the death penalty. The prosecutor argued,

> In this case we're asking a very serious decision be made here. And I'm fully aware of how serious it is and what I'm asking you to do. I'm asking you to give Mr. Streeter the death penalty. And the way I'm asking you to arrive at that decision, which I believe to be the just decision, is to engage in a weighing process.
>
> The judge is going to instruct you that what you need to do is weigh all these various aggravating and mitigating factors that we kind of touched upon in the first part of the trial. And the notion is that you must weigh all of this together. And if the aggravating factors, aggravating evidence pertaining to the factors, particularly A, B and C, which I'll get to in a second, if they substantially outweigh the mitigating factors *and you believe that's the proper verdict*, then you should vote for the death penalty. And that's what we're asking you to do.

(25 RT 2579-2580, emphasis added.)

This argument is very different from the argument in *Edelbacher*, *supra*, where the prosecutor failed to inform the jury they were to determine whether the penalty was appropriate, and specifically told them not to consider whether the death penalty should be applied in that case. (*People v. Edelbacher*, *supra*, 47 Cal.3d at pp. 1039-1040.) It is also very different from the argument in *Meyers*, *supra*, where the prosecutor similarly told the jury their role was a fact-finding one, and they were not permitted to make up their mind about the penalty and use that determination to manipulate the weight to be given to the various factors. (*People v. Meyers*, *supra*, 43 Cal.3d at p. 275, and fn. 14.) In contrast, the prosecutor's argument here made it abundantly clear that in addition to weighing the relevant factors, the jury was required to assess whether it believed that death was the appropriate verdict.

Defense counsel, too, continued to make it clear that the jurors were required to individually determine the appropriateness of the death penalty. He argued,

> You must - - as the prosecutor told you, the last sentence, that doesn't apply, because you now apply sympathy and value - - moral values to each of those factors. You can decide - - I mean, if that wasn't - - you have to decide whether or not he lives or dies. That has to come from you. You have to apply your sympathetic and moral values that you have on your own.
>
> I mean, we don't sentence a man to death simply because he was convicted under these circumstances. Had that been the case, you wouldn't be required to be here. You wouldn't be here at all. You have to decide as jurors whether this man should live or die.

(25 RT 2619-2620.)

Here, as in *Brasure*, the jury was clearly informed that the weighing process was not a mechanical process, but required an individualized

assignment of moral and sympathetic value to each of the factors. Additionally, as in *Brasure*, the jury here was told of their individual responsibility to determine the appropriateness of the death penalty under all the circumstances. This Court should reject Streeter's claim that the failure to give the instruction denied him his rights under the state and federal constitutions, as the instructions that were given did not mislead the jury about their sentencing discretion. (*People v. Brasure, supra,* 42 Cal.4th at p. 1066.)

The jury note does not change that result. On February 25, 1999, at 2:44 p.m., after deliberating for approximately 6 1/2 hours, the jury sent the following note to the court:

> Reference 8.84, paragraph 2 (It is the law of . . .)
>
> Assume the aggrevating (sic) circumstances in the case, as stated in 8.85, significantly outway (sic) the mitigating circumstances. May we still select life without the possibility of parole?
>
> Is the opinion of the juror(s) that the circumstances presented in this case do not meet the minimum standards for the sentence of death allowed as a mitigating circumstance?

The court responded, "Under the law you are permitted to reach any verdict you wish as to the appropriate penalty." (2 CT 465.)

Streeter interprets this jury note as indicating some confusion regarding the weighing process, but caution should be taken to avoid reading too much into it. The note does not indicate that the jury as a whole, or even multiple jurors, needed additional guidance on the issues raised in the note. The trial court's response appropriately reaffirmed the breadth of the jury's discretion, and the jury's subsequent conduct, as described below, reveals they fully understood and exercised that discretion.

With respect to the note, Streeter argues the trial court simply should have answered "yes," informing the jury that they do have the discretion to vote for life without parole even where the aggravating circumstances significantly outweigh the mitigating circumstances. But this Court has held a jury need not be instructed that it is free to impose life without parole in those circumstances. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1135; *People v. Monterrosso* (2004) 34 Cal.4th 743, 792.) One rationale is that the concept is covered by CALJIC No. 8.88, but another is that the instruction is argumentative, because it fails to also tell the jury that any aggravating factor is sufficient to impose the death penalty. (*Ibid.*)

At 3:06 p.m. on Thursday, February 25, 1999, 22 minutes after the court sent its response to the jury, the jury sent a note stating, "We cannot all come to one verdict. No unanimous verdict." (2 CT 466.) The court informed the jury it was going to send them home, that it would not be in session on Friday or the following Monday, and that they were directed to return the following Tuesday after a four day break. The court instructed the jury to give it a rest and come back fresh the following Tuesday (25 RT 2642-2643.) The jury resumed deliberations the following Tuesday morning. They deliberated most of the day and eventually reached a verdict that Tuesday afternoon around 3:10 p.m. (17 RT 2644.)

This chronology weighs against the idea that jurors were misled by the court's response into believing they could not impose life without parole where the aggravating circumstances substantially outweighed the mitigating circumstances. It also reveals they understood that if they felt the case did not meet the minimum standards for death, that was sufficient in itself to impose a sentence of life without parole. Shortly after being reminded of their expansive discretion, the jury indicated it was unable to reach a unanimous verdict. This suggests the court's response reinforced the jury's understanding that they could vote for life without parole even

under the circumstances presented in the note, and at least some of them chose to exercise that discretion. Only after substantial additional deliberations did they ultimately unanimously agree that death was the appropriate verdict.

Finally, the failure to give CALJIC No. 8.88 in this case does not require reversal. As set forth above, this was not a case where the jury was affirmatively misled by a confusing instruction, such that the jury instructions that were given required additional explanation to prevent the jury from misunderstanding its function. In contrast to *Brown*, Streeter's jury was consistently, properly and fully informed about the nature of the weighing process and the requirement of exercising independent judgment about the appropriateness of the penalty under all the circumstances.

The trial court intended to and should have instructed the jury pursuant to CALJIC No. 8.88, and a reference to CALJIC No. 8.88 would have been a reasonable response to the jury's question. Nonetheless, even where the trial court should have followed the *Brown* decision and failed to do so, reversal is not required if, considering the totality of instructions and arguments, there is no reasonable likelihood the trial court's failure to so instruct misled the jurors as to the scope of their sentencing discretion or responsibility. (*People v. Brasure, supra,* 42 Cal.4th at p. 1062, and cases cited.) Any error was a state law error on instructional issue, from which Streeter suffered no prejudice, so reversal is not required. As set forth above, the instructions and arguments in this case fully protected against the concerns raised in *Brown*. There is no reasonable likelihood the jurors were misled as to the scope of their discretion or responsibility. The judgment should be affirmed.

XVII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING ADMISSION OF PHOTOGRAPHS OF YOLANDA, AND A TAPE RECORDING OF HER SCREAMS OF PAIN AS SHE WAS BEING TRANSPORTED TO THE HOSPITAL, IN THE PENALTY TRIAL, BECAUSE THAT EVIDENCE FELL SQUARELY WITHIN THE AGGRAVATING FACTORS THE JURY WAS PERMITTED TO CONSIDER, IT WAS PROPER VICTIM IMPACT EVIDENCE, AND IT WAS NOT UNFAIRLY PREJUDICIAL

Streeter contends the trial court improperly admitted several items of evidence at the penalty trial which were irrelevant and unduly prejudicial. Specifically, he claims the admission of hospital and autopsy photographs of Yolanda, and the tape recordings of Yolanda's screams in the ambulance on the way to the hospital, violated Evidence Code section 352 and his federal constitutional rights. (AOB 256-271.) The evidence was properly admitted.

A. Relevant Facts

Prior to the penalty retrial, defense counsel moved to exclude hospital and autopsy photographs, and a tape recording of the victim's screams as she was transported by ambulance to the hospital. (18 RT 1895-1896.) At the hearing on that motion, the prosecutor argued the evidence was relevant to show the facts and circumstances of the crime, including the way Streeter killed Yolanda and tortured her, particularly because this jury had not heard the evidence at the guilt phase and they were entitled to a full understanding of the facts and circumstances surrounding the crimes and the special circumstance findings. (18 RT 1896.) He argued the audiotape was brief, and offered to keep it even shorter by playing only a portion of the 1 1/2 minute tape, and he argued the evidence constituted victim impact evidence, both because it revealed the impact of the crime on Yolanda, and because Yolanda's family members were traumatized by the fact that the

last thing they ever heard from her were her screams of pain on the recording. (18 RT 1896, 1901.)

Defense counsel argued the evidence was irrelevant to a determination of penalty. He also argued the photographs and the tape recording did not tend to show the facts and circumstances of the crime because it was evidence of things that occurred after the crime had been committed. (18 RT 1895, 1898-1899.)

The court ruled as follows:

> I am going to limit the photographs to two, so you better pick out the two that you think would be most appropriate in describing the circumstances of the crime. ¶ As to the tape taken in the ambulance, that's a tough one because I think it's arguably correct on both sides, but somebody's more right than the other side. I'm going to let it in under the theory that it is part of the circumstances of the crime because it evidenced further the degree of severity of the conduct of the defendant on the victim. And there is some merit, I think, to [the prosecutor's] argument regarding the comparison with the sentencing and what we're doing here. You're trying to determine the appropriate penalty in either case. ¶I am concerned about some degree of inflaming the jury, but the relevance under which that evidence is admissible, in my opinion, exceeds the prejudice that might result therefrom under the theory that it's inflaming the jury. And to some extent, it does make sense that the consequences of Mr. Streeter's act, the jury's allowed to determine the impact of that act upon the family members, that the consequences included the pain the victim was going through and can be properly considered by the jury.

(18 RT 1904-1905.)

B. Streeter's Federal Constitutional Claim Is Forfeited; In Any Event, There Was No Violation Of State Or Federal Law Because The Challenged Evidence Was Highly Relevant And Was Not Unfairly Prejudicial

Streeter did not object on federal constitutional grounds in the trial court. (See 18 RT 1895.) In *People v. Heard*, *supra*, 31 Cal.4th at p. 946,

this Court found the defendant had failed to preserve his federal constitutional claims on appeal because he had not objected on those grounds in the trial court. (*People v. Heard*, *supra*, 31 Cal.4th at p. 972.) Here, too, Streeter's failure to raise his federal constitutional objections in the trial court forfeits the claims on appeal. To the extent his constitutional claims are merely a gloss on his objections in the trial court, they are preserved but without merit because the trial court did not abuse its discretion in admitting the evidence. (*People v. Riggs*, *supra*, 44 Cal.4th at pp. 248, 292, citing *People v. Partida*, *supra*, 37 Cal.4th at pp. 428, 437-438, and *People v. Prince*, *supra*, 40 Cal.4th at p. 1179.)

Evidence Code section 352 provides,

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

A trial court's ruling in admitting evidence over an Evidence Code section 352 objection is reviewed for an abuse of discretion. The reviewing court determines whether 1) the evidence was relevant, and 2) the trial court abused its discretion in determining that the probative value of the evidence outweighed its prejudicial effect. (*People v. Ramirez*, *supra*, 39 Cal.4th at pp. 398, 453, citing *People v. Carter*, *supra*, 36 Cal.4th at pp. 1114, 1166.) Relevant evidence is any evidence having a tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, §210; *People v. Ramirez*, *supra*, 39 Cal.4th at p. 453.)

The discretion to exclude evidence under Evidence Code section 352 is much narrower at the penalty phase, because the prosecution has the right to establish the circumstances of the crime, including its gruesome consequences (Pen. Code, § 190.3, factor (a)), and the risk of an improper

guilt finding based on a visceral reaction is no longer present. (*People v. Bonilla*, *supra*, 41 Cal.4th at pp. 354-355).

Regarding the first consideration under Evidence Code section 352, the trial court did not abuse its discretion in ruling that the photographs and the audiotape were relevant to the jury's determination of penalty. Penal Code section 190.3, subdivision (a) ("Factor a") provides that the trier of fact shall consider the circumstances of the crime in determining the defendant's penalty. Pursuant to CALJIC No. 8.85, the jury was instructed:

> In determining what penalty is to be imposed on the defendant, you shall consider all the evidence which has been and will be received during any part of the trial in this case. You shall consider, take into account and be guided by the following factors, if applicable:
>
> The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances which were found to be true. . .

(19 RT 1911-1913; 25 RT 2630-2631, 1 CT 226-227, CALJIC No. 8.85.)

The evidence was highly relevant as to the circumstances of the crime and the special circumstance of torture murder. As set forth in Argument IV, which Respondent incorporates herein by reference, this Court has held that evidence of the victim's pain and suffering was relevant proof of an act "calculated" to cause extreme pain. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1158.) Evidence of Yolanda's extreme pain and suffering, presented through the sounds of her screams and the pictures of her charred body, had a tendency in reason to establish Streeter's state of mind when he committed the acts that caused such suffering. Streeter's torturous intent was highly relevant to the jury's determination regarding the appropriateness of the death penalty. The tape and photographs provided the jury with images and sounds which gave them a comprehensive picture

of the circumstances of the crime. Thus, the photographs and the tape were relevant to the jury's analysis of factor (a).

Moreover, the photographs and the tape were properly admitted as victim impact evidence under factor (a). The jury was instructed:

> You may consider the impact of the defendant's crime on the victim and on the victim's family members as part of the circumstances of the crime of which the defendant was convicted in the present proceedings in factor A of the jury instruction 8.85, which was read to you.

(25 RT 2631, emphasis added.)

Yolanda's screams and her charred body were compelling evidence of the impact of Streeter's crime on Yolanda. The jury instruction and common sense dictate that the interpretation of "victim impact" evidence includes the impact on the deceased victim as well as her family.

The tape recorded screams of a surviving victim have been held to be admissible as victim impact evidence. In *People v. Hawthorne* (2009) 46 Cal.4th 67, 101-102, this Court upheld the admission of a 911 tape as victim impact evidence, and rejected the defendant's contention that the evidence was cumulative. There, the defendant and his companion had entered and burglarized a home where a 16-year-old girl was in the house with her mother. The girl and the mother were in separate rooms, and the defendant shot them both in the head. After they left, the girl called 911 for help. While talking to the dispatcher, a family friend arrived and took the phone from the girl. The girl walked into her mother's bedroom and began screaming when she discovered her injured mother. Her screaming was heard on the background of the 911 tape. The friend urged the dispatcher to send paramedics quickly, describing the girl as a "hysterical teenager." (*Id.* at p. 101.)

The girl survived, and the tape of her screams was played during her testimony, over the defendant's objection. The trial court admitted the tape

as relevant victim impact evidence relating to the circumstances of the crime under Factor (a), and further determined its probative value outweighed its prejudicial effect. (*People v. Hawthorne*, *supra*, 46 Cal.4th at pp. 67, 101-102.) This Court upheld the admission of that evidence, because the 911 tape clearly showed the immediate impact and harm caused by the defendant's criminal conduct on the surviving victim, and it provided legitimate reasons for the jury to impose the death penalty. (*Ibid.*) This Court specifically held the tape was relevant under Factor (a), it was not cumulative because only the tape revealed the immediate impact of the crimes on the surviving victim, and it was not so inflammatory as to have diverted the jury's attention from its proper role, or invited an irrational response. (*Ibid.*)

Just as the teenager's screams were the only evidence of the immediate impact of the crimes on the surviving victim in *Hawthorne*, the tape recording of Yolanda's screams were the only evidence of the immediate impact of the crimes on her. Implicit in this Court's holding in *Hawthorne* that the 911 call was not cumulative is a conclusion that the tape provided something that testimony could not: a more accurate description of the emotional impact of the crime at the time it occurred. The same is true of Yolanda's screams of pain in the ambulance.

Streeter contrasts the audiotape here with the videotapes in *People v. Prince*, *supra*, 40 Cal.4th at p. 1179, and *People v. Kelly*, *supra*, 42 Cal.4th at p. 763, where this Court found no error in admitting videotaped tributes of the victim. (AOB 267.) He argues

> [t]his case did not involve a sanitized videotape of the victim but an intensely graphic audiotape of the victim's screams in the ambulance on the way to the hospital after suffering severe injuries.

(*Ibid.*)

Exactly. That is why the tape was properly admitted. In the aforementioned cases, there was no error even where the videotape had no direct connection to the defendant or the crime. Here, the relevance and the probative value of the evidence is much more clear; the graphic nature of the tape was the direct consequence of Streeter's actions. The emotional impact of the tape arose directly from the degree to which it accurately impressed upon the jury the reality of what Streeter had done to Yolanda.

Nor did the trial court abuse its discretion in concluding the evidence was not unfairly prejudicial. "Murder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant." (*People v. Moon*, *supra*, 37 Cal.4th at pp. 1, 35.)

In *People v. Brasure*, *supra*, 42 Cal.4th at pp. 1037, 1054, the defendant argued the admission of crime scene and autopsy photographs violated Evidence Code section 352, and rendered his trial unfair and his penalty determination unreliable. This Court disagreed. Although the photographs showed a victim who had been "tortured at length, doused with gasoline and burned, and his body left exposed to the elements and wildlife for several days," the gruesomeness of the photographs simply showed what had been done to the victim, and "the revulsion they induce is attributable to the acts done, not to the photographs." (*Ibid.*)

Similarly, here, the photographs of Yolanda's body and the tape of her screams in the ambulance were highly disturbing, but not unfairly so. The emotional impact of the evidence resulted from the reality it revealed about "what had been done to the victim." (*People v. Brasure*, *supra*, 42 Cal.4th at p. 1054.) It is virtually beyond dispute that any witness who had seen or heard the images and sounds depicted in the photographs and tape would have been permitted to testify about their observations. The photographs and audiotape provided a more accurate account of the events than would have come from such a witness, because it placed the jury one step closer to

the crime and gave them a perspective on Yolanda's suffering which defied description. While Evidence Code section 352 protects against evidence that is unfairly prejudicial, its application here would unfairly protect Streeter from the horrific consequences of his intentional criminal conduct.

In *People v. Love* (1960) 53 Cal.3d 843, 852, overruled on other grounds in *People v. Balderas* (1985) 41 Cal.3d 144, this Court reversed the defendant's death penalty following the improper admission of a photograph of the front of the deceased victim, which did not show her wound but did show the expression of her face in death, and also the admission of a tape recording taken in the hospital emergency room shortly before the victim died. The recorded conversation involved the basic facts of the shooting, which had already been admitted by the defendant and established at the guilt phase. This Court found the sole purpose of playing the recording was to let the jury hear the failing voice and the groans of the victim as she was dying. The playing of the recording was preceded by the testimony of an attending doctor who explained that the victim was in extreme pain because of the injuries sustained to her kidney from the angle of the gunshot wound. (*Id.* at pp. 854-855.)

In contrast to the instant case, the prosecutor in Love did not suggest that the defendant intended to cause the pain, or that he aimed the gun intentionally to cause the extremely painful kidney injuries that resulted. (*Id.* at p. 855.) This Court found that although the permissible range of inquiry on the issue of penalty was necessarily broad because of the jury's complete discretion to choose between alternate penalties, the decision must be a rational one, and evidence that serves primarily to inflame the passions of the jury must be excluded, and the probative value and inflammatory effect must be carefully weighed. The Court found it was clear the challenged evidence had no significant value, because the only purpose was to show that the victim died in unusual pain, but "*proof of*

such pain is of questionable importance to the selection of penalty unless it was intentionally inflicted." (*People v. Love*, *supra*, 53 Cal.3d at p. 856, emphasis added.)

The very reason the evidence was wrongfully admitted in *Love* is the very reason the evidence was properly admitted here. As set forth extensively in Argument IV, since Streeter intentionally caused Yolanda to suffer, the pain she actually endured at his hands was of great importance in determining the appropriate punishment.

Finally, even if the admission of this evidence was error, it does not require reversal of the death judgment because it is not reasonably probable the jury would have reached a different result had the evidence been excluded. (*People v. Heard*, *supra*, 31 Cal.4th at p. 978; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Even if the error violated Streeter's federal constitutional rights, it is nevertheless harmless because the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 18.)

The photographs of Yolanda's burn injuries and audiotape were emotionally compelling, but constituted a very minor portion of the overall penalty trial. Only two photographs were admitted, and the brief audiotape took little time in comparison to the 18 witnesses that provided statements or testified on behalf of the prosecution. That evidence included extensive testimony about the same subject matter as the photographs and tape: the testimony of firefighter Jeff Boyles, who testified that when he responded to the Chuck E. Cheese restaurant, Yolanda was screaming, burning and smoldering. She was frantic and in pain. She was burned far worse than anyone he had ever seen. She was so badly mutilated and charred that they were unable to administer pain medication. She was screaming in agony, "Why is this happening to me?" and "Why did he do this to me?" She said her hands were melting off of her and she asked to be shot, to be killed, to

be put out of her misery. She asked about her children. (19 RT 1987-1996.) Dr. David Vannix testified about the extent and degree of Yolanda's burn injuries, and the intensity of the pain those injuries caused. (20 RT 2095-2117.)

While the tape of Yolanda's screams, and the photographs, gave the jury a different perspective of her suffering, they did not provide the jury with information it did not have through other witnesses. (*People v. Heard*, *supra*, 31 Cal.4th at p. 978.) The trial court did not abuse its discretion in admitting the challenged evidence because it was highly relevant, and its probative value was not substantially outweighed by the danger of unfair prejudice. Streeter's death judgment should be affirmed.

XVIII. THE TRIAL COURT PROPERLY INSTRUCTED THE PENALTY PHASE JURY TO ACCEPT THE GUILTY VERDICTS AS CONCLUSIVELY PROVED; THE TRIAL COURT PROPERLY DENIED STREETER'S REQUEST TO INSTRUCT THE JURY ON LINGERING DOUBT AND THE ELEMENTS OF THE CRIMES OF WHICH HE HAD ALREADY BEEN CONVICTED

Streeter contends the trial court erred by removing the concept of lingering doubt from the penalty phase jury's consideration. Specifically, he argues the penalty jury was improperly told they had to accept the guilt jury's verdicts as conclusive, and the court refused proposed defense instructions on the elements of the crimes and the concept of lingering doubt. He claims the errors violated his statutory and constitutional rights and require reversal of his death judgment. (AOB 271-284.) Streeter is wrong. The jury instructions correctly required the jury to conclusively accept the prior jury's guilty verdicts. The proposed instructions on the elements of the offenses, and lingering doubt, were not required, and did not apply in the circumstances of Streeter's case. The trial court permitted Streeter to present evidence and argue the concept of lingering doubt, and he did so extensively. If there was error, it was harmless.

During the instructional conference, the trial court indicated its intent to include an instruction provided by the prosecutor, which stated, "You must accept the previous jury's verdicts as having been proved beyond a reasonable doubt." (2 CT 446, 22 RT 2378-2379.) Defense counsel did not object to the instruction. He asked the court to instruct the jury on the elements of the crimes and special circumstances, and on the concept of lingering doubt.

With respect to counsel's request for instructions on the elements of the crimes and special circumstances, the court stated:

> [Defense counsel] orally indicated he wished to submit those instructions. I advised him orally that he could save his ink because I would not give them because of the fact that the former jury has made the decisions that it did. These issues, elements, factors that [defense counsel] was attempting to put before this jury are not relevant to this jury since the question of guilt and truth of special circumstances has already been established. And I've just indicated I will instruct the jury that they are to consider those things as having been proved beyond a reasonable doubt and there's nothing that indicates that they should or it would be proper to start reinstructing them as to the elements of the crime.

(22 RT 2381-2382.)

With respect to Streeter's request for a lingering doubt instruction, the court emphasized that the concept was proper for argument but not for instruction, and noted that the instruction proposed by defense counsel was inappropriate in any event because it was addressed to jurors who voted for guilt at the guilt phase. (22 RT 2383-2384.)

Preliminarily, all of Streeter's claims of instructional error are forfeited. Streeter did not object to the instruction proposed by the prosecutor requiring the jury to accept the guilty verdicts, nor did he alert the trial court to his claims that the failure to give his requested instructions violated the constitution. (See 22 RT 2378-2379.) Accordingly, those

claims are forfeited. (*People v. Sanders* (1995) 11 Cal.4th 475, 510, fn. 3; *People v. Davis* (1995) 10 Cal.4th 463, 501, fn. 1.)

In any event, there was no error. It was entirely proper for the court to instruct the jury to accept the prior jury's verdicts, and to decline Streeter's request for instructions on the elements of the crimes and special circumstances. Streeter's guilt had already been proved, and was not an issue the penalty jury was entitled to relitigate.

> The guilt phase jury determined defendant's guilt and the truth of the special circumstance allegation beyond a reasonable doubt. As a matter of law, the penalty phase jury must conclusively accept these findings.

(*People v. Harrison* (2005) 35 Cal.4th 208, 256, citing *People v. Cain* (1995) 10 Cal.4th 1, 66; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1238.)

Streeter contends the trial court misstated the law by informing the jury they must "accept" the prior jury's verdicts as having been proven beyond a reasonable doubt. He attempts to distinguish *People v. DeSantis*, *supra*, 2 Cal.4th 1198, wherein this Court held the issue of lingering doubt was not removed from the jury by the trial court's rulings or the prosecutor's comments that the defendant's guilt was to be "conclusively presumed as a matter of law" because the jury had so found in the guilt phase. Streeter claims the "crucial difference" between this case and *DeSantis* is the distinction between the term "presumed," as stated in *DeSantis*, and the term "proven" as used here. (AOB 274-275.) Streeter's argument places too much emphasis on the term "presumed" as used in *DeSantis*, and gives too little weight to its context. The jury in *DeSantis* was instructed that the matter was "conclusively" presumed "as a matter of law," a directive which carries the same weight and finality as the language used here. Streeter's effort to distinguish *DeSantis* is unconvincing.

Streeter claims his case is like *People v. Gay* (2008) 42 Cal.4th 1195, 1221, because the instruction in this case is "indistinguishable" from the

instruction found erroneous in *Gay*. (AOB 276.) Nothing in *Gay* supports Streeter's claim. First, *Gay* reaffirmed the general rule that a penalty jury may not relitigate the defendant's guilt. (*People v. Gay*, *supra*, 42 Cal.4th at p. 1222.) Second, the holding in *Gay* was that a defendant may present evidence regarding the circumstances of the crime, including evidence pertaining to lingering doubt, in a penalty retrial involving different jurors who did not hear the evidence during the guilt phase. (*Id.* at p. 1222.) Finally, *Gay* did not find it was error to instruct the jury that the defendant's guilt had been conclusively proven. Rather, *Gay* held the court's emphasis on that instruction, combined with its admonition to the jury to disregard defense counsel's statement that they would hear evidence that the defendant was not the shooter, rendered prejudicial the error of excluding such evidence. (*Id.* at pp. 1225-1226.)

Here, Streeter was not prevented from presenting evidence surrounding his state of mind at the time he committed the crime, which was the only disputed issue, and the only issue open to lingering doubt. The defense case at the penalty trial included extensive testimony from family members and friends who portrayed Streeter as a devoted father, son, partner and neighbor. (22 RT 2295-2317.) Streeter testified in detail about his history with Yolanda, their loving relationship, his desperation when she left him, his use of drugs and alcohol before the crime, and the fact that the suicide note was a ploy to get Yolanda back, disputing the prosecutor's theory that the note revealed his intent to kill. (22 RT 2318-2375.)

Nor was there any error in the trial court's refusal to give Streeter's proposed instruction on lingering doubt. "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." (*Tuilaepa v. California* (1994) 512 U.S. 967, 979 [114 S.Ct. 2630, 129 L.Ed.2d 750].) "'[A]lthough it is proper for the jury to consider

lingering doubt, there is no requirement that the court specifically instruct the jury that it may do so.'" (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 949; *People v. Brown* (2003) 31 Cal 4th 518, 567 quoting *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219; see also *People v. Bonilla*, *supra*, 41 Cal.4th at pp. 313, 357; *People v. Demetrulias* (2006) 39 Cal.4th 1, 42; *People v. Gray*, *supra*, 37 Cal.4th at pp. 168, 231-232; *People v. Lawley* (2002) 27 Cal.4th 102.) "The rule is the same under the state and federal Constitutions." (*People v. Brown*, *supra*, 31 Cal.4th at p. 567, citing *Franklin v. Lynaugh* (1988) 487 U.S. 164, 173 174 [108 S.Ct. 2320, 101 L.Ed.2d 155]; *People v. Lawley*, *supra*, 27 Cal.4th at p. 166; *People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1060, 1187 ["Defendant clearly has no federal or state constitutional right to have the penalty phase jury instructed to consider any residual doubt about defendant's guilt."].) Thus, the proposed "lingering doubt" instruction was not required under either state or federal law. (*People v. Lawley*, *supra*, 27 Cal.4th at p. 166; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1187.)

The "lingering doubt" instruction was also unnecessary in this case, because other instructions, the presentation of evidence on the issue, and the arguments of counsel clearly conveyed to the jury that they could consider any lingering doubt about Streeter's guilt. The trial court instructed the jury that in making its penalty determination, it could consider "the circumstances of the crime of which defendant was convicted in the present proceedings and the existence of any special circumstance found to be true," and

> any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime. And any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(25 RT 2630-2631, CALJIC No. 8.85]; see also *People v. Bonilla*, *supra*, 31 Cal 4th at p. 567; *People v. Demetrulias*, *supra,* 39 Cal.4th at p. 42; *People v. Gray*, *supra*, 37 Cal.4th at p. 232; *People v. Earp* (1999) 20 Cal.4th 826, 903-904; *People v. Hines* (1997) 15 Cal.4th 997, 1068.) "These instructions sufficiently encompassed the concept of "lingering doubt," and the trial court was under no duty to give a more specific instruction. [Citations.]" (*People v. Hines*, *supra*, 15 Cal.4th at p. 1068; see *People v. Brown*, *supra,* 31 Cal.4th at p. 568.)

Here, with the court's express permission, defense counsel was permitted to argue lingering doubt and he did so, extensively. (22 RT 2381-2382; see *People v. Hines*, *supra*, 15 Cal.4th at p. 1068 [the court permitted defendant to argue mitigating factor of lingering doubt even though it denied instruction on same].) The entire focus of counsel's opening statement was to urge the jurors to reconsider the question of Streeter's guilt, and his state of mind. After explaining the evidence he intended to present on the issue of Streeter's guilt, counsel stated:

> The jury in the first trial found him guilty, and that he was - - that he had planned to kill Yolanda, that he laid in wait and waited for her for that purpose, and that he intentionally killed her and that he intentionally caused her to suffer by torture.
>
> There is another issue in the law that you will be provided. It's called lingering doubt. Whether or not he really did lay in wait and whether or not he did intend to kill Yolanda and intend to inflict torture, that is, that painful death, is an issue that you will be considering, is that lingering doubt. And that lingering doubt gives you the right to vote any way you want to vote . . .

(19 RT 1931-1933.)

Defense counsel emphasized this concept again in his closing argument:

> There is also a rule in the law that says that if you have a lingering doubt as to any of these occurring, you may consider that lingering doubt. Lingering doubt. The jury found beyond a

reasonable doubt that he did this, but there might be something that makes you wonder to yourself whether or not it is true, but you have enough reasonable doubt to believe it is true. So something is troubling in your mind.

For instance, the first jury said that he was laying in wait, waiting there to kill her. That was his intention. And then he intended to set her afire, commit torture. Excuse me for a minute.

And you remember the defendant testified that he didn't intend to do that. He lost it. Didn't know why that happened. He lost it.

He was waiting there to see his child, Howie, Little Howie. And you remember little Patrick testified that the defendant grabbed Little Howie, Baby Howie, from the back seat of the car in which Yolanda was driving and Yolanda asked him what are you doing, or words to that effect, and Patrick says that he said, "I'm out of here and leave me; I'm out of here."

Okay. And he tells us he was waiting there to see his child and she was late and he got a little upset. And whatever happened, he lost it. He didn't intend for things like that to happen.

The jury found that not to be true that he did it. But there might be a lingering doubt as to whether there was an actual intent for that crime to be committed."

(25 RT 2616-2617.)

Based on the foregoing, the trial court's instructions did not effectively tell the jury to disregard the mitigating evidence Streeter presented on the issue of lingering doubt, nor did it create an insurmountable barrier to the jury's consideration of the issue. (See AOB 277-280, and cases cited.)

Even assuming arguendo there was error, reversal is not required because there is no reasonable possibility the jury would have selected a different penalty had the error not occurred. (*People v. Gay*, *supra*, 42 Cal.4th at p. 1223.) Like this Court found in *DeSantis*, *supra*, the

instructions and comments by the court and by the prosecutor "merely reminded the jury that it was not to redetermine guilt," they "did not remove the question of lingering doubt from the jury," and the defendant "was able virtually to retry the guilt phase case under the guise of introducing evidence of the circumstances of the crime to the penalty jury." (*People v. DeSantis*, *supra*, 2 Cal.4th at p. 1235.)

Moreover, the penalty jury was instructed to consider the aggravating and mitigating factors in CALJIC No. 8.85, including both factor (a) and factor (k). These instructions are sufficiently broad to encompass any residual doubt the jurors may have had about Streeter's guilt. (*People v. Lawley*, *supra*, 27 Cal.4th at p.166, *People v. Davis*, *supra*, 10 Cal.4th at p. 545.) These instructions, counsel's argument, and the extensive evidence presented on the issue of Streeter's guilt for the underlying charges and special circumstances, made it clear to the jury that it was up to them to independently determine whether Streeter's state of mind at the time he killed Yolanda made him deserving of the death penalty. The death judgment should be affirmed.

XIX. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY HOW TO CONSIDER EVIDENCE UNDER FACTOR (B) (CALJIC NO. 8.87)

Streeter contends the trial court improperly instructed the jury according to CALJIC No. 8.87 that they were to presume Streeter's conduct involving Yolanda's siblings constituted "criminal acts which involved the express or implied use of force or violence or the threat of force or violence." He argues this instruction created a mandatory presumption that the incidents constituted such acts, and that it improperly escalated the seriousness of the incident by defining the incident as an actual, express threat or implied use of force or violence. He argues the instruction was prejudicial and requires reversal of the death penalty. (AOB 284-291.)

Streeter's claims are forfeited, and his arguments have previously been rejected by this Court.

The jury was instructed on Factor (b) pursuant to CALJIC No. 8.87 as follows:

> Evidence has been introduced for the purpose of showing that the defendant has committed the criminal act which involved the express or implied use of force or violence or the threats of force or violence.
>
> Before a juror may consider any criminal act or acts as an aggravating circumstance in this case, the jury must be first satisfied beyond a reasonable doubt that the defendant did, in fact, commit the crime or acts as an aggravating circumstance.

(25 RT 2631-2632.)[30]

Streeter did not object to the instruction. His failure to do so forfeits the claim on appeal. In any event, Streeter's "mandatory presumption" argument was rejected in *People v. Nakahara*, *supra*, 30 Cal.4th at pp 705, 720. There, this Court stated,

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[30] In addition to CALJIC No. 8.87, the jury was instructed on Factor (b) pursuant to CALJIC No. 8.85 as follows:

> In determining which penalty to be imposed or is to be imposed on the defendant, you should consider all of the evidence which has been received during any part of the trial of this case.
>
> You shall consider, take into account, and be guided by the following factors, if applicable:
>
> . . . The presence or absence of criminal activity by the defendant, other than the crime for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or express or implied threats to use force or violence.

(25 RT 2630, CT 228-228, CALJIC No. 8.85.)

> CALJIC No. 8.87 is not invalid for failing to submit to the jury the issue whether the defendant's acts involved the use, attempted use, or threat of force or violence.

(*People v. Nakahara*, *supra*, 30 Cal.4th at pp 705, 720.)

In *People v. Loker*, *supra*, 44 Cal.4th at p. 691, this Court confirmed that the characterization of other crimes as involving express or implied use of force or violence or the threat thereof, is a legal question properly resolved by the court. (*Ibid.*, citing *People v. Monterrosso*, *supra*, 34 Cal.4th at pp. 743, 793; *People v. Nakahara*, *supra*, 30 Cal.4th at p. 720.)

Streeter claims the instruction was prejudicial, and "this was a close case." (AOB 290.) But even giving Streeter the benefit of every possible evidentiary doubt, it was not a "close case" at all on the relevant issue; that his conduct against Victor involved the use, attempted use or threat of force or violence. Streeter concedes his actions involved "threatening-type acts," (AOB 290), and in the trial court, defense counsel did not even argue that Streeter's conduct towards the Buttlers did not constitute the use or threat to use force or violence. Instead, he emphasized that Streeter had denied the conduct and that "he never did carry out any of those threats." (25 RT 2611.) Indeed, the undisputed evidence established that Streeter's threatening conduct towards Yolanda's siblings resulted in his conviction for felony assault with a deadly weapon. (19 RT 1984.)

Moreover, the prosecutor's argument clearly explained the proper use of Factor b evidence.

> Now, it's important for you to remember this. Doing violence to property is not okay under this statute. You can't say that, "Well, he broke the windows out and caused property damage and therefore we have Factor B." That's not what the law is about. The law is about threatening people, a threat to other persons. So when you're considering that fact, you have to ask yourself, "Was that an act of express or an implied threat to use violence against the persons of the various people, Victor and Rallin and so on?" Okay?

Because if you just say, "Well, he broke some window; therefore, we have Factor B", that wouldn't be fair to him. So you must make the decision, in your hearts, in your minds, as to whether or not when he did things like break the windows, throw rocks through the windows, whether it was a bat or a rock or a tire iron or a jack, or whatever his story is this week, certainly he admits to doing certain of these things, and you have to ask yourself, "Does that mean that was an implied threat to use force or violence against people?" And if you find that's true, then so be it, then Factor B has existence.

(25 RT 2589.)

The jury was properly instructed on Factor B. Streeter's death judgment should be affirmed.

XX. THE INCLUSION OF STREETER'S MISDEMEANOR CONVICTION FOR SHOOTING AT AN INHABITED DWELLING IN CALJIC NO. 8.86 (FACTOR C) WAS HARMLESS ERROR

Streeter contends the trial court committed prejudicial error by instructing the jury they could consider his prior misdemeanor conviction under Factor c. (AOB 291-294.) The error was harmless.

Penal Code section 190.3, subdivision (c) ("Factor c") permits the jury to consider the presence or absence of any prior felony conviction in determining penalty. The jury was instructed pursuant to CALJIC No. 8.86 as follows:

Evidence has been introduced for the purpose of showing that the defendant has been convicted of the crimes of assault with a firearm, violation of Penal Code Section 245(a)(2), and shooting at an inhabited dwelling, Penal Code 246, a misdemeanor, prior to the offense of murder in the first degree of which he has been found guilty in this case.

(25 RT 2632.)

Pursuant to CALJIC No. 8.85, the jury was told:

In determining which penalty to be imposed or is to be imposed on the defendant, you should consider all of the

evidence which has been received during any part of the trial of this case.

You shall consider, take into account, and be guided by the following factors, if applicable:

. . . The presence or absence of any prior conviction other than for the crimes for which the defendant has been tried in the present proceedings.

(25 RT 2630.)

Streeter correctly points out that a misdemeanor conviction cannot be used as an aggravating factor under Factor c. (AOB 293, *People v. Osband*, *supra*, 13 Cal.4th at pp. 622, 735.) Thus, the inclusion of Streeter's misdemeanor conviction in CALJIC No. 8.86 was error, as was the omission of the term "felony" from CALJIC No. 8.85.[31]

But it was harmless under any standard. Streeter acknowledges the jury was fairly instructed to consider his felony conviction for assault with a deadly weapon under Factor c. Moreover, the facts underlying the misdemeanor conviction involving shooting into the home of Paul Triplett, knowing there were people in the home, were admissible under Factor b. As to that factor the jury was instructed to consider,

the presence or absence of criminal activity by the defendant, other than the crime for which the defendant has been

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[31] Respondent found no support in the record for Streeter's assertion that the misdemeanor conviction was included in the instruction (CALJIC No. 8.86) provided by the prosecutor. (See AOB 292.) The record provides greater support for the inference that the court modified the instruction during a conversation with counsel in which the prosecutor informed the court the offense was a misdemeanor. Neither party objected when the court said it would modify the instruction accordingly. (24 RT 2575-2576.) Since neither side addressed the misdemeanor conviction in its argument on Factor C, and both sides discussed Streeter's felony conviction, the parties likely assumed the court had modified the instruction by deleting any reference to the misdemeanor.

> tried in the present proceedings, which involved the use or attempted use of force or violence or express or implied threats to use force or violence.

(25 RT 2630.)

Accordingly, the only "prejudice" Streeter arguably suffered was the possibility that the jury considered the *fact* that he was *convicted* as an aggravating factor under Factor c. But it defies logic to think that fact standing alone would carry any greater weight than the facts underlying the conviction, or the fact that he also had a felony conviction.

Moreover, the arguments of both parties made it clear that only Streeter's prior felony conviction was appropriate for consideration under Factor c. The prosecutor argued:

> Factor c is, the presence or absence of any prior felony conviction, other than the crimes for which he's been convicted in this proceeding. That is to say, other than the murder, okay, and the torture and lying in wait. This refers to the 245, or what we call an assault with a deadly weapon that he pled guilty to in connection with his assault on Victor.
>
> And its not important whether or not it was a gun or whether it was a tire iron or whether it was a jack or whether it was a bat. Whatever he used, he pled guilty to that crime against Victor, and it was a conviction, a felony conviction, and you have the information before you about that. So we have three different factors in aggravation.

(25 RT 2589-2590.)

Similarly, the only conviction referenced by defense counsel was the felony conviction for the conduct against Victor. (25 RT 2617.) Neither party mentioned the incident involving Paul Triplett.

Based on the foregoing, there is no reasonable likelihood the error affected the verdict. Streeter's death judgment should be affirmed.

XXI. ANY ERROR IN GIVING CALJIC NO. 1.00 WAS HARMLESS

Streeter contends the trial court committed reversible error when it repeated CALJIC No. 1.00 in his penalty retrial. Specifically, Streeter claims the concluding portion of that instruction stating "regardless of the consequences" diminished the jury's sense of responsibility for its penalty decision, and that the error was compounded by the court's failure to instruct pursuant to CALJIC No. 8.88 (Argument XVI), and the trial court's comments to the jury, including the fact that there had been a prior penalty trial. (AOB 294-297.) Any error was harmless.

Pursuant to CALJIC No. 1.00, the jury was instructed:

> You have two duties to perform. First you must determine the facts from the evidence received in the trial and not from any other source.
>
> A fact is something proved by the evidence or by stipulation.
>
> A stipulation is an agreement between the attorneys regarding the facts.
>
> Second, you must apply the law that I state to you to the facts as you determine them and in this way arrive at your verdict. You must accept and follow the law as I state it to you, whether or not you agree with the law.
>
> If anything concerning the law said by the attorneys in their arguments or at any time during the trial conflicts with my instructions on the law, you must follow my instructions.
>
> Both the People and the Defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences.

(25 RT 2623-2624.)

Streeter correctly points out that this instruction applies only to guilt, and should not be given in penalty trials. (AOB 294, citing *People v. Ray*

(1996) 13 Cal.4th 313, 354; *People v. Jennings* (1988) 46 Cal.3d 963, 991; *People v. Keenan* (1988) 46 Cal.3d 478, 517; *People v. Wade* (1988) 44 Cal.3d 975; *People v. Brown, supra*, 40 Cal.3d at pp. 512, 537, fn. 7.) This Court's disapproval of the instruction comes from its potential to diminish the jury's sense of responsibility for the precise decision it is called upon to reach. (*People v. Jennings, supra*, 46 Cal.3d at p. 991.) However, this Court has generally declined to find prejudice when the instruction is considered in light of the entire charge to the jury, because the jury is almost certain to understand that it may disregard only those consequences which are not relevant to its sentencing decision, and that it bears the ultimate responsibility for choosing the appropriate consequence of life without parole, or death. (*People v. Kipp, supra*, 18 Cal.4th at pp. 349, 380.) The issue is whether the jury may have been misled into improperly applying the instruction. (*People v. Babbitt* (1988) 45 Cal.3d 660, 717-719.)

Here, there was virtually no risk the challenged phrase undermined the jury's sense of responsibility for the decision it was being asked to make. The trial court's introductory comments, the questionnaire, the other instructions and the arguments of counsel fully communicated to the jury that their service was for the specific purpose of determining the consequences of Streeter's actions; either life without parole, or death.

In its preliminary comments to prospective jurors, the court explained the jurors' sole and unique "responsibility of deciding what the appropriate penalty should be." (16 RT 1625-1626.) When questionnaires were distributed, the jury was told to disregard question 33, which instructed them to refrain from discussing the death penalty until the penalty phase had concluded. The court explained the question was not relevant in the penalty phase, because "your whole function in this trial is to discuss penalty at the appropriate point." He also explained that question 33

applied in the guilt phase, but here they are dealing with penalty. (16 RT 1631.)

Moreover, the gravity of the jury's responsibility was made clear through the instructions as a whole. The jury was specifically instructed that the law provided two possible penalties, did not favor either one, and that:

> The jury determines the penalty in the second phase by weighing and considering certain enumerated aggravating and mitigating factors, bad and good things that relate to the facts of the crime and to the background and character of the defendant, including a consideration of mercy.
>
> . . .
>
> In weighing these factors - - pardon me - - the weighing of these factors is not quantitatively, but qualitative. In order to fix the penalty of death, the jury must be persuaded that the aggravating factors are so substantial in comparison to the mitigating factors that death is warranted instead of life imprisonment without parole.
>
> . . .
>
> In this case here, you are going to be hearing these aggravating and mitigating factors. When it comes around for you to make a decision, you will be weighing those facto (sic) in making this determination which I have just read to you and you will be instructed about this later on . . ."

(17 RT 1724-1725.)

The jury was extensively instructed on the factors to consider in making its determination as to the appropriate consequences Streeter should suffer for his actions. (CALJIC No. 8.85; 19 RT 1911-1913; 25 RT 2630-2631.)

The arguments of counsel reaffirmed the jury's responsibility to consider the consequences of their actions. The prosecutor informed the jury they were entitled to consider sympathy. (25 RT 2604-2605.) He

specifically acknowledged that he understood the seriousness of what he was asking them to do, which was to impose the death penalty. (25 RT 2579-2580.) Defense counsel specifically told the jury that the last sentence of the instruction did not apply. (25 RT 2619-2620.) Both attorneys repeatedly impressed upon the jury the gravity of the decision they were being asked to make, so the jury was not misled by a single, inapplicable phrase. (See *People v. Babbitt*, *supra*, 45 Cal.3d at pp. 717-719.)

Whatever meaning the jury might have given to the language "regardless of the consequences," they could not have taken it as a direction to disregard the reality that the consequence of their decision was that Streeter would be put to death. Such an interpretation would defy logic in the face of the task they were being asked to perform. This result is not changed by the arguable omission of CALJIC No. 8.88 or the trial court's comments to the jury that their service was unique and that this was a penalty retrial. First, as set forth in Argument XVI, the principles contained in CALJIC No. 8.88 were fully communicated to the jury. Second, the court's purpose in informing the jury about the prior penalty trial was to determine whether thay had been exposed to any publicity about that trial, an issue which certainly was in Streeter's best interests to explore. (See, e.g., 16 RT 1689.) The introductory comments, opening statements, jury instructions and arguments of counsel made it unmistakably clear to the jury that they individually and collectively bore full responsibility for the weighty decision of whether Streeter would live or die. The death judgment should be affirmed.

XXII. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Streeter raises several "routine" challenges to the constitutionality of California's death penalty statute, which he acknowledges have been

repeatedly rejected by this Court. (AOB 297-312.) Streeter has not presented sufficient reasoning to revisit these issues; therefore, extended discussion is unnecessary and Streeter's claims should all be rejected consistent with this Court's previous rulings.

Streeter claims that Penal Code section 190.2 is impermissibly broad, because it fails to meaningfully narrow the pool of murderers eligible for the death penalty. He claims the large number of special circumstances makes almost all first degree murderers eligible for the death penalty. (AOB 298.) This Court has consistently rejected this claim. (*People v. Davis*, *supra*, 46 Cal.4th at p. 648; *People v. Zamudio* (2008) 43 Cal.4th 327, 373; *People v. Cook* (2007) 29 Cal.4th 566, 617; *People v. Elliot*, *supra*, 37 Cal.4th at pp. 453, 487; *People v. Harris* (2005) 37 Cal.4th 310, 365.) Streeter has not presented any reason to reconsider this issue.

Streeter claims that Penal Code section 190.3, subdivision (a), which requires the finder of fact to consider "the circumstances of the crime" in determining the appropriate penalty in capital cases, has been applied in such a broad manner that it virtually applies to every feature of every murder, including those that contradict each other, which results in arbitrary and contradictory application, in violation of his constitutional rights. (AOB 298-300.) This Court has rejected this argument.

> It is not inappropriate . . . that a particular circumstance of a capital crime may be considered aggravating in one case, while a contrasting circumstance may be considered aggravating in another case. The sentencer is to consider the defendant's individual culpability; there is no constitutional requirement that the sentencer compare the defendant's culpability with the culpability of other defendants. [Citation.] The focus is upon the individual case, and the jury's discretion is broad.

(*People v. Jenkins* (2000) 22 Cal.4th 900, 1051; accord *People v. Hamilton*, *supra*, 45 Cal.4th at pp. 863, 960; *People v. Ramos* (2004) 34 Cal.4th 494, 533; *People v. Maury* (2003) 30 Cal.4th 342, 439.)

Streeter has not presented any reason to reconsider this issue, therefore, his claim should be rejected.

Streeter claims the death penalty statute and accompanying jury instructions fail to set forth the appropriate burden of proof. He argues his death sentence is unconstitutional because it is not premised upon findings made beyond a reasonable doubt. He claims some burden of proof is required, or the jury should have been instructed that there was no burden of proof. (AOB 300-303.) This claim has been repeatedly rejected. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 960; *People v. Michaels*, *supra*. 28 Cal.4th at pp. 486, 541.) California's death penalty statute is constitutional.

As this Court's precedent makes clear:

> The death penalty law is not unconstitutional for failing to impose a burden of proof–whether beyond a reasonable doubt or by a preponderance of the evidence–as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence. [Citation.] Unlike the statutory schemes in other states cited by defendant, in California 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification. [Citations.] ¶ The jury is not constitutionally required to achieve unanimity as to aggravating circumstances. [Citation.] ¶ Recent United States Supreme Court decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 have not altered our conclusions regarding burden of proof or jury unanimity.

(*People v. Brown* (2004) 33 Cal.4th 382, 401-402.)

In California

> once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole.

(*People v. Ward* (2005) 36 Cal.4th 186, 221 quoting *People v. Prieto* (2003) 30 Cal.4th 226, 263.)

The United States Supreme Court's decisions, including *Cunningham*, "interpreting the Sixth Amendment's jury trial guarantee [citations] have not altered our conclusions in this regard." (*People v. Whisenhunt, supra*, 44 Cal.4th at pp. 174, 227-228.) *Cunningham* "involves merely an extension of the *Apprendi* and *Blakely* analyses to California's determinate sentencing law" (*People v. Prince, supra*, 40 Cal.4th at pp. 1179, 1297), and thus has no bearing on this Court's earlier decisions upholding the constitutionality of the state's capital sentencing scheme (*People v. Stevens, supra*, 41 Cal.4th at pp. 182, 212). Thus, California's death penalty withstands constitutional scrutiny, even after reexamination in light of *Apprendi* and *Cunningham*. Streeter has not presented any reason to reconsider this issue.

Streeter claims his death verdict was not premised on unanimous jury findings, as to either the aggravating factors or the unadjudicated criminal activity. (AOB 304-306.) This Court has consistently rejected these claims. (*People v. Hamilton, supra*, 45 Cal.4th at p. 960; *People v. Ward, supra*, 36 Cal.4th at pp. 186, 221-222; *People v. Riggs, supra*, 44 Cal.4th at pp. 248, 329; *People v. Whisenhunt, supra*, 44 Cal.4th at p. 228; *People v. Elliot, supra*, 37 Cal.4th at p. 487; *People v. Anderson* (2001) 25 Cal.4th 543, 589.)

Streeter contends his constitutional rights were violated by the trial court's failure to instruct the jury regarding the standard of proof and lack of need for unanimity as to mitigating circumstances. (AOB 306-307.) This Court has previously rejected that argument. (*People v. Lewis, supra*, 43 Cal.4th at pp. 415, 534; *People v. Rodgers* (2006) 39 Cal.4th 826, 897) Streeter has offered no persuasive reason to reconsider this argument.

Streeter contends the penalty jury should have been instructed on the presumption of life. (AOB 307-308.) This Court has repeatedly rejected the argument that there is a presumption of life in the penalty phase of a capital trial that is analogous to the presumption of innocence at the guilt trial. (*People v. Abilez*, *supra*, 41 Cal.4th at pp. 472, 532; *People v. Perry* (2006) 38 Cal.4th 302, 321; *People v. Kipp*, *supra*, 26 Cal.4th at pp. 1000, 1137.) Streeter has not presented any compelling reason for this Court to revisit these holdings.

Streeter contends the jury's failure to make written findings violated his right to meaningful appellate review. (AOB 308-309.) This Court has consistently rejected any claim that written findings are required. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 960; *People v. Riggs*, *supra*, 44 Cal.4th at p. 329; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Elliot*, *supra*, 37 Cal.4th at p. 488; *People v. Cornwell*, *supra*, 37 Cal.4th at pp. 50, 105; *People v. Jones*, *supra*, 29 Cal.4th at pp. 1229, 1267.) This Court should follow its prior rulings.

Streeter claims the instructions to the jury on aggravating and mitigating factors violated his constitutional rights. Specifically, he challenges the use of restrictive adjectives in the list of mitigating factors, the failure to delete inapplicable sentencing factors, and the failure to instruct that statutory mitigating factors were relevant solely as potential mitigators. (AOB 309-310.) This Court has repeatedly rejected the same challenge Streeter raises to the terms "extreme" and "substantial." (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 960; *People v. Parson*, *supra*, 44 Cal.4th at pp. 332, 369-370; *People v. Salcido* (2008) 44 Cal.4th 93, 168; *People v. Prince*, *supra*, 40 Cal.4th at pp. 1179, 1298; *People v. Beames* (2007) 40 Cal.4th 907, 934.) This Court has previously rejected the argument that a trial court is required to delete inapplicable sentencing factors, (*People v.Taylor* (2001) 26 Cal.4th 1155, 1179-1180), as well as

the claim that the trial court was required to instruct that statutory mitigating factors were relevant solely as potential mitigators. (*People v. Hillhouse*, *supra*, 27 Cal.4th at pp. 469, 509.) This Court should deny Streeter's challenges as he presents no compelling reason for this Court to deviate from its prior holdings.

Streeter claims the prohibition against inter-case proportionality review guarantees arbitrary and disproportionate impositions of the death penalty. (AOB 311.) This Court has repeatedly rejected this contention and should do so again here. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 960; *People v. Cornwell*, *supra*, 37 Cal.4th at pp. 50, 105; *People v. Elliot*, *supra,* 37 Cal.4th at pp. 453, 488; *People v. Smith*, *supra,* 35 Cal.4th at p. 374; *People v. Jones*, *supra*, 29 Cal.4th at pp. 1229, 1267.)

Streeter claims the California capital sentencing scheme violates the Equal Protection Clause. (AOB 311-312.) This Court has previously rejected this claim. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 960; *People v. Prieto*, *supra*, 30 Cal.4th at p. 276; *People v. Allen*, *supra*, 42 Cal.3d at pp.1222, 1286-1288.)

Streeter claims California's use of the death penalty as a regular form of punishment falls short of international norms. (AOB 312.) This Court has repeatedly rejected similar arguments and should do so again here. "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citation.]" (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 960; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1322; accord *People v. Mungia*, *supra*, 44 Cal.4th at pp. 1101, 1143; *People v. Panah* (2005) 35 Cal.4th 395, 500; *People v. Elliot*, *supra*, 37 Cal.4th at p. 488.) Streeter does not present any reason to revisit these holdings.

In sum, Streeter's constitutional challenges to California's death penalty statute have been repeatedly rejected by this Court, and should be again.

CONCLUSION

Respondent respectfully requests the judgment of conviction and sentence of death be affirmed in its entirety.

Dated: August 20, 2009

Respectfully submitted,

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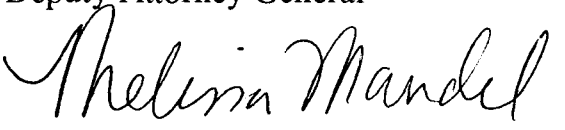

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains **78,119** words.

Dated: August 20, 2009

EDMUND G. BROWN JR.
Attorney General of California

MELISSA MANDEL
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Howard L. Streeter** Case No.: **S078027**

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 August 21, 2009, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 21, 2009, at San Diego, California.

G. Nolan
Declarant

Signature