SUPREME COURT COPY

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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. WILLIE LEO HARRIS, Defendant and Appellant.	**CAPITAL CASE** Case No. S081700

SUPREME COURT
FILED
DEC 17 2009
Frederick K. Ohlrich Clerk
Deputy

Kern County Superior Court Case No. 71427A
The Honorable Roger D. Randall, Judge

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DEATH PENALTY

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STATEMENT OF THE CASE

On November 9, 1998, the Kern County District Attorney filed an eight-count amended information against appellant, Willie Leo Harris. Count one charged appellant with the willful, unlawful, deliberate, and premeditated murder of Alicia Corey Manning, in violation of Penal Code[1] section 187, subdivision (a). Count two charged appellant with the robbery of Alicia Corey Manning, in violation of section 212.5, subdivision (a). Count three charged appellant with the rape of Alicia Corey Manning, in violation of section 261, subdivision (a)(2). Count four charged appellant with the sodomy of Alicia Corey Manning, in violation of section 286, subdivision (c). Count five charged appellant with the residential burglary of Alicia Corey Manning, in violation of section 460, subdivision (a). Count six charged appellant with theft of a vehicle owned by Alicia Corey Manning, in violation of Vehicle Code section 10851, subdivision (a). Count seven charged appellant with arson of a vehicle owned by Alicia Corey Manning, in violation of section 451, subdivision (d). Count eight charged appellant with the residential burglary of Bree Torigiani, in violation of section 460, subdivision (a). (5 CT 1183-1195.)[2]

As to count one, the amended information alleged special circumstances of robbery (§§ 212.5, subd. (a), 190.2, subd. (a)(17)(A)), rape (§§ 261, 190.2, subd. (a)(17)(C)), sodomy (§§ 286, subd. (c), 190.2, subd. (a)(17)(D)), and burglary (§§ 460.1, 190.2, subd. (a)(17)(G)). Count one further alleged that appellant used a deadly or dangerous weapon in the

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

[2] "CT" refers to the Clerk's Transcript On Appeal; "RT" refers to the Reporter's Transcript On Appeal; "AOB" refers to the Appellant's Opening Brief. Transcript citations will be preceded by a volume designation, if appropriate.

commission of the offense, in violation of section 12022, subdivision (b)(1). Counts one through eight alleged appellant had served a prior prison term (§ 667.5, subd. (b)), and had a prior "strike" conviction (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)). Counts one through five and eight further alleged that appellant had a prior serious felony conviction within the meaning of section 667, subdivision (a). (5 CT 1183-1195.)

On September 19, 1997, appellant was arraigned on the original information.[3] He pled "not guilty" on all counts and denied all allegations. (3 CT 517.)

On November 23, 1998, a jury was impaneled to try the case. (5 RT 1224-1225.) On December 9, 1998, the jury found appellant guilty as charged in count eight, but were unable to reach verdicts on counts one through seven. (5 RT 1288-1289.) Appellant waived his right to a jury trial on the issue of the prior convictions, and the court found all three prior conviction allegations in count eight to be true. (5 RT 1289-1290.)

On January 7, 1999, the trial court denied probation and sentenced appellant to an aggregate term of 18 years in prison, which consisted of: the upper term of six years doubled to 12 years (§ 667, subd. (e)) on count 8; five years for the section 667, subdivision (a) allegation; and one year for the section 667.5, subdivision (b) allegation. Appellant received 864 days total presentence custody credit. (6 CT 1518-1519, 1522.)

On January 11, 1999, appellant filed a notice of appeal from the conviction on count 8. (6 CT 1523.)

On January 28, 1999, appellant filed a motion to continue the second trial on counts 1 through 7 to allow him time to file a motion for change of

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[3] Appellant was never arraigned on the amended information because two counts were dropped and the remaining counts were renumbered, but no new counts were added. (5 RT 1176.)

venue. (13 CT 3606-3615.) On February 2, 1999, the trial court granted a continuance. (13 CT 3616.) On April 16, 1999, appellant filed a motion for change of venue (14 CT 3640-3774), which was subsequently denied on May 19, 1999 (14 CT 3830). On May 25, 1999, appellant petitioned for a writ of mandate in the Court of Appeal, which was subsequently denied on May 26, 1999. (14 CT 3929.)

On June 18, 1999, a second jury was impaneled to re-try counts 1 through 7. (15 CT 3974.) On June 30, 1999, the jury found appellant guilty on count 1 and found the special circumstances of robbery and rape, along with the arming allegation, to be true. They also found appellant guilty as charged in counts 2, 3, 6, and 7. The jury found appellant not guilty on counts 4 and 5, and found the special circumstances of sodomy and burglary not true. (15 CT 4029-4030.) The trial court then struck the remaining allegations. (15 CT 4931.)

On July 1, 1999, the penalty phase of the trial began. (16 CT 4309.) On July 6, 1999, the jury returned a verdict of death. (16 CT 4324.)

On August 24, 1999, the trial court denied probation and sentenced appellant to the upper term of 6 years on counts 2 and 3, stayed pursuant to section 654, and the upper term of 3 years on counts 6 and 7 to be served concurrent to count 1. As to count 1, the court imposed a sentence of death, plus 1 year for the section 12022, subdivision (b)(1) enhancement. (16 CT 4518-4519.)

This appeal is automatic.

STATEMENT OF FACTS

A. The People's Case

In the spring of 1997,[4] Alicia Manning[5] was a senior at California State University Bakersfield (CSUB) on track to graduate in June of that year. Alicia lived at 5100 Ming Avenue, apartment B-16, with her roommate, Thea Bucholz, who was also a senior at CSUB. Alicia and Bucholz were good friends who had lived together for two years. (27 RT 6142-6144.)

After graduation, Alicia planned on driving back to the east coast with her boyfriend Charles Hill.[6] Alicia lined up a summer job at Fort Belvoir in Virginia and she was going to stay there with her family for the summer. (30 RT 6950.)[7] Charles[8] was moving to Charlotte, North Carolina, to work at his family's business repairing hydraulic tools. (27 RT 6146; 30 RT 6927, 6950.) At the end of the summer, Alicia planned to drive to Charlotte to see how things were going with Charles and they were either going to live together in Charlotte or, if she got into graduate school, they would both relocate. (30 RT 6927, 6950-6951.) Charles' father, Lane Hill, helped Alicia map out the route that she was going to take back to Virginia,

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[4] All further dates refer to the year 1997 unless otherwise noted.

[5] Alicia, Lee, Valerie, Scott, and Kevin Manning will be referred to by their first names to avoid confusion.

[6] At the time of trial, Charles was 24 years old, 5 feet 10 inches tall, and weighed approximately 195 pounds. (30 RT 6954.)

[7] The prosecution admitted a letter entitled "Dear Dave" into evidence, in which Alicia wrote of her plans to move to the east coast with Charles after graduation. The letter was written within the week prior to her murder. (30 RT 6911-6914, 6921-6922; People's Ex. 14.)

[8] Charles and Lane Hill will be referred to by their first names to avoid confusion.

and he let her use his AAA membership to rent a moving van. (30 RT 6928.)

Alicia and Charles had known each other for approximately three and a half years, and they had been seriously dating for the last year. (27 RT 6144-6145; 30 RT 6924-6925, 6949-6950.) Alicia had a very good relationship with Charles' parents; she was like a daughter to them. (30 RT 6925, 6952.) Charles planned to propose to Alicia on her graduation day. (30 RT 6949.)

In early April, Bucholz met appellant at her friend's apartment. Bucholz and appellant formed a fast friendship and they regularly saw each other at least once or twice a day. (27 RT 6153-6154.) Appellant made several attempts to turn his friendship with Bucholz into a romantic relationship, but Bucholz told him she was not interested and they remained friends. (27 RT 6157, 6193.)

Alicia first met appellant approximately one week after he and Bucholz met. Bucholz brought appellant over to the apartment for the first time, and Alicia was there so Bucholz introduced her to appellant. Appellant visited Bucholz at her apartment approximately five times and Alicia was there on three of those occasions. (27 RT 6155-6156.)

When Bucholz and appellant met, he was living with his girlfriend Zenobia "Christy" Findley at 601 Taylor Street, apartment 10, near the intersection of Stockdale Highway and New Stine Road. Findley and appellant dated briefly in July of 1995 and then they got back together in December of that same year. Appellant moved into Findley's apartment, which she shared with her brother, in January of 1996. (27 RT 6612-6615.)[9]

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[9] Findley testified that appellant frequently paged her when she was away from the apartment, and he was very controlling of the time that she (continued...)

Findley worked at the Bakersfield Californian newspaper and was a full-time student at CSUB. Appellant was unemployed and not attending school. Neither Findley nor appellant had a car during this time, and Findley would get rides to work and school from a friend. (29 RT 6615-6616.)

Throughout April and May, appellant frequently called the apartment when Bucholz was not home, and Alicia told Bucholz that appellant was calling too frequently and it interfered with her studying. Appellant would also page Bucholz several times a day. Alicia asked Bucholz more than once to tell appellant to stop calling the apartment. Bucholz told appellant that his frequent phone calls were bothering Alicia, and since she was rarely home the best way to reach her was to page her. (27 RT 6157-6160.) Alicia also told Lane that she was annoyed by the number of phone calls she received from a person she identified as Thea's new boyfriend, and she was purposefully not answering the phone and would leave notes for Bucholz relating the messages. (30 RT 6934.)

During the latter part of April and the beginning of May, Findley suspected that appellant had become romantically involved with Bucholz. (29 RT 6618-6619.) Findley's phone bill contained approximately one page of calls to Bucholz' pager, most of which were made between 11:00 p.m. and 4:00 a.m. (29 RT 6640.)[10] Findley had only seen Bucholz twice, but she knew that Bucholz was Caucasian with reddish colored hair, and she drove an older model light blue two-door car. (29 RT 6637-6638.)[11]

(...continued)
spent away from him. (29 RT 6643.) She also testified that appellant flirted with other women while she was dating him. (29 RT 6648.)

[10] Findley did not find out the number belonged to Bucholz' pager until sometime after May 21, 1997. (29 RT 6620.)

[11] Bucholz drove a 1984 blue Toyota Corolla. (27 RT 6220.)

At some point, Findley called the apartment looking for Bucholz and Alicia answered the phone. (29 RT 6621, 6646-6647.) The call turned into an argument between Findley and Alicia during which Findley threatened Alicia, prompting her to call the police. (27 RT 6163; 29 RT 6621.)[12] Alicia complained to Lane on several occasions that she had received threatening phone calls from appellant's girlfriend. (30 RT 6934.)

Charles lived at his parents' house in Tulare. (27 RT 6206.) Alicia stayed at the Hill residence nearly every weekend, and she would occasionally come up for a day during the week. (30 RT 6926.)[13] If Charles wanted to visit Alicia in Bakersfield, Alicia would have to drive to Tulare to pick him up and take him back to Bakersfield with her, because he did not have a working vehicle. (27 RT 6206; 30 RT 6951, 6928-6929.) There were occasions when Charles would get a ride to Bakersfield with his friend Daniel Cisneros who also had a girlfriend at CSUB, and sometimes Lane would drive Charles to Bakersfield himself. (27 RT 6206; 30 RT 6929.)

On the weekend of May 17, Alicia visited Charles in Tulare and stayed with him at his parents' house until she drove back to Bakersfield Sunday afternoon. (30 RT 6925, 6951-6952.) During this visit, Charles and Alicia discussed a possible break-up because Alicia felt Charles spent too much time with his friends. (30 RT 6967-6968.) Alicia also told Charles that she might have Chlamydia and she thought she got it from him. She told him she saw the nurse at the health center on campus and got

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[12]Findley denied threatening Manning during this conversation. (29 RT 6621, 6647.)

[13] Going the speed limit, it would take a little over an hour to drive from Tulare to Bakersfield. (30 RT 7022.)

tested. (30 RT 6959.) They ultimately decided to stay together no matter what the test results were. (30 RT 6983-6984.)[14]

On the morning of May 15, Alicia had gone to the health center on campus to get a birth control refill and to get checked for a possible urinary tract infection. Based on her symptoms, Carolyn Krone, the nurse practitioner, conducted a full examination, including tests for sexually transmitted diseases (STDs). The examination showed that Alicia had a yeast infection, and she began treatment for it that same day. The results of the STD tests came in on May 19, and Krone called Alicia that same day to tell her that all of the tests came back negative. (30 RT 6987-6988.) Alicia immediately called Charles to tell him about the results. (30 RT 6959.)

On May 19, Alicia came home and found Bucholz and appellant sitting on Bucholz' bed. Alicia confronted the pair about the threatening phone call she received from Findley. Alicia was furious about the entire situation. She said a crazy woman called the apartment looking for them and the woman threatened her, so she called the police. Alicia asked Bucholz and appellant to tell Findley to stop calling the apartment. Appellant simply stared at Alicia, and did not say anything in response. (27 RT 6161-6165.)

On the afternoon of May 19, Lane drove to Bakersfield for business and he took Charles with him. (30 RT 6935.) They met Alicia for dinner at Los Hermanos, a Mexican restaurant on Stockdale Highway, around 5:00 p.m. (27 RT 6165; 30 RT 6935, 6953.) After dinner, they walked across the parking lot to Trader Joe's so Lane could buy some marmalade for his wife. (30 RT 6936.) Then, Lane left for his meeting, which started at 7:00

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[14] The prosecution admitted a letter entitled "Charles sweetheart," in which Alicia professed her love for Charles. The letter was written within the week prior to her murder. (30 RT 6911-6914, 6921-6922; People's Ex. 13.)

p.m., and Alicia and Charles walked next door to Albertson's before driving back to Alicia's apartment. (30 RT 6953, 6936.) Alicia let Charles drive her car back to her apartment after dinner, and he parked the car in the carport closest to Alicia's apartment building. (30 RT 6960, 6962.)[15]

When they arrived at Alicia's apartment no one else was there and they remained alone in the apartment until Lane came to pick Charles up between 10:00 and 10:30 p.m. (30 RT 6954.) Charles and Alicia had previously engaged in sexual intercourse and they planned on having sex that evening, but they ultimately did not because Charles was feeling sick from dinner. (30 RT 6951, 6955.) After his meeting ended, Lane picked Charles up at Alicia's apartment and they drove back to Tulare. (30 RT 6936-6937.) As Lane and Charles were getting in the car, they saw Bucholz pull into the parking lot and go up to the apartment. (30 RT 6937, 6955.)

Bucholz had been out on the evening of May 19, and she came home between 10:00 and 10:30 p.m. She did not see anyone she recognized in the parking lot as she arrived home. Alicia was alone in the apartment when Bucholz arrived and they stayed up talking and listening to a radio talk show. They did not go to sleep until midnight or later. (27 RT 6165-6167.)

On May 20, Alicia came home from class around 3:00 p.m. and Bucholz left for her afternoon class about 10 minutes later. When Bucholz left the apartment, Alicia was sitting on the sofa looking through some papers. It turned out that Bucholz' afternoon class was canceled, so she went over to her friends' apartment where she spent the rest of the afternoon. (27 RT 6167-6169.)

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[15] Charles drove Alicia's car numerous times, but he did not have his own key to her car or her apartment. (27 RT 6221; 30 RT 6977, 6979.)

Bucholz had a criminal law class that evening that started at 6:00 p.m. and ended at 8:00 p.m. Appellant paged Bucholz around 6:15 p.m., and she stepped out of class to return the call. She told appellant she was in class and he asked her if they could meet up later. She told him to page her between 9:00 and 9:30 p.m., but he never paged her back that evening. (27 RT 6169-6170, 6211.)

On May 20, Findley went to work at 4:00 p.m. and got off work around 8:30 p.m. Findley's friend, Monica Tavarez, gave her a ride home from work that evening. On the way home they stopped at the 7-Eleven, near the intersection of New Stine and Stockdale Highway, where Findley withdrew money from the ATM[16] and bought a beer for appellant. (29 RT 6622-6624.)

After they left the 7-Eleven, they drove to Findley's apartment. They ran into appellant on the south side of the apartment complex, and Findley gave him the beer and some money. She also told appellant that she was going to a friend's house and she would be back later. She left the apartment complex around 9:15 or 9:20 p.m. to go to her friend Molly Gutierrez' house to play Trivial Pursuit. (29 RT 6625-6627.)

Later that evening, at approximately 10:52 p.m., Findley received a page that she recognized as her apartment phone number. (29 RT 6628-6629, 6632.) Findley called her apartment and spoke with appellant who was wondering why she had not returned home yet. She told him that she would be home shortly but, before she could leave, appellant called her back, although she could not remember what they discussed. Shortly thereafter, Tavarez drove Findley home, and they arrived at the apartment complex around 11:00 p.m. (29 RT 6629-6631.) When she arrived home,

[16] The time listed on the ATM receipt was approximately 9:00 p.m. (29 RT 6624.)

appellant was on the balcony listening to music. She did not notice anything unusual about appellant's demeanor or appearance that night. (29 RT 6636.)

James Ave, an athletic trainer at CSUB, lived at 5100 Ming Avenue, apartment D-10. On May 20, Ave was at work and did not get off until 6:00 p.m. After leaving work, Ave returned home and then left his apartment to return to campus around 7:30 p.m. (28 RT 6457-6459.) When Ave returned to his apartment around 10:00 p.m., he saw Alicia's green Ford Escort parked in the first space closest to her apartment, and he noticed that the dome light was on inside the car. (28 RT 6459-6461; 29 RT 6709-6710.)[17]

Prabhjeet Singh, a student at CSUB, lived at 5100 Ming Avenue, apartment B-15. His apartment shared a landing and staircase with apartment B-16, which was occupied by Alicia and Bucholz. On May 20, Singh got off work at 8:00 p.m. On his way home, he stopped at a restaurant to pick up dinner and he had a beer at the bar before arriving home around 9:00 p.m. (29 RT 6589-6590.)

After Singh arrived home, he ate dinner and talked on the telephone to a friend. He had plans to meet his friend, Amit Bansal, an MBA student, at the racquetball courts on campus at 10:15 p.m. that evening, because Bansal did not get out of class until 10:10 p.m. While he was eating, Singh heard someone go up and down the stairs outside his apartment about six times. (29 RT 6590-6592.)

Around 10:10 p.m., Singh heard the door to apartment B-16 open and about five seconds later he opened his door to leave and he saw someone at

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[17] Ave had trouble remembering whether he saw the car when he left at 7:30 p.m. or when he returned at 10:00 p.m., but he thought it was more likely that he saw the car at 10:00 p.m. because it was darker and the dome light would have been more prominent. (28 RT 6459-6461.)

the bottom of the staircase turning left. He was not able to make out the person's race or gender. By the time he made it down the stairs, the person had vanished. Then, Singh made his way to the parking lot where his car was parked under the carport in the second space nearest to his apartment. (29 RT 6592-6595.)

As he approached his car, Singh saw Alicia's Ford Escort parked in the stall next to his, which was the stall closest to the apartments. The dome light inside the car was on and Singh saw a television on the front passenger seat and a portable stereo in the back seat. He looked around expecting to see Alicia or Bucholz, but did not see anyone. Singh arrived at the racquetball courts around 10:20 p.m., five minutes late, and Bansal was already there waiting for him. (29 RT 6596-6597.)

That night, shortly before 11:00 p.m., Bakersfield Fire Captain William Hammons responded to a reported vehicle fire in the 300 block of Montclair Street. When Captain Hammons arrived on the scene, a group of people were standing approximately 20 to 30 feet away from the vehicle which was isolated in an alley behind an apartment complex. (26 RT 6062-6065.) Captain Hammons did not notice any unusual behavior from any of the bystanders at the scene. (26 RT 6069-6070.) By this time, a bystander had already extinguished the fire using a dry powder extinguisher. (26 RT 6065-6066.)

The driver and passenger seats of the vehicle were scorched and the roof liner inside the vehicle had also been damaged. In Captain Hammons' 22 years of experience with the fire department he had never seen a car fire start in the driver's seat. The unusual nature of the fire prompted Captain Hammons to request that the police and arson investigators respond to the scene for further investigation. (26 RT 6066-6068.)

Bakersfield Fire Captain Jimmy Embry, an arson investigator, arrived on scene between 11:00 and 11:30 p.m. (26 RT 6068, 6080-6081.)

Captain Embry spoke to Captain Hammons who told him the vehicle was a 1996 Ford Escort that appeared to have been intentionally set on fire. The damage was concentrated in the passenger compartment of the vehicle, particularly the driver's seat and the headliner above it. (26 RT 6081-6082.)

Based on the location of the damage, Captain Embry was able to determine that the fire started on the driver's side seat cushion. From his observations of the vehicle, Captain Embry was also able to conclude that the fire was intentionally set using rubbing alcohol as an accelerant. Based on the extent of the damage, Captain Embry concluded that the fire had only burned for a few minutes before being extinguished. (26 RT 6083-6085.)

Captain Embry requested that the Bakersfield Police Department (BPD) dispatch an officer to the scene. (26 RT 6085-6086.) Bakersfield Police Officer Mike Golleher arrived on scene at approximately 11:20 p.m. (26 RT 6068, 6085-6086, 6108-6109.) A registration check showed that the vehicle was registered to Alicia Corey Manning. A purse containing Alicia's checkbook was located on the floorboard in the backseat of the vehicle and the keys were still in the ignition. (26 RT 6086-6087.)

Shortly after midnight, Captain Embry and Officer Golleher went to Alicia's apartment in an attempt to contact her. (26 RT 6087, 6110.) They knocked on the apartment door but did not get an answer. (26 RT 6087-6088, 6110.) Then they contacted the apartment manager to see if Alicia still lived at that location, and they were told that she did. (26 RT 6110.) Captain Embry asked dispatch to call the telephone number on the checkbook and he also called the number from his cell phone, but the line was busy. (26 RT 6088.)

The apartment was on the second floor and there was a balcony with a sliding glass door on one side of the apartment. The blinds on the sliding

glass door were partially open, allowing Officer Golleher to look into the living room. Officer Golleher did not see a television in the living room, but he did see a space in a cabinet on the north wall of the living room that appeared to have housed a television at some point in time. (26 RT 6111-6113.) Captain Embry did not try to open the door to Alicia's apartment to see if it was unlocked before they left. (26 RT 6088.)

Bucholz arrived home around 1:35 a.m. on the morning of May 21. The door to the apartment was unlocked, which was extremely unusual because Alicia always kept the door locked when she was home. The blinds on the sliding glass door were open, which was also unusual. As she entered the apartment, Bucholz noticed the television was not in its usual place and there were items scattered around the living room. Bucholz attributed the mess in the living room to Alicia's packing, and she assumed Alicia had taken the television into the bedroom. (27 RT 6173-6176.)

Bucholz went into the bathroom, changed into her pajamas, and brushed her teeth. The door to the bedroom she shared with Alicia was partially closed, which was how Alicia usually kept it, but when she tried to open it she found that something was blocking the door from inside the bedroom. She turned the hall light on and she could see that her fan was lying face down on the floor just behind the door. Bucholz turned on the bedroom light, opened the door, and found Alicia, naked from the waist down, lying face down on her bed in a pool of blood. There was blood on the carpet and walls. She called out Alicia's name several times but did not receive a response. (27 RT 6176-6179.)

Bucholz immediately went to the phone to call 9-1-1. The phone, which was normally on top of the microwave, was lying on the dining room floor. The receiver was off the hook and the phone looked like it had been pulled toward the bedroom. Bucholz dialed 9-1-1 and a police officer arrived about five minutes later. (27 RT 6179-6180.)

1. The Crime Scene

On May 21, between 1:00 and 2:00 a.m., Officer Golleher responded to a report of someone injured or possibly deceased inside the same apartment he had visited earlier in the evening. Officer Golleher entered the apartment and spoke to a woman in the living room who told him that her roommate was injured. When Officer Golleher entered the bedroom inside the apartment, he saw a white female lying across the bed with her feet on the floor and her head facing the south wall. He checked for a pulse but could not find one, and he determined the woman was deceased. (26 RT 6113-6115.)

At approximately 1:44 a.m., Bakersfield Police Officer John Austin Scott arrived on scene. As Officer Scott entered the apartment, he saw a blood-stained white t-shirt lying on the floor. He also saw what looked like the wooden handle of a steak knife protruding from under the t-shirt. Officer Scott preserved the evidence at the crime scene until Sergeant Borton arrived and took over that duty. (28 RT 6375-6378.) After Sergeant Borton arrived, Officer Scott went next door to speak with Alicia's neighbor, Jerry Singh. (28 RT 6380.)

Bakersfield Police Detectives Bob Stratton and Richard Herman arrived on scene around 2:30 a.m. Initially, Detective Stratton spoke to the security officer who did periodic checks throughout the night at the apartment complex. Then, he spoke with the patrol officers who secured the scene. (29 RT 6652-6654.)

Once inside the apartment, Detective Stratton saw several telephone messages and a microcassette tape on top of the microwave. There was a telephone answering machine to the right of the microwave. (29 RT 6671-6672.) He also found a piece of paper on the floor under the kitchen table with the phone number to the Bakersfield Police Department written on it. (29 RT 6706-6707.)

Detective Stratton went into the bedroom and observed Alicia's body in the southeast corner of the room, lying face down across a futon. He briefly looked at the scene in the bedroom before turning it over to Supervising Criminalist Greg Laskowski, Criminalist Jeanne Spencer, and Identification Technician Debbie Fraley for evidence collection. (29 RT 6675-6676.)

Spencer and Fraley assisted Laskowski in collecting physical evidence and photographing the crime scene. (27 RT 6282; 28 RT 6394; 30 RT 6838.) Laskowski examined the points of entry into the apartment and did not find evidence of a break-in. (28 RT 6348.) Fraley dusted the outside doorknob and the handrails on the staircase leading up to Alicia's apartment for latent prints, but did not obtain any usable prints. (30 RT 6870-6871.) She also dusted the inside of the apartment for latent prints, but was not able to find any that were suitable for comparison. (30 RT 6868-6869.)

As Laskowski entered the apartment, he could see the wooden handle of a steak knife protruding from underneath a blood-stained t-shirt lying on the floor of the living room. (27 RT 6287.) The blood pattern on the t-shirt indicated someone had used it to wipe the blade of the knife. (27 RT 6290.) Fraley seized the knife and t-shirt as evidence. (30 RT 6851-6853.) Laskowski also observed a note on top of the microwave written on a torn piece of paper towel that said, "Will called at 6:15 p.m., 9:00 p.m., and 9:30 p.m." (27 RT 6204-6205, 6296-6297.)

Inside the bedroom, Alicia was lying face down on the futon with her feet touching the floor. (28 RT 6396.) A pair of brown plaid shorts[18] that were lying on the floor within one or two feet of Alicia's body were seized

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[18] Bucholz testified that these shorts belonged to Alicia, but she could not remember if she was wearing them that day. (30 RT 6905.)

as evidence. (27 RT 6299-6301; 28 RT 6396; 29 RT 6676.) There was a blood-stained note pad, two broken bottlenecks, and a shard of glass underneath the plaid shorts. (27 RT 6303-6306.) Several shards of glass were found on the futon around Alicia's head. (27 RT 6310-6311.) Laskowski found a broken Pilsner glass that was consistent with these shards of glass in a pile of clothes that were lying on the futon next to Alicia's body. (27 RT 6311.) Glass fragments were also located under Alicia's body when it was removed from the apartment. (28 RT 6365.)

In addition, a pair of white panties[19] found on the floor of the bedroom was collected as evidence. (27 RT 6299-6301; 28 RT 6400.) There was a bloody sanitary napkin inside the panties, and there was also blood on the edges of the panties. (28 RT 6359-6360, 6402.) Fraley also seized a bloody knife with a black plastic handle, fine serrated blade, and double-pronged tip that was found on the floor between the two beds. (27 RT 6314-6315; 28 RT 6404-6405; 30 RT 6861.) The blade of the knife was bent, which was likely caused by its use as a stabbing instrument. (27 RT 6316-6317; 28 RT 6404.)

A large amount of blood had pooled around Alicia's head and shoulders, and blood spatter emanated up from her head in a fan-like projection on the walls. (27 RT 6318.) Spencer collected a blood sample from the wall of the bedroom for further testing. (28 RT 6394-6395.) There were also blood smears or transfer patterns on Alicia's buttock, thigh, and feet, which appeared to come from a bloody hand making contact with those parts of her body. (27 RT 6318-6319.) Alicia was stabbed in the back of the head and neck, and also on her arms, hands, and the side of her body. (27 RT 6324.) Based on his observations, Laskowski

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[19] Bucholz testified that these panties did not belong to her. (30 RT 6906.)

determined that Alicia was lying face down on the futon when she was bludgeoned in the head and neck area with the broken bottles and Pilsner glass and repeatedly stabbed. (27 RT 6323-6324, 6327.)

2. The Autopsy

Forensic Pathologist Dr. Donna Lee Brown performed Alicia's autopsy. (28 RT 6510.) Dr. Brown observed four distinct areas of blunt force trauma along the left side of Alicia's head. The force applied was so strong that it removed the skin and exposed her skull. Dr. Brown determined that these injuries were caused by a heavy-duty glass object, in part, because she removed several shards of glass from under Alicia's scalp that appeared to be portions of a Pilsner glass. (28 RT 6513-6515.) Dr. Brown opined that the extent of the blunt force injuries in this case would be sufficient to render someone unconscious, and could have been sufficient to kill someone. (28 RT 6518.)

Additionally, Alicia was stabbed approximately 57 times in the side and back of the neck. There were approximately 20 superficial slicing marks on her right cheek, and there was also a stab wound to her right cheek that was 2 inches long and 3 inches deep. She had approximately 10 incised marks on the inside portion of her left arm, and she also had a superficial stab wound to the left side of her abdomen. There was an irregular stab wound across the front of her neck that was three inches long and three inches deep, and it cut above and below her voice box. Alicia had a few scrape marks on her left elbow and the left side of her chest and abdomen. She also had some cuts on her left hand. (28 RT 6518-6519.)

Some of the stab wounds to the neck appeared to have been caused by a two-pronged object, and were consistent with the two-pronged knife found in Alicia's apartment. (28 RT 6520-6522.) Based on her training and experience, Dr. Brown opined that Alicia was alive, but not necessarily

conscious, when the blunt force trauma and stab wounds were inflicted. (28 RT 6524-6525.)

Dr. Brown did not observe any vaginal trauma, which is not uncommon even in cases where a sexual assault has occurred. (28 RT 6526, 6534.) Dr. Brown did, however, find anal trauma, consisting of three small contusions or bruises. These bruises were consistent with anal penetration with an object the size of an adult penis, and would not have been present unless there was anal penetration. Dr. Brown opined that these three bruises appeared to have been inflicted at or near the time of Alicia's death. Based on the results of the autopsy, Dr. Brown determined Alicia's death was caused by extreme loss of blood, and it happened in a matter of minutes. (28 RT 6534-6538.)

Spencer was present during Alicia's autopsy and she collected evidence using a sexual assault kit. (28 RT 6410.) Spencer seized control head and pubic hair samples from Alicia, along with vaginal, oral, and anal swabs. She collected pubic combings and the t-shirt that Alicia was wearing when her body was discovered. Spencer also collected a sample of what appeared to be urine that had pooled between Alicia's legs. (28 RT 6412-6413.)

The oral swab tested negative for semen, but the vaginal and anal swabs tested positive for the presence of semen. (28 RT 6414-6415.) Spencer found a large number of sperm on the vaginal swab but only a few heads on the anal swab. She noted a possible explanation for this was vaginal drainage, rather than actual anal penetration. (28 RT 6434-6436.) The urine sample also tested positive for semen. The hairs Spencer collected from the pubic combing all belonged to Alicia. (28 RT 6415.)

3. Crime Scene Evidence Analysis

Spencer tested the brown plaid shorts found near Alicia's body for blood and semen, but both tests came back negative. (28 RT 6397, 6399.)

She also collected some glass shards found on the shorts. (28 RT 6397.) The white panties seized from the bedroom also tested negative for semen. The sanitary napkin found inside the white panties tested positive for blood, but not semen. (28 RT 6416.)[20]

Spencer tested several items of bedding seized from the futon where Alicia's body was found, including a fur blanket, fitted and flat sheets, and a comforter. Spencer found one semen stain on the fur blanket that was located under where the vaginal area of Alicia's body was positioned. She also tested the comforter, which was black on one side and maroon on the other, for the presence of semen. The maroon side, which was facing down and not in contact with Alicia's body when she was found, tested positive for semen. (28 RT 6416-6419.)

A green hand towel and t-shirt found in the living room both tested positive for blood, which Spencer matched to a known sample of Alicia's blood. (28 RT 6421.) Spencer was given blood samples from the knife found in the living room and from some pieces of broken glass. (28 RT 6405.) The blood samples from these objects were also positively matched to a known sample of Alicia's blood. (28 RT 6407-6408.)[21]

Laskowski and Fraley processed the inside and outside of Alicia's Ford Escort for fingerprints. They were not able to obtain prints from inside the vehicle due to the fire and smoke damage and the dry chemical that was used to extinguish the fire. (27 RT 6327-6331; 30 RT 6872-6873.)

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[20] The blood found on and around the sanitary napkin inside the white panties was not tested to determine whether it was menstrual blood because the location was consistent with menstrual blood, the pathologist told Spencer Alicia was on the last portion of her menstrual cycle, and there is no good way to test for menstrual blood. (28 RT 6424-6425.)

[21] Spencer compared the blood samples from all of these items to known samples from appellant, Charles, Anthony Chappell, and Michael Gonzales, but none were a match. (28 RT 6409, 6421.)

They were, however, able to obtain usable prints from the outside of the vehicle. (30 RT 6871-6872.) Fraley compared the usable fingerprints to appellant's fingerprints and they were not a match. (30 RT 6875.) The melted remains of a plastic bottle containing rubbing alcohol were located inside the vehicle on the driver's seat. The rubbing alcohol was likely used as an accelerant to assist in starting the fire. (27 RT 6331-6332.)

4. DNA Evidence

The Kern County Regional Criminalistics Laboratory sent blood samples from Alicia, Michael Gonzales, appellant, Anthony Chappell, and Charles, two pieces of maroon material, and fibers from a fur blanket, a urine sample, four anal swabs, and four vaginal swabs to Cellmark Diagnostic for DNA analysis. (28 RT 6488-6490.) Charlotte Word, Deputy Director of Cellmark Diagnostics (28 RT 6470), reported the results of the DNA analysis (28 RT 6493-6503).

Analysis of the sperm fraction of the anal swabs excluded Gonzales, Chappell, and Charles as sources of the sperm, but were consistent with appellant's DNA. Some of the sperm fraction results were below the level of interpretation, so Word could not definitively include or exclude appellant as the source of the sperm. (28 RT 6493, 6495-6496.)

Appellant was the only person who could not be excluded as a source of both the non-sperm and sperm fractions of the urine sample. The sperm fraction of the urine sample was consistent with appellant's DNA to a statistical frequency of 1 in 1,100 African-Americans, 1 in 11,000 Caucasians, and 1 in 13,000 Hispanics. (28 RT 6496-6498.)

Alicia could not be excluded as the source of DNA from the non-sperm fraction of the vaginal swabs, and the four males were all excluded as possible sources. Appellant was the only person who could not be excluded as the source of DNA from the sperm fraction of the vaginal swabs. The sperm fraction of the vaginal swabs was consistent with

appellant's DNA to a statistical frequency of 1 in 410 million African-Americans, 1 in 1.6 billion Caucasians, and 1 in 1.5 billion Hispanics. Word noted that when sperm results are present on a vaginal swab it generally means that they were deposited within 24 to 48 hours of collecting the sample. (28 RT 6501-6503.)

Gonzales and Chappell were excluded as sources of the non-sperm fraction from the fur blanket sample. Appellant, Alicia and Charles, however, could not be excluded as possible sources of DNA from the non-sperm fraction of the fur blanket sample. Appellant was the only person who could not be excluded as the source of DNA from the sperm fraction of the fur blanket sample. The sperm fraction of the fur blanket sample was consistent with appellant's DNA to a statistical frequency of 1 in 1.6 million African-Americans, 1 in 4.8 million Caucasians, and 1 in 9.1 million Hispanics. (28 RT 6498-6499.)

Two samples of the maroon comforter were tested for DNA, one from the top and one from the center of the comforter. The non-sperm fraction from the top sample was consistent only with Alicia's DNA. Alicia and Charles could not be excluded as sources of the DNA from the sperm fraction from the top sample, and the results were consistent with a mixture from those two individuals. The non-sperm fraction of the center sample was consistent only with Alicia's DNA. Charles was the only person who could not be excluded as the source of DNA from the sperm fraction of the center sample. (28 RT 6500-6501.)

5. Charles' Alibi

On May 20, around 4:30 p.m., Charles' friend, Joe Hampton, dropped him off at his friend Pat McCarthy's house in Tulare. (30 RT 6956, 6976-

6977.)[22] Charles called Alicia from McCarthy's house around 5:30 p.m., and he called his father around 6:00 p.m. (30 RT 6938, 6956-6957.)[23] Charles told Lane he was at a friend's house and that he talked to Alicia earlier and told her where he was. (30 RT 6938.) Charles left McCarthy's house around 1:00 a.m. and walked home. (30 RT 6957, 7009.) McCarthy's house was approximately two miles from Charles' house and it took him about 20 minutes to walk home. (30 RT 6958.)

That afternoon and evening, McCarthy and Charles were shooting pool, playing video games, and drinking beer. (30 RT 7011.) Between 4:30 p.m. and 1:00 a.m., neither Charles nor McCarthy left the house. (30 RT 6958, 6966.)[24] Charles recalled approximately 10 to 15 people coming and going from McCarthy's house that day. (30 RT 6966-6967.)[25]

Lane was a light sleeper and he awoke when Charles returned home around 2:00 a.m. on May 21. (30 RT 6938-6939.) After arriving home, Charles went directly to bed. (30 RT 6965-6966.) Around 5:30 a.m., as Lane was getting ready to leave for work, Tulare Police Officers came to the house and asked to speak with Charles. (30 RT 6939, 6958.) The officers told Charles that Alicia was murdered. (30 RT 6958.) Charles broke down crying and ran off to his bedroom. (30 RT 6939-6940, 6959.)

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[22] McCarthy recalled picking Charles up between 1:00 and 2:00 p.m. and then driving back to his house. (30 RT 7013-7014.)

[23] McCarthy did not see Charles make any phone calls while he was at his house, but there were short periods of time where Charles was out of McCarthy's presence during which he could have made phone calls. (30 RT 7010.)

[24] McCarthy could not say with absolute certainty that Charles did not leave his residence for a few hours that day, but he did not remember him being gone for more than 15 or 20 minutes at the most. (30 RT 7017, 7021.)

[25] McCarthy could not remember if anyone else came over to his house on that day, but he always had friends coming and going since he lived at the house by himself. (30 RT 7009-7010.)

6. Police Investigation

Shortly after discovering Alicia's body and learning that she had a boyfriend who lived in Tulare, the Bakersfield Police Department contacted law enforcement officials in Tulare County and asked them to notify Charles about Alicia's death and to look for any visible injuries on Charles' body. On May 21, between 6:00 and 7:00 p.m., Detective Stratton went to the Hill residence in Tulare. Charles was not home when he arrived, so he spoke with Lane while he waited for Charles to return. Detective Stratton spoke to Charles when he arrived home around 8:15 p.m. As he was talking to Charles, Detective Stratton looked at Charles' hands, arms, head, and neck for visible injuries but did not see any. (28 RT 6681-6682.)

On May 22, at approximately 2:30 p.m., Detectives Stratton and Herman first contacted appellant at his apartment. (29 RT 6678-6679, 6755-6756.) Appellant's apartment at 601 Taylor Street was approximately eight-tenths of a mile from Alicia's apartment. (29 RT 6662-6663.) Appellant's apartment was approximately three-tenths of a mile from the location where Alicia's vehicle was found at 326 Montclair. (29 RT 6665-6666.) The detectives interviewed appellant and Findley separately. (29 RT 6678-6679.)

Findley told Detective Stratton she got off work around 8:30 p.m. on May 20, and she stopped at the store a few blocks from her apartment before going home. She showed him an ATM receipt, which documented the time she was at the store as 8:48 p.m. Findley told Detective Stratton that after she left the store she went home, gave appellant some money and the beer she had purchased for him, told him she would be back in a couple hours, and then she left with her friend. (29 RT 6683-6686.) Findley said she received a page from appellant later that evening, and she showed Detective Stratton her pager, which indicated the time of the page was 10:56 p.m. (29 RT 6645, 6687.) Findley stated that she told appellant she

would be home by 11:30 p.m., and she did actually arrive home at approximately 11:30 p.m. (29 RT 6687.)

Appellant told Detective Stratton he was home with Findley the night of May 20. (29 RT 6689, 6707.) Detective Stratton asked appellant when he had last been in Alicia's apartment, and appellant said he was there on the morning of May 19, with Bucholz. Appellant told Detective Stratton he had only been to that apartment approximately four or five times, and he had never been there when Bucholz was not there. Appellant also said that he called the apartment several times on the evening of May 20, in an attempt to get in touch with Bucholz. Detective Stratton showed appellant the note found on the top of the microwave, and appellant believed the note was referring to the times that he called that night. (29 RT 6689-6691.) Appellant specifically denied having been at Alicia's apartment on the night of May 20. (29 RT 6708.)

Detective Stratton spoke with Findley again on June 11, at approximately 7:00 p.m. She told him that appellant's friend, Anthony (Amp) Denweed, came over to their apartment around midnight on the night of May 20. Appellant left with Amp that night to go to the store. (29 RT 6688.) Findley said Amp came over to the apartment four or five times a week. He usually came over late in the evening, and appellant would go outside and talk to him and they would leave together. They were typically gone for 30 minutes before appellant returned home. (29 RT 6641-6643.)[26]

During the course of his investigation, Detective Stratton learned from Bucholz that a 19-inch Sears television, a VCR, and a portable stereo were missing from her apartment. (27 RT 6186; 29 RT 6680.) Alicia and

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[26] Amp testified that prior to appellant's arrest, he would visit appellant approximately once a week for anywhere from 30 minutes to an hour. (30 RT 7045.) Sometimes he would visit appellant as late as 10:00 or 11:00 p.m. (30 RT 7045.)

Charles had purchased the VCR at a yard sale, and it did not work properly. (27 RT 6186.)

On July 1, Kern County District Attorney Investigators Kevin Clerico and Tam Hodgson, went to a house located at 400 East Fourth Street in Bakersfield to search for the items stolen from Alicia's apartment. (31 7062-7063.) The house belonged to Amp's mother and Amp lived there with his girlfriend, Michelle Holiday. (30 RT 7039-7041, 7051-7052.) Amp and Holiday gave Investigator Clerico permission to search the residence. He seized two portable stereos and a cellular phone. (31 RT 7063-7064.)[27]

Holiday told Investigator Clerico that after Alicia's murder, appellant contacted Amp and tried to sell him a television.[28] Holiday was glad Amp did not buy the television. After speaking with Holiday, Investigator Clerico talked to Amp and he denied that appellant had tried to sell him a television after Alicia's murder. He also denied telling Holiday that appellant tried to sell him a television. (31 RT 7065-7066.)[29]

On March 4, 1999, Kern County District Attorney Investigator Greg Bresson went to the residence of appellant's friend, Debra Cain, in an

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[27] Sometime later, Investigator Clerico showed the stereos to Bucholz to see if she could identify them as having belonged to her, but she did not recognize either of the stereos. (31 RT 7064.)

[28] At trial, Holiday testified that she told investigators appellant tried to sell her a television in March, and she denied telling investigators that appellant tried to sell Amp a television in May or June. (30 RT 7053-7054, 7057.)

[29] At trial, Amp claimed appellant never tried to sell him a television anytime after May 20. He denied telling Holiday that appellant tried to sell him a television shortly after May 20. He also denied that appellant tried to sell him a radio or that he testified as such at the first trial. (30 RT 7042-7043.)

attempt to locate property that was stolen from Alicia's apartment.[30] Cain told Investigator Bresson that appellant was an acquaintance of hers, and that he lived across the street from her when she lived in an apartment complex at 510 Taylor Street. (30 RT 7024-7026.) Cain testified about an occasion when she ran into appellant in the parking lot of her apartment complex and he tried to sell her an older model black VCR without a remote control. Cain was interested in buying the VCR, but she did not ultimately buy it because it did not work. (30 RT 7000-7001.) Cain initially told Investigator Bresson that appellant tried to sell her a VCR in June. She later changed the date and said it was actually in May. Cain told Investigator Bresson that the incident took place around the time her granddaughter was born and it was definitely prior to appellant's arrest. (30 RT 7026-7027.)[31]

7. Appellant's Statements

Around 4:00 a.m. on May 21, appellant paged Bucholz while she was at the police station talking with Detective Stratton. She called appellant and told him that it was not a good time to talk and that he could page her later that morning. She spoke to him again between 9:00 and 9:30 a.m., at which time she told him the police would probably be contacting him because she gave them his name. Appellant got really quiet after she said this. Bucholz asked appellant where he was the night of May 20, and he said he was with Findley watching movies and eating pizza. (27 RT 6170-

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[30] Investigator Bresson did not find any items of stolen property at Cain's residence. (30 RT 7025.)

[31] At trial, Cain denied telling Investigator Bresson that the attempted sale took place in May or June. (30 RT 7003.) Instead, she claimed it happened in early April. (30 RT 7001) She did admit that she did not want to come to court to testify because she considered appellant to be a good friend. (30 RT 7003.)

6173.) During this conversation, appellant did not sound like himself and Bucholz thought something was not right with him. (27 RT 6246-6247.)

Detective Herman picked appellant up at his apartment on May 30, at approximately 10:15 a.m., to drive him to Physicians Automated Laboratories for a blood draw to be used for later DNA analysis. (29 RT 6756-6757.) On the drive to the laboratory, appellant continually pressed Detective Herman for information related to the physical evidence that was found at the crime scene. Appellant specifically asked whether they found blood that belonged to the suspect. Detective Herman avoided answering these questions and appellant continued to press him for information. Appellant asked Detective Herman why they wanted a sample of his blood, and Detective Herman told him that it could be used to conduct a DNA test. (29 RT 6759-6760.)

When Detective Herman first picked appellant up he seemed to be cheerful and in good spirits. Appellant's demeanor immediately changed after he learned that DNA evidence was collected from the crime scene, and he became extremely nervous. Detective Herman asked appellant why he was nervous and appellant said that he was afraid of needles. (29 RT 6760-6761.)

On the drive home, appellant still seemed nervous and Detective Herman asked him if he had sexual intercourse with Alicia. Appellant hesitated and then said he had sex with Alicia twice. Appellant said the first time they had sex was at Alicia's apartment in her bedroom, sometime in April shortly after he first met her. The second time was around midnight on May 19, the day before her murder, at Alicia's apartment on her living room couch. Appellant claimed both of these sexual encounters were consensual. Detective Herman asked appellant why he previously denied having a relationship with Alicia, and he said he did not want to be involved with this case. (29 RT 6763-6768.)

On June 11, Detectives Stratton and Herman interviewed appellant at the Lerdo jail.[32] At this time, appellant was in custody for allegedly committing a residential burglary. (29 RT 6786.) Before the interview began, Detective Stratton read appellant his *Miranda*[33] rights and asked him if he was willing to waive those rights, and appellant said, "I'll cooperate with y'all. I'm trying to clear myself of this shit." (29 RT 6788-6790.)

Detective Stratton questioned appellant about having sexual intercourse with Alicia, and appellant said he only had sex with her once on May 19, between 11:00 p.m. and 1:00 a.m. Detective Stratton asked appellant if he had made plans to have sex with Alicia before going over that night, and he said he called Alicia earlier in the day to ask if he could come over that night and she said he could. Detective Stratton asked appellant whether they had straight, anal, or oral sex, and appellant said, "We just fucked." Appellant said he was at the apartment for about 15 or 20 minutes and the sex took place on the living room floor. Detective Stratton asked appellant if he used a condom, and appellant said he did part of the time but he took if off before ejaculating. Detective Stratton asked appellant whether or not he knew if Bucholz was in the apartment when this occurred and he said he did not know. (29 RT 6790-6793.)

Detective Stratton asked appellant if he previously told Detective Herman that he had sex with Alicia on two occasions, and appellant denied saying that and repeated that he only had sex with her once. After Detective Herman confronted appellant on this point, he changed back to his previous story and said he also had sex with Alicia in April. Detective Stratton told appellant that the semen collected from Alicia's body was

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[32] The majority of their conversation with appellant was tape-recorded without appellant's knowledge. (29 RT 6787.)

[33] *Miranda v. Arizona* (1966) 384 U.S. 436.

being compared with his blood sample for a DNA match. Detective Stratton asked appellant if he thought the semen would match his blood sample, and appellant responded, "I'm pretty sure I fucked her." Detective Stratton told appellant the people at the lab would be able to tell whether the semen had been deposited on Monday or Tuesday. (29 RT 6793-6795.)

After hearing this, appellant changed his story again claiming he called Alicia on Tuesday and told her Bucholz was not going to be home until 10:00 p.m., and he asked her if he could come over and she said yes. (29 RT 6798.) Appellant said he waited until Findley came home from work and then left again before walking to Alicia's apartment. (29 RT 6798, 6817.) He said he arrived at Alicia's apartment around 9:00 p.m. and they had sex in the bedroom. (29 RT 6798, 6818-6819.) Detective Stratton asked appellant if he used a condom when he had sex with Alicia on Tuesday night and he said he used a condom but took it off before ejaculating. (29 RT 6799.) He said he flushed the used condom and wrapper down the toilet. (29 RT 6818.)

Appellant claimed the sex was consensual and he did not kill Alicia. The detectives told appellant that he was being conniving and changing his story, and appellant responded, "I'm conniving just like you're conniving, but I didn't kill the bitch." (29 RT 6799-6800.)

Appellant told Detective Stratton he called Alicia's apartment three times on Tuesday evening looking for Bucholz. He was not sure if he talked to Alicia all three times, but he left a message on the answering machine at least once, possibly twice. (29 RT 6816-6817.) Detective Stratton listened to the microcassette tape that was found near the answering machine in Alicia's apartment, and there appeared to be only one message from appellant on that tape. In the message, appellant said something to the effect of, "If someone calls looking for Thea's pager

number don't give it to her, it's my girlfriend, she's trippin'." (29 RT 6699-6700.)

8. The Torigiani Burglary

Bree Torigiani and her brother Scott Torigiani,[34] lived in a condominium (condo) at 600 New Stine Road, unit 13. On June 11, Bree arrived home around 1:00 a.m. and she noticed the kitchen window was open and the screen had been removed. Bree continued into the living room where she saw the glass door on the entertainment center was open and the VCR was gone. She also noticed that a tin container that was normally inside the cabinet was open and all of its contents were spread out on the floor. (29 RT 6732-6734.)

Bree dropped everything she was carrying and ran into the garage, because she was afraid that someone was in the house. Then she realized she shut the garage door after she pulled her car in and she could not get out of the garage, so she ran back inside to get the phone and call 9-1-1. She heard someone inside the house and thought Scott might have come home and had not parked his truck in the garage, so she yelled out his name and a man came running down the hallway and out the front door. (29 RT 6735-6736.)

The man, later identified as appellant (29 RT 6722, 6737), was carrying a suitcase that had been under Bree's bed (29 RT 6736.). Bree screamed and ran after him. He ran down a lighted path that ran alongside Bree's condo in the direction of New Stine Road. Bree ran back into the house and called 9-1-1. (29 RT 6736.)

Officer Dennis West and his canine partner were working patrol when they received a call around 1:00 a.m. to respond to 600 New Stine Road,

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[34] Bree and Scott Torigiani will be referred to by their first names to avoid confusion.

unit 13, to assist in the investigation of a suspected residential burglary. (29 RT 6715-6716.) Officer West was given a description of appellant and he saw a person matching that description in the central courtyard area of the apartment complex at 601 Taylor. (29 RT 6716-6717, 6720-6721.) Officer West got out of his car and walked into the apartment complex, but he did not initially see appellant. (29 RT 6721.)

Then, he saw appellant carrying a suitcase down the staircase leading away from apartment number 10. (29 RT 6721-6722.) Officer West identified himself as a police officer and told appellant to stop, but he turned around and ran back up the stairs. (29 RT 6722, 6725.) After appellant reached the top of the stairs, he turned around and came back down. When appellant reached the bottom of the stairs, he set the suitcase down, turned away from Officer West, and ran. Appellant only took two or three steps before Officer West grabbed his collar and took him down to the ground. Within a few seconds, Officer Hook arrived as backup and the two officers struggled with appellant for approximately 15 seconds before they were able to place him in handcuffs. (29 RT 6725-6726.)

Appellant asked Officer West why he was being arrested and Officer West told him he was being detained because he matched the description of a burglary suspect. In response, appellant said he did not burglarize anyone and he lived here in apartment number 10. Officer West found several items of jewelry in appellant's left front pant pocket and a walkman-type radio in his right rear pant pocket, which he suspected had been taken in the burglary. Officer West searched the suitcase and found a VCR and a camera inside. (29 RT 6726-6728.)

Officer John Jamison took Bree to the 600 block of Taylor Street, where Officer West had detained appellant, for an in-field show-up. (29 RT 6728, 6739, 6748-6749.) Bree identified appellant as the man she

chased out of her apartment. (29 RT 6739, 6750.) She later identified appellant again in a line-up at the Lerdo jail. (29 RT 6739.)

After the show-up, Officer Jamison took Bree back to her condo, and sometime later he returned with the suitcase and other property recovered from appellant. (29 RT 6738-6739, 6751.) Bree identified the property as hers. (29 RT 6739-6740, 6752.)

B. Defense Case

1. Medical Experts

Dr. Marvin Ament, a pediatric gastroenterologist, was hired by and testified for the defense. (31 RT 7080.) Based on his review of slides prepared during Alicia's autopsy, testimony from the coroner who conducted the autopsy, and his review of the autopsy report, Dr. Ament formed the opinion that Alicia had not been forcibly sodomized. (31 RT 7083, 7092.) Dr. Ament did not see any injury to the anus on the slides he analyzed. (31 RT 7095.) Assuming, however, the blue marks on the slides of Alicia's anal tissue were bruises, Dr. Ament opined that they were no more than 24 hours old. (31 RT 7109-7110.)

Dr. William David Stanley, an obstetrician/gynecologist and infertility specialist, was also hired by and testified for the defense. Dr. Stanley had performed rape examinations on approximately 10 to 12 people about 10 years prior. In preparation for his testimony, Dr. Stanley was asked to review the autopsy report, pictures of the crime scene, transcripts of prior medical testimony, and a medical report from CSUB. (31 RT 7129-7131.)

Dr. Stanley testified that in some cases of rape there is no vaginal injury, and statistics show vaginal injury occurs in anywhere between 30 and 95 percent of rape cases. (31 RT 7142.) He admitted that the large scale studies that have more scientific validity show that only between 20 and 40 percent of cases of sexual assault involve vaginal injury. He

testified that external injuries to the body occur in 80 percent of sexual assault cases, including bruising, scratches, scrapes, cuts, stab wounds, and wounds caused by being bludgeoned. (31 RT 7145-7148.) Based on the finding of sperm in the vaginal vault, Dr. Stanley opined that Alicia had sexual intercourse sometime during the 24 hours preceding her death and he saw no medical evidence of non-consensual sex. (31 RT 7152, 7158.)

2. Lori Hiler and Loli Ruiz

In May of 1997, Lori Hiler lived in the same apartment complex as Alicia, in apartment number A-10. (31 RT 7174-7175.) On May 20, Hiler ran into Ray White while she was at the pool with her son. White invited Hiler to come over to his apartment later for a drink. Hiler and her son left the pool around 9:00 p.m. and went back to their apartment. (31 RT 7206-7207.) On cross examination, Hiler admitted telling Investigator Bresson she left the pool around 8:00 p.m., but claimed that was a mistake. (31 RT 7242-7243.)[35] After her son was in bed, Hiler walked to White's apartment. (31 RT 7207.)

Hiler testified that she was supposed to meet White at his apartment at 10:00 p.m., but she was running late. (31 RT 7183.) On cross examination, she admitted to telling Investigator Bresson that she was supposed to meet White at 9:00 p.m., but claimed that was a mistake. (31 RT 7243.) She claimed she looked at the clock on her microwave as she left her apartment and the time was 10:08 p.m. (31 RT 7183.) On her way to White's apartment, Hiler testified she saw someone carrying a 19-inch television walking from the direction of building B toward the carport. (31 RT 7182-7184, 7197.) Hiler described the person she saw that night as a white male in his late twenties or early thirties, six feet tall, 200 pounds, with brown

[35] Portions of the tape-recorded interview of Hiler that took place on December 1, 1998, were played for the jury. (32 RT 7386-7387.)

shoulder-length hair. He did not have facial hair or visible tattoos or scars, and he was not wearing jewelry. (31 RT 7201-7202.)

As Hiler passed the man on the walkway, he stepped off the path because it was too narrow for both of them to walk on at the same time. (31 RT 7200.) She looked at him and said, "How you doing," and he responded by saying, "Umm." He did not turn to look at her, but just continued looking in the direction he was walking. (31 RT 7196-7197.) Hiler testified that she also saw Alicia's car parked in the parking lot that night. (31 RT 7188.) One of the car doors appeared to be slightly open and the dome light was on inside the car. (31 RT 7189, 7226-7227.)

Hiler was at White's apartment for about 40 minutes before they walked back to her apartment to check on her son. (31 RT 7202-7203, 7209.) They were at her apartment for about 10 minutes before walking back to White's apartment. Hiler eventually went back to her apartment for the night at approximately 12:30 a.m. (31 RT 7209.)

Hiler testified that she learned of Alicia's murder when she left her apartment to take her son to school the following morning. After learning of the murder, Hiler and her son went to stay with her boyfriend. Hiler said she returned to her apartment about a week later to get some of her belongings but did not permanently return until a month after the murder, and she moved out a couple months after that. (31 RT 7177-7180.)

Hiler testified that the first time she read anything about Alicia's murder was approximately two weeks after it happened, when she read an article that showed a picture of Alicia's boyfriend Charles. Hiler had seen Charles around the apartment complex a couple times, but she did not know him by name and she had never spoken to him. At the time, Hiler thought Charles looked like the person she saw carrying the television the night of May 20. (31 RT 7185-7187.) Hiler claimed she did not realize she might have information relevant to the case until she went back to her apartment

sometime around June 1, to pay her rent, and the apartment manager told her the police wanted to speak to everyone that lived in the complex. Hiler said she spoke with Detective Stratton one or two days later. (31 RT 7211-7213.)

Hiler testified that Detective Stratton showed her a six-pack photographic line-up and asked her if she could pick the person she saw carrying the television out of the line-up. (31 RT 7191.) Hiler picked Charles' picture out of the line-up. (31 RT 7191; 32 RT 7344.) Hiler said she called Detective Stratton the following day and told him she was not sure if Charles was really the person she saw that night, or if she just picked him because she saw his picture in the newspaper. (31 RT 7193, 7226.) Hiler said she began to have doubts when she saw a picture of appellant in the newspaper along with an article indicating he was a suspect in Alicia's murder, and her boyfriend asked her if she was sure the guy she saw was white. (31 RT 7194-7195, 7224.)

On cross examination, after having her recollection refreshed with Detective Stratton's police report, Hiler testified that she first saw Charles' picture in the newspaper on the night of June 6. The next morning, she read the article and possibly an additional article that came out on June 7. Hiler admitted that when she first saw Charles' photograph in the newspaper she remembered having seen him around the apartment complex, but she did not immediately recognize him as the person she saw carrying the television on the night of the murder. (31 RT 7216-7219.) Hiler admitted, at present, she was not sure if Charles was the person she saw carrying the television that night or whether the person was black or white. (31 RT 7223-7224.)

Detective Stratton testified that on June 9, he spoke with Hiler in person and showed her the photographic line-up. Hiler told Detective Stratton she saw someone carrying a television set at the apartment

complex on May 20. She described the person as a white male, approximately 28 to 30 years old, six feet two inches tall, heavy-set, with blond hair, and wearing a button-up multi-colored shirt. (32 RT 7354-7355.)

As Detective Stratton was speaking with Hiler, White appeared and joined in the conversation. Prior to White's appearance, Hiler told Detective Stratton that she went from her apartment to White's apartment and then later left his apartment to go back home for the night. After White joined the conversation, Hiler remembered that she and White both went to her apartment and then went back to his apartment before she eventually returned to her apartment for the evening. Hiler initially told Detective Stratton she saw the man carrying the television on her first trip to White's apartment, but later said it might have been on the second trip. Hiler initially told Detective Stratton she returned home for the evening around 11:30 p.m., but, after White joined the conversation, she changed her story and said it may have been as late as 12:30 a.m. (32 RT 7355-7358.)

In May of 1997, Teodula "Loli" Ruiz also lived in the same apartment complex as Alicia, in apartment number D-4. Ruiz had lived in that apartment for approximately six months and claimed she did not know Alicia or Charles. Ruiz testified that on May 21, at approximately 2:30 a.m., the police knocked on her door, told her a crime had been committed, and asked her if she heard or saw anything. (32 RT 7308-7310.) She told them she did not see or hear anything. (32 RT 7320-7321.)

Ruiz testified that sometime later, when she was talking with her cousin, she remembered seeing a white male driving a blue-green Ford Escort into the apartment complex on the evening of May 20. (32 RT 7313, 7321.) Ruiz specifically noticed this because he seemed to hesitate as he pulled into the space and he parked the car at a slant. (32 RT 7313.) She claimed she did not see anyone else in the car with him. (32 RT 7315.)

The following Saturday, the police knocked on Ruiz' door again and she told them what she saw. (32 RT 7311.)

Ruiz described the man as heavy-set with hair that came to the middle of his neck, and said he was wearing a baseball cap so she could not see his face. (32 RT 7316.) Ruiz said she only saw the man from the side and she could not see his eyes, nose, or mouth. (32 RT 7322.) Despite her limited view, Ruiz picked Charles' picture out of a six-pack photographic line-up as the person who most resembled the person she saw that night. (32 RT 7319.)

On cross examination, Ruiz could not remember what time it was when she saw the man, but she did admit that she previously testified that it was sometime between 5:15 and 5:30 p.m. She also admitted that when she first spoke to the police at 2:30 a.m. on May 21, they specifically asked her if she had seen a green Ford Escort the previous night and she told them she had not seen anything. (32 RT 7325-7326.) She testified that she did not immediately call the police once she remembered this information, but instead she waited until May 24, when the police were back at the apartment complex, to talk to them. (32 RT 7329-7330.)

Ruiz also admitted that when she first spoke to Detective Stratton she told him she was not sure whether she saw the green Ford Escort on Monday, May 19, or Tuesday, May 20. When she spoke with him again a few days later, she told him she thought it was Tuesday, but she was not positive. (32 RT 7330.) Ruiz testified that she could not remember ever seeing the green Ford Escort at the complex before that day. Ruiz believed the man she saw was wearing blue jean shorts, a white t-shirt, and a blue baseball cap. She admitted telling Detective Stratton that she could not make a positive identification. (32 RT 7734-7337.)

Detective Stratton testified that the first time he talked to Ruiz was on the telephone, at approximately 6:00 p.m., on May 25. (32 RT 7345.) Ruiz

said the man she saw appeared to be in his thirties, approximately five feet seven inches tall with a stocky build, and he was wearing a blue baseball cap and blue jean shorts. She told Detective Stratton she was not sure if she saw the car on Monday or Tuesday, but she was leaning toward Tuesday. (32 RT 7350-7352.)

On June 10, Detective Stratton met with Ruiz in person and showed her the photographic line-up. (32 RT 7345-7346.) At this time, she was still not sure if she saw the man on Monday or Tuesday. After making the identification, Ruiz indicated the picture she chose looked like the man she saw getting out of the green Ford Escort, but he had a baseball cap on so she could not make a positive identification. (32 RT 7350-7351.)

3. The Arson

Christopher Bourgoine[36] testified that on May 20, at approximately 11:00 p.m., he was sitting in his car in the alley behind his apartment complex, talking to his then girlfriend, when he heard a "poof" noise. (31 RT 7271, 7273-7274.) He looked around and saw a car on fire in his rear-view mirror. (31 RT 7273.) He grabbed the fire extinguisher from his car and ran toward the fire. Thick, black smoke was coming out of the open driver's side window, so he sprayed the extinguisher through the window and put the fire out in less than one minute. (31 RT 7275-7277.)

Christopher testified that as he was putting out the fire, he saw a man, who appeared to have come over the fence, running toward him. According to Christopher, the man seemed nervous and he repeatedly patted him on the back, told him he did a good job, and asked him if he saw who set the fire. Christopher described this person as a white male in his late twenties to early thirties, five feet nine inches tall, with dark curly

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[36] Christopher and Gloria Bourgoine will be referred to by their first names to avoid confusion.

brown hair, a thick mustache, and no visible tattoos. He was wearing a paisley-patterned polo shirt, blue jeans, a belt, and tennis shoes. Christopher said he had never seen this man before. (31 RT 7277-7281.)

According to Christopher, the man was still at the scene when the initial fire department personnel arrived five minutes later. He disappeared, however, after someone in the crowd pointed out that the fire investigator had arrived. (31 RT 7282-7283.)

On cross examination, Christopher testified that the fire investigator arrived approximately 10 minutes after the initial fire department personnel. He remembered seeing the man at the scene for several minutes after the fire department personnel arrived, and did not notice that the man was gone until about 10 minutes later. (31 RT 7288-7289.) He admitted that he did not know whether the man left before or after someone commented that the fire investigator had arrived. (31 RT 7292.)

Christopher and his twin sister Gloria were living together at the time of this incident. Gloria testified that between 10:00 and 11:00 p.m., Christopher's girlfriend ran into the apartment and said there was a car on fire in the alley. Gloria ran outside and saw her brother trying to extinguish the car fire. (31 RT 7293-7295.)

A few minutes later, Gloria saw a man who appeared to have come up the back alleyway. The man was clean-cut, with shoulder-length brown hair, and a mustache. He was wearing jeans, tennis shoes, and a polo shirt. Gloria said the man told her he lived in the houses behind the apartment complex. She lived in that apartment complex for four and a half years, and she had never seen the man before. (31 RT 7295-7296.)

Gloria said she told the police the man was acting nervous, and he repeatedly asked if anyone saw who started the fire. She claimed the man left after the fire inspector came. According to Gloria, the fire inspector arrived approximately 30 minutes to an hour after the initial fire department

personnel. She admitted that she could not remember exactly when the man left, because she just looked up at some point and he was gone. (31 RT 7296-7299.)

On cross examination, Gloria testified that she thought the man left before the fire inspector arrived. (31 RT 7300-7301.)

C. Rebuttal

Detective Stratton spoke with McCarthy on the telephone on May 23, at approximately 11:15 a.m. McCarthy told Detective Stratton he had not spoken with Charles for several days. McCarthy said he picked Charles up at his house around 1:00 or 2:00 p.m. on May 20, and they went back to McCarthy's house. They hung out there all day and Charles walked home around 12:30 a.m. When he spoke with Detective Stratton, McCarthy did not know that Alicia had been murdered. McCarthy told Detective Stratton he was absolutely certain that Charles was with him on Tuesday from approximately 2:00 p.m. until 1:00 a.m. (32 RT 7366-7367.)

Detective Stratton spoke with McCarthy over the phone for a second time on June 13, at approximately 7:15 a.m. This conversation occurred after Detective Stratton spoke with Hiler. During this conversation, McCarthy did not waver from the timeline he gave Detective Stratton in their first conversation. Detective Stratton told McCarthy that if they determined he was lying he could get in trouble for providing Charles with a false alibi. In response, McCarthy said, "I don't have to worry about that because Charles Hill was here and did not leave and could not have been in Bakersfield on Tuesday night." (32 RT 7367-7368.)

D. PENALTY PHASE

1. People's Case

a. Victim Impact Testimony

Alicia was the only daughter of Lee and Valerie Manning. Alicia had two younger brothers, Scott, 22, and Kevin, 19. Alicia was a loving, caring, loyal person who always went out of her way to help others, and never asked for or expected anything in return. (34 RT 7770-7771.)

Alicia had plans to work at a military installation in Virginia before applying to graduate school and eventually taking the Foreign Service examination. Her intent was to become a counselor so that she could help Americans and other people overseas in the diplomatic service. Lee served in the United States Army for 23 years in the advance attaché business. He worked with the Defense Intelligence Agency, and the Manning family lived in nine different countries, China, Finland, South Africa, Ghana, Barbados, South Korea, Malawi, Chile, and Ethiopia, when Alicia was growing up. Lee was employed by the Department of Defense and stationed in Cambodia, Indochina at the time of Alicia's death. (34 RT 7771-7773.)

Alicia had a loving, close relationship with her brothers, especially with her youngest brother Kevin. Alicia's death has left a tremendous void in the family and while her brothers do not like to talk about it, Lee can see the emptiness in their hearts when he looks into their eyes. Both of Alicia's brothers keep pictures of her with them. Lee and Valerie will never have the chance to see their daughter get married or have children, and Valerie has nightmares because of Alicia's death. Alicia's death caused a lot of anger in Lee, which manifested itself through arguments at home. (34 RT 7774-7775.)

b. Prior Uncharged Offense

On February 4, Beatrice Thompson went to the 7-Eleven on the corner of Stockdale Highway and New Stine Road to purchase a money order. Thompson noticed two other customers inside the 7-Eleven, one was a black male. After Thompson left the store, she walked through the parking lot on her way back to her apartment. She was carrying her purse, which had two small handles, in her left hand as she walked. (34 RT 7777-7779.)

As she began to cross the street, a man, later identified as appellant, approached her and told her to give him her purse. (34 RT 7779, 7811.) Thompson recognized appellant as one of the customers from the 7-Eleven. Appellant was approximately two feet away from Thompson when he initially confronted her. When Thompson refused to give him her purse, he snatched it from her so forcefully that the straps broke off in Thompson's hand. As he ran away, several items fell out of the purse and he came back to pick them up. Thompson screamed for help but there was no one around to help her. As Thompson was screaming, appellant ran down an alley that went through to Taylor Street. (34 RT 7779-7782.)

At approximately 2:20 p.m., Officer Jason Hackney responded to Thompson's apartment at 609 Taylor Street, apartment number 3, in response to a report of a purse snatching.[37] Thompson described the perpetrator as a black male in his thirties, approximately five feet eleven inches tall, 170 pounds, with a beard, and wearing a blue hooded sweatshirt and jeans. Officer Hackney went to the 7-Eleven on Stockdale Highway and New Stine Road and seized a videotape from the store's closed-circuit surveillance camera. (34 RT 7803-7805.)

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[37] Appellant's apartment complex at 601 Taylor Street is located right next to the apartment complex at 609 Taylor Street. (34 RT 7805.)

Several months later, Thompson saw a picture of appellant in the newspaper and recognized him as the man who stole her purse. (34 RT 7783.) Thompson's daughter contacted the police department sometime in June, and, on June 19, Detective Kevin Legg went to Thompson's apartment to show her a photographic line-up. (34 RT 7784-7785, 7797, 7806-7809.) Thompson looked at the line-up for approximately 20 seconds before identifying appellant as the man who stole her purse. (34 RT 7811.)[38]

Detective Legg subsequently reviewed the video surveillance tape seized from the 7-Eleven, and he recognized appellant in the footage. He had a total of 18 still photographs prepared from the videotape. One of the photographs depicts Thompson standing at the checkout counter and appellant standing slightly behind and to the right of her.[39] The photograph shows the date and time as February 4, 1997, at 3:11 p.m. The clerk at the 7-Eleven told Detective Legg that the time stamp on the tape was an hour ahead, so the real time was actually 2:11 p.m. (34 RT 7812-7815.)

c. Prior Convictions

The People introduced documentation of appellant's three prior convictions. These convictions included first degree burglary in 1990 and possession of a controlled substance in 1988 and 1995. (34 RT 7820-7821, 7825.)

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[38] Thompson also made an in-court identification of appellant. (34 RT 7788-7789.)

[39] This photograph was introduced into evidence. (34 RT 7787.)

2. Defense Case

a. Appellant's Background

Appellant's mother, Jerlene Harris,[40] testified that appellant was born on January 9, 1969, and was the youngest of six children. Jerlene was married to Deo Edward Harris, who was the father of all but her oldest child. Deo was killed shortly after appellant was born, and, in the two years that followed, Jerlene continued to stay home and take care of her children. Jerlene eventually went back to work to get off welfare. She left appellant with a neighbor while she was at work and the other kids were at school. (34 RT 7850-7853.)

As a child, Jerlene said appellant always had a lot of energy and it was hard to get him to stay still. Appellant always woke up with a smile on his face, and whenever there was a family disagreement appellant would make a joke to break up the tension because he did not like it when people argued. (34 RT 7857-7858.)

Appellant did not move out of Jerlene's home until he moved in with Findley, but even then he would move back in whenever they got into a fight which, according to Jerlene, happened often. Jerlene said appellant had a lot of girlfriends and he constantly fought with all of them, although she claimed that he was never physically violent toward any of them. (34 RT 7856-7857.)

Appellant's sister, Delora Harris, testified that she helped raise appellant and they had an extremely close relationship. Delora described an incident that occurred when she was about 11 or 12 years old. She said she left school during lunch to check up on appellant and she found the

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[40] Jerlene, Deo, and Delora Harris will be referred to by their first names to avoid confusion.

babysitter beating him. Delora took appellant home and stayed there with him until her mother got home from work. She remembered that appellant would always come home starving even though their mother would send his breakfast and lunch with him. Jerlene quit working for a period of time after this happened so she could stay home with appellant. (34 RT 7861-7864.)

Delora left Bakersfield to attend San Antonio Junior College when appellant was about seven or eight years old. Delora hated that she had to leave appellant and he cried and begged her not to go. Delora said she drove to Bakersfield every weekend to pick appellant up and take him to school to stay with her. Appellant would call her every Wednesday to make sure she was still going to come and get him, and then he would call again on Thursday for the same reason. Delora would make a collect call to the house every Sunday night to let appellant know she arrived back at school safely, and she told him not to accept the call but he always accepted it anyway. (34 RT 7866-7867.)

After she graduated from college, Delora moved back to Bakersfield and she maintained a close relationship with appellant. He would call her every day several times a day to ask what she was doing and if he could come over. (34 RT 7868.) When Delora hit a low point in her career appellant talked her into going back to school. (34 RT 7873.)

Delora testified that appellant got into fights when he was a kid, but she had never known him to be in fights or lose his temper as an adult. In fact, appellant would act as a mediator to try to calm things down whenever an argument broke out between family members. (34 RT 7869-7870.)

When appellant was five years old, his siblings first introduced him to marijuana. (34 RT 7870-7871.) When appellant was 16 or 17 years old, a family member introduced him to crack cocaine. (34 RT 7877.)

Delora's daughter and appellant's niece, Dracena Smith, is only eight years younger than appellant. (34 RT 7879, 7887.) She testified that appellant was more than a cousin to her; he was also a brother and a friend. They hung out and partied together. They talked on the phone nearly every day and he would ask her to hook him up with one of her friends and she would ask him to do the same for her. (34 RT 7879-7880.)

Smith recounted an incident that occurred at her grandmother's house when she was six or seven years old. Some of her cousins, including appellant, were jumping from the top bunk of one set of bunk beds to the bottom of another set of bunk beds. Smith tried to jump too but she ended up falling and cutting her head open. Appellant picked her up and he became faint at the sight of the blood. According to Smith, appellant could not stand the sight of blood. (34 RT 7881.)

At one point, Smith was dating one of appellant's friends, who appellant did not approve of, and he introduced her to crack cocaine. When appellant found out about this he was upset with Smith and he told her that she should not go down this road because it is an expensive habit that is really hard to quit. Smith said that after appellant talked to her about it she never smoked crack again. (34 RT 7882.)

According to Smith, appellant was calm in any situation. She recounted one particular instance when appellant was going to kiss his girlfriend and she spit in his mouth. Smith claimed appellant simply told her, "I ain't trippin' on you no more" and left. She said appellant always wanted to be loved and if the woman he was dating was not available he would see other women on the side to get the attention he needed. (34 RT 7882-7886.)

Karisha James lived down the street from Smith and the two grew up together. Smith introduced James to appellant when James was 16 years old, and she has known appellant for about five years. According to James,

she and appellant were just friends, but there was an incident when she and appellant were kissing and he bit her lip so she spit in his mouth and burned him with a lighter. In response, appellant just apologized because he did not realize he had bit her lip. James still considers appellant to be a friend and has never known him to be violent. (34 RT 7949-7952.)

Appellant used to date Tameka Hall's cousin, Sonia Green. Green lived with Hall, and appellant moved in with them when he was dating Green. Hall had remained in contact with appellant up until the time of Alicia's murder. Hall never saw appellant become angry or violent toward another person. Hall still considered appellant to be a friend, and she said that he was always a great friend to her. (34 RT 7955-7958.)

Avonda Jones dated appellant for approximately six or seven months in 1995, and they had a son together. They lived together in Jones' house in Southwest Bakersfield for a short period of time. According to Jones, when she got upset with appellant he would just walk away instead of arguing back, and he was never violent toward her. Appellant maintained contact with his son even after he and Jones broke up, and his son had spent about seven days with him just prior to Alicia's murder. Jones considered appellant to be a good father and a good person. (34 RT 7943-7948.)

Findley lived with appellant from January of 1996 until he was arrested for Alicia's murder. She was attracted to him because he was always smiling and telling jokes. The thing she liked most about appellant was his playful nature. Appellant was always hyper, except when he listened to music which would usually calm him down. According to Findley, when appellant used drugs it would slow him down and he would usually stay home and fall asleep. (34 RT 7894-7895.)

Appellant and Findley argued a lot and during one such argument, Findley hit appellant and he called the police on her. According to Findley, appellant never hit her back and she had never seen him in a physical fight.

The majority of the fights between Findley and appellant centered on the many other women appellant became romantically involved with during the course of his relationship with Findley. (34 RT 7895-7897.)

b. Defense Psychologist

Cecil Whiting, a clinical psychologist, was asked by the defense to conduct a mental status examination of appellant. (34 RT 7901, 7904-7905.) Dr. Whiting administered four different psychological tests to appellant. One of these tests was a neuropsychological battery, which was used to assess cognitive efficiency and functioning. (34 RT 7907.) Dr. Whiting found that appellant did not have any significant problems with general cognition and thinking. (34 RT 7909.)

To test appellant's logical reasoning, Dr. Whiting administered two different sets of proverbs, one set of general proverbs and another set of proverbs that were more familiar to African-Americans. Appellant provided sophisticated responses to both sets of proverbs, which demonstrated to Dr. Whiting that he had a refined and efficient ability to make logical associations and deduce meaning from a variety of life experiences. Dr. Whiting presented appellant with a number of difficult situations to test his judgment, and he found that appellant, with some minor problems, had a tendency to apply and associate good judgment. (34 RT 7909-7910.)

Dr. Whiting tested appellant's short-term memory and found no significant problems. Dr. Whiting, however, did find that appellant's long-term memory is mildly impaired, which suggests the presence of repression. Dr. Whiting found that appellant had a mild impairment in concentration, which is not unusual for adults, such as appellant, who were diagnosed with attention deficit hyperactivity disorder (ADHD) as a child. Dr. Whiting also tested appellant's emotional status, specifically looking at

depression and anxiety, and he found no firm indication of any emotional problems. (34 RT 7910-7912.)

Dr. Whiting tested appellant's verbalization and expressive speech, which are broken into several segments including rumination, slurred speech, stuttering, echolalia (repetitive speech) aphasic speech, circumspect speech, and metaphoric speech. He found that appellant did not ruminate over words, his speech was not slurred, he did not stutter or stammer, there was no echolalia, and he did not have a tendency toward aphasic, circumspect, or metaphoric speech. The only things Dr. Whiting found with respect to appellant's verbalization and expressive speech were mild indications of African-American Creole English. Dr. Whiting also found that appellant had a mild impairment in the area of perceptive speech, which means the ability to hear and understand the speech of others. (34 RT 7912-7913.)

As he was developing appellant's social history, Dr. Whiting discovered that, as an adult, appellant found out that his father was a well-known street hustler and pimp who was murdered by a woman with whom he was having an affair. When Dr. Whiting asked appellant how he felt about this appellant said he did not know how to feel. To Dr. Whiting, this was a sign of sensory numbing and repression. A person who represses has a tendency to cover up the things going on in his life by compensating. In Dr. Whiting's opinion, appellant's verbal impulsivity and talkative nature are forms of compensation used to cover some psychological pain he may have experienced in the past. (34 RT 7915-7916.)

Appellant was raised by a group of children and young adolescents, his siblings, because his mother went back to work as soon as she could after appellant's father died. Dr. Whiting opined that a child who experiences inconsistent parenting is more likely to develop functional ADHD, which comes from the environment rather than something that is

brain-based. A child that is reared in that environment must relate to five different people's personalities and ideas of discipline. In Dr. Whiting's opinion, this type of group parenting led to appellant's tendency, as an adult, to form relationships with controlling women who physically abused him. (34 RT 7917-7919.)

Dr. Whiting discovered that appellant's family is extremely close and they get together for six holidays per year, but these gatherings generally end in either verbal or physical conflict. Appellant's family sees him as a mediator who will step into the middle of an altercation in order to try to defuse it. When he was young, appellant would leave the house or go to his room whenever a conflict started. (34 RT 7921-7922.)

Dr. Whiting administered a Thematic Appreciation test, which is used to determine whether a person is motivated by power, affiliation, or achievement. Based on the results of this test, Dr. Whiting determined that appellant is affiliation motivated, which means he likes interacting with and being around people. (34 RT 7922-7923.)

Dr. Whiting also applied the Luria-Nebraska test to appellant to determine whether or not he suffered from brain damage. The results of the test showed no brain damage and only some minor learning disabilities. (34 RT 7923-7924.) These disabilities do not have any implications for appellant's overall general intelligence; they simply mean that he may have difficulty with certain tasks. (34 RT 7928.) Dr. Whiting noted two psychological problems with appellant, fear of the dark and fear of blood. (34 RT 7929.)

Dr. Whiting administered the Holmes and Rahe Life Stressors test, which suggested that at the time of his arrest appellant was under a great deal of stress. Under conditions of stress, people tend to revert back to previous behaviors. Based upon his experience, Dr. Whiting's perception of appellant is that he is a passive, jovial, friendly, and outgoing person. In

Dr. Whiting's opinion, appellant's personality and psychological characteristics are inconsistent with other people convicted of similar crimes. (34 RT 7930-7932.)

Dr. Whiting could not diagnose appellant as currently having ADHD, but he did see some indications of ADHD still present in appellant. One of these indications is appellant's verbal impulsivity, or tendency to speak before thinking. Verbal impulsivity can, but does not necessarily, reflect a tendency to make impulsive judgments in other areas. Based on his mental status examination, appellant did exhibit some characteristics of impulsive judgment. Dr. Whiting opined, however, that appellant does have the ability to make good judgments. (34 RT 7934-7937.)

c. Prison Expert

James W.L. Park testified as an expert in prisoner classification and prison operation. (34 RT 7968-7969.) According to Park, when appellant was first incarcerated at the age of 20, he adjusted to prison life with few problems. He did have some problems with talking when he should have been listening and not cleaning his cell, but by the time of his release he was doing good work in the kitchen and attending Narcotics Anonymous. (34 RT 7976.)

According to Park, during appellant's second incarceration, he built an above average work record. He had some minor housekeeping offenses, but no dangerous or deadly rule infractions. Appellant's prison records reflected some verbal altercations but no physical violence. (34 RT 7977.)

In Park's opinion, appellant was not a model prisoner, but he was not a real problem prisoner either. Park opined, based on the classification elements and appellant's prior behavior while incarcerated, that appellant would be able to adequately adjust to prison life. (34 RT 7977-7978.)

ARGUMENT

Pre-Trial

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S CHANGE OF VENUE MOTION

Appellant claims the trial court prejudicially erred in denying his change of venue motion. (AOB 65-158.) Respondent disagrees.

A. Relevant Record

1. Change of Venue Hearing

Appellant filed his written motion for change of venue on April 16, 1999. (14 CT 3640.) The two-day hearing on the pretrial motion began on May 18, and ended on May 19, 1999. (14 CT 3824-3831.)

Professor Edward Bronson testified as a change of venue expert for the defense. (16 RT 3853.) Based on his review of the media coverage of this case, Professor Bronson tentatively concluded that appellant's prospective jury pool would be unfairly guilt and death oriented. (17 RT 3964.) This tentative conclusion prompted him to design a public survey to assess the impact of pretrial publicity on the community. (17 RT 3965.) The results of the public survey confirmed his tentative conclusion regarding pretrial publicity and, based on these results, he opined that there was a reasonable likelihood that appellant could not get a jury panel unaffected by pretrial publicity. (17 RT 4018.)

Rejecting Professor Bronson's ultimate conclusion, the trial court denied appellant's motion finding that it was *not* reasonably likely that appellant could not receive a fair trial in Kern County. (17 RT 4098-4099.) First, the court addressed the nature and extent of the media coverage. The court recognized that the media coverage was substantial and it included discussion of the brutal nature of some aspects of the crime and the sexual overlay. (17 RT 4090.) It found, however, that there was substantial

coverage throughout the trial of the defense's theory that a third party, most likely the victim's boyfriend, was the actual killer. As to the coverage of the 11-1 verdict from the first trial and the reasons for the lone holdout, the court noted that while some jurors were quoted as saying the one juror who did not vote for guilt based his decision on religious beliefs and feelings, the juror himself was also interviewed and he explained that he voted not guilty because he had not been persuaded beyond a reasonable doubt. (17 RT 4091.) The court also found that the media did not paint an unsympathetic portrait of appellant. Overall, the court determined that the media coverage had been fairly evenhanded in its portrayal of both sides of the case. (17 RT 4093.)

Regarding the size of the community, the court noted that Kern County was one of seven counties in California that had a population between 500,000 and 1 million people. Unlike the other six counties, however, Kern County was the only county that spanned a relatively large geographical area. The court also noted that Professor Bronson made no attempt to survey Tehachapi, Mojave, and Rosamond or the even smaller communities of Boron and North Edwards. This fact was significant to the court's analysis, because the actual venire would be drawn from the smaller outlying communities in Kern County in addition to the greater Bakersfield area. (17 RT 4094-4095.)

In relation to the nature and gravity of the offense, the court stated,

> [T]his is a case, as both sides have discussed, this is a case that is as serious as a case can get in that the defendant's life is on the line as a potential forfeit as a penalty in this case, and that category certainly speaks to the knowledge of the jurors who enter the case, that they are dealing with a case that has an overlay that does not exist in most cases.

(17 RT 4095.)

Lastly, the court considered the status of the victim and appellant in the community. It found that the status of the victim and appellant in this case was the opposite of what you usually find in reported appellate cases on change of venue, in that appellant is a local resident and native of Kern County while the victim was a resident of Virginia who was planning on moving back to the east coast after graduation. Therefore, the court stated, "[Y]ou don't have a case of a prominent local person becoming the victim of a wanderer or a vagabond." The court did not discount the fact that the victim was humanized by the press, but that was countered by the fact that appellant was not demonized by the press. Further, the court did not find significant political overtones that have been found in some cases where venue was an issue. (17 RT 4095-4097.)

The court also considered the findings of Professor Bronson's survey. The court specifically looked at the results pertaining to prejudgment of the case and noted that out of the 400 people surveyed, 39% thought appellant was probably guilty, 56% did not know or refused to answer, and 5% thought he was probably not guilty. Based on Professor Bronson's testimony that a survey of the average jury pool would yield results of between 28 and 40% believing the defendant was probably guilty, the court found that the results of the survey in this case did not present a significant increase in prejudgment by the potential venire. Considering all of these factors, the court determined that appellant could receive a fair trial in Kern County. (17 RT 4098-4099.)

2. Jury Voir Dire

Voir dire began on June 7, 1999, and 12 jurors and 4 alternates were sworn to try the case on June 18, 1999. (26 RT 6007, 6009.) A brief summary of voir dire for the 12 impaneled jurors is described below.

Juror 19834 heard about the case through the newspaper and television coverage, but it was roughly the same information that the court

had provided to the prospective jurors on the opening day of voir dire. (28 CT 7920; 24 RT 5519.) He had not formed any opinions as to appellant's guilt or innocence, and the information he acquired about the case prior to coming to court had not caused him to prejudge the case. (28 CT 7922; 24 RT 5520.) Neither the prosecution nor the defense challenged Juror 19843 for cause. (24 RT 5534.)

Juror 47554 had not heard about the case through newspaper or television coverage. (28 CT 7943.) Her mother told her about the murder shortly after it happened, but she did not receive any other information about the case. (21 RT 4686-4687.) She had not formed any opinions as to appellant's guilt or innocence, and the information she acquired about the case prior to coming to court had not caused her to prejudge the case. (28 CT 7945; 21 RT 4687.) Neither the prosecution nor the defense challenged Juror 47554 for cause. (21 RT 4696.)

Juror 75727 heard about the case through newspaper and television coverage, but it was roughly the same information the court had provided to the prospective jurors on the opening day of voir dire. (28 CT 7966; 24 RT 5599-5600.) She had not formed any opinions as to appellant's guilt or innocence, and the information she acquired about the case prior to coming to court had not caused her to prejudge the case. (28 CT 7968; 24 RT 5600.) Neither the prosecution nor the defense challenged Juror 75727 for cause. (24 RT 5613.)

Juror 23537 heard about the case through television coverage, but it was roughly the same information the court provided to the prospective jurors on the opening day of voir dire. (28 CT 7989; 21 RT 4848-4849.) He had not formed any opinions as to appellant's guilt or innocence, and the information he acquired about the case prior to coming to court had not caused him to prejudge the case. (28 CT 7991; 21 RT 4849.) Neither the

prosecution nor the defense challenged Juror 23537 for cause. (21 RT 4858.)

Juror 83798 read about the case in the newspaper, but he received more information from the court's brief description of the case on the opening day of voir dire than he did from the article he read. (28 CT 8012; 21 RT 4698.) He had not formed any opinions as to appellant's guilt or innocence, and the information he acquired about the case prior to coming to court had not caused him to prejudge the case. (28 CT 8014; 21 RT 4698-4699.) Neither the prosecution nor the defense challenged Juror 83798 for cause. (21 RT 4704.)

Juror 18695 had not heard anything about this case before coming to court, and she had not formed any opinions as to appellant's guilt or innocence. (28 CT 8035, 8037; 22 RT 5105.) Neither the prosecution nor the defense challenged Juror 18695 for cause. (22 RT 5118.)

Juror 34529 heard about the case through newspaper and television coverage, but he learned more about the case from the court's brief description on the opening day of voir dire than he did from the media coverage. (28 CT 8058; 23 RT 5285.) He was not even aware that appellant had already been tried once before. (23 RT 5285.) He had not formed any opinions as to appellant's guilt or innocence, and the information he acquired about the case prior to coming to court had not caused him to prejudge the case. (28 CT 8060; 23 RT 5285-5286.) Neither the prosecution nor the defense challenged Juror 34529 for cause. (23 RT 5294.)

Juror 39063 heard about the case through newspaper and television coverage, but it was roughly the same information the court provided to the prospective jurors on the opening day of voir dire. (28 CT 8081; 21 RT 4935.) He had not formed any opinions as to appellant's guilt or innocence, and the information he acquired about the case prior to coming

to court had not caused him to prejudge the case. (28 CT 8083; 21 RT 4935.) Neither the prosecution nor the defense challenged Juror 39063 for cause. (21 RT 4944.)

Juror 36943 had not heard about the case prior to coming to court, and he had not formed any opinions as to appellant's guilt or innocence. (28 CT 8104, 8106.) Neither the prosecution nor the defense challenged Juror 36943 for cause. (24 RT 5655.)

Juror 95187 heard about the murder and the mistrial on the news, but he had not read any newspaper articles about the case. (28 CT 8127; 20 RT 4515.) He had not formed any opinions as to appellant's guilt or innocence, and the information he acquired about the case prior to coming to court had not caused him to prejudge the case. (28 CT 8129; 20 RT 4516.) Neither the prosecution nor the defense challenged Juror 95187 for cause. (20 RT 4524.)

Juror 39313 had read about the case in the newspaper, but it was no more information than the court provided to the prospective jurors on the opening day of voir dire. (28 CT 8150; 22 RT 5188-5189.) She had not formed any opinions as to appellant's guilt or innocence, and the information she acquired about the case prior to coming to court had not caused her to prejudge the case. (28 CT 8152; 22 RT 5189.) Neither the prosecution nor the defense challenged Juror 39313 for cause. (22 RT 5197.)

Juror 02941 heard about the case through television coverage, but she learned more about the case from the court's brief description on the opening day of voir dire than she did from the media coverage. (28 CT 8173; 24 RT 5661-5662.) She had not formed any opinions as to appellant's guilt or innocence, and the information she acquired about the case prior to coming to court had not caused her to prejudge the case. (28

CT 8175; 24 RT 5662.) Neither the prosecution nor the defense challenged Juror 02941 for cause. (24 RT 5668.)

At the conclusion of voir dire and prior to swearing in the jury, the defense renewed its motion for change of venue. (26 RT 6002-6005.) The court once again denied the motion. (26 RT 6006.)

B. Law and Analysis

A change of venue must be granted when the defendant demonstrates a reasonable likelihood that a fair trial cannot be held in the county. (§ 1033, subd. (a); *People v. Vieira* (2005) 35 Cal.4th 264, 278-279.) In ruling on the motion, the trial court considers: (1) the nature and gravity of the offense; (2) the nature and extent of the news coverage; (3) the size of the community; (4) the status of the defendant in the community; and (5) the popularity and prominence of the victim. (*Id.* at p. 279.) On appeal, it is the defendant's burden to show: (1) that denial of the venue motion was error (i.e., a reasonable likelihood that a fair trial could not be had at the time the motion was made); and (2) that the error was prejudicial (i.e., a reasonable likelihood that a fair trial was not in fact had). (*People v. Prince* (2007) 40 Cal.4th 1179, 1213.) Reasonable likelihood means something less than "more probable than not" and something more than merely "possible." (*People v. Dennis* (1998) 17 Cal.4th 468, 523.) The reviewing court sustains any factual determinations supported by substantial evidence, and independently reviews the trial court's determination as to the reasonable likelihood of a fair trial. (*People v. Hart* (1999) 20 Cal.4th 546, 598.)

With respect to the first factor, there is no question that this case is as serious as they come, and the trial court said as much in its ruling on the motion. (17 RT 4095.) It has long been recognized, however, that the nature and gravity of the offense are not dispositive: "'The charged offenses were serious and predictably attracted the attention of the media.

But, . . . the same could be said of most multiple or capital murders. This factor is not dispositive.'" (*People v. Dennis*, *supra*, 17 Cal.4th at p. 523, quoting *People v. Pride* (1992) 3 Cal.4th 195, 224.)

As to the second factor, in 1999, Kern County had a population of 648,000 people, ranking 14 out of 58 counties in California in population size. (17 RT 3949.) "Cases in which venue changes were granted or ordered on review have usually involved counties with much smaller populations." (*People v. Balderas* (1985) 41 Cal.3d 144, 178-179, citing *Williams v. Superior Court* (1983) 34 Cal.3d 584, 592 [Placer County, 117,000 population]; *Martinez v. Superior Court* (1981) 29 Cal.3d 574, 582 [same, 106,500 population]; *Frazier v. Superior Court* (1971) 5 Cal.3d 287, 293, fn. 5 [Santa Cruz County, 123,800 population]; *People v. Tidwell* (1970) 3 Cal.3d 62, 64 [Lassen County, 17,500 population]; *Fain v. Superior Court* (1970) 2 Cal.3d 46, 52, fn. 1 [Stanislaus County, 184,600 population]; *Maine v. Superior Court* (1968) 68 Cal.2d 375, 385, fn. 10 [Mendocino County, 51,200 population].) In fact, denials of requests for venue changes have been upheld in cases involving counties with significantly smaller populations than Kern County's was at the time of appellant's trial. [See *People v. Vieira* (2005) 35 Cal.4th 264, 280-283 [Stanislaus County, population 370,000]; *People v. Weaver* (2001) 26 Cal.4th 876, 905 [Kern County, population 450,000]; *People v. Hayes* (1999) 21 Cal.4th 1211, 1251 [Santa Cruz County, under 200,000 population] *People v. Coleman* (1989) 48 Cal.3d 112, 134 [Sonoma County, 299,681 population].) Thus, Kern County's size does not weigh in favor of a change of venue.

As for the status of appellant and the prominence of the victim, neither appellant nor the victim were prominent or notorious apart from their connection with the current case. As the trial court pointed out, appellant was a native of Kern County and the victim was a resident of

Virginia who planned to move back to the east coast after graduation. (17 RT 4095-4096.) Thus, this was not a case of a local person being killed by a transient. (17 RT 4096.) Appellant complains of the potential for prejudice caused by the murder of a young white woman by a black man. (AOB 84.) This Court, however, has found that "[t]his element of possible prejudice presumably would follow the case to any other venue." (*People v. Prince*, *supra*, 40 Cal.4th at p. 1214.) Furthermore, the defense's own expert stated that only one article actually mentioned appellant's race (16 RT 3938), and the coverage certainly did not emphasize appellant's race or use inflammatory racial terms. (See *ibid.*) Appellant claims the elevated status given to him and the victim by the publicity following the murder is determinative of the issue. (AOB 128-129.) This Court, however, has found,

> [a]ny uniquely heightened features of the case that gave the victim[] and defendant any prominence in the wake of the crimes, which a change of venue normally attempts to alleviate, would inevitably have become apparent no matter where defendant was tried.

(*People v. Prince*, *supra*, 40 Cal.4th at p. 1214, quoting *People v. Dennis*, *supra*, 17 Cal.4th at p. 523.) Appellant's claim that this line of reasoning effectively eliminates the status of the defendant and victim as a factor in the analysis (AOB 132-133) is based on the incorrect assumption that it is their status after the crime that is relevant. In fact, it is their status prior to the crime that is relevant to this particular issue (see *People v. Prince*, *supra*, 40 Cal.4th at 1214; *People v. Ramirez* (2006) 39 Cal.4th 398, 434), and respondent submits that post-crime publicity is more appropriately addressed under the category of nature and extent of media coverage.

The trial court found there was substantial media coverage of this case that included information about the brutal and sexual nature of the crime. (17 RT 4090.) However, even where the media coverage has been

characterized as "saturation," this Court has found no error in the denial of a motion for change of venue where the "defendant did not show that the media coverage was unfair or slanted against him or revealed incriminating facts that were not introduced at trial." (*People v. Ramirez*, *supra*, 39 Cal.4th at p. 434.) The trial court in this case found the coverage to be evenhanded in the way that it covered both prosecution and defense theories of the case, and did not portray appellant as an unsympathetic person. (17 RT 4093.) The record supports the trial court's conclusion that the media reported both prosecution and defense theories of the case. (14 CT 3720-3733.) While the media did report that appellant had prior theft and drug related convictions, the trial court correctly found these facts were not used to make appellant out to be a bad person but, instead, they were used to show that he had a non-violent past. (14 CT 3703-3704, 3711-3712; 17 RT 4093.) The coverage also included statements from appellant's girlfriend and sister professing his innocence (14 CT 3687-3690, 3695-3696, 3711-3712, 3714, 3723), and more than one article noted that appellant had previously worked for the SPCA and Bakersfield Police Department (14 CT 3687-3688, 3711-3712). Furthermore, the majority of the newspaper articles were well over one year old at the start of the second trial (14 CT 3668-3736; 30 CT 8680-8749), and the most recent article was printed three months prior to the start of the second trial (30 CT 8748-8749). The last recorded television segment was aired over one month prior to the start of the second trial. (29 CT 8407; 30 CT 8593.) "The passage of time ordinarily blunts the prejudicial impact of widespread publicity." (*People v. Prince*, *supra*, 40 Cal.4th at p. 1214.)

Moreover, the passage of time appears to have had the expected effect in this instance. Among the 12 seated jurors, 2 knew nothing about the case prior to coming to court, and the remaining 10 remembered few specifics. (See *People v. Prince*, *supra*, 40 Cal.4th at p. 1215 [vague recollection of

past news coverage suggests absence of prejudice].) Most of the jurors who had prior knowledge of the case indicated they knew the same or fewer details about the case than what the judge told all prospective jurors on the first day of voir dire. (21 RT 4698, 4848-4849, 4935; 22 RT 5188-5189; 23 RT 5285; 24 RT 5519, 5599-5600, 5661-5662.) More importantly, the jurors with prior knowledge of the case asserted that they had not prejudged the case based on this prior knowledge and all 12 seated jurors indicted they had not formed any opinion as to appellant's guilt or innocence. (28 CT 7922, 7945, 7968, 7991, 8014, 8037, 8060, 8083, 8129, 8152, 8175; 20 RT 4516; 21 RT 4687, 4698-4699, 4849, 4935; 22 RT 5105, 5189; 23 RT 5285-5286; 24 RT 5520, 5600, 5662.) This record simply does not support appellant's contention that he could not have had and did not have a fair trial in Kern County.

Appellant insists that voir dire is not an effective indicator of prejudice and the jurors' assurances regarding their ability to be impartial cannot be trusted. (AOB 139-157.)

> Although "such assurances are not conclusive" [citation], neither do we presume that exposure to the publicity, by itself, causes jurors to prejudge a defendant's guilt or otherwise become biased. [Citation.]

(*People v. Prince*, *supra*, 40 Cal.4th at p. 1215.) Here, appellant presumes juror bias based on mere exposure to pretrial publicity and his belief that voir dire cannot adequately expose those biases. Appellant's argument on appeal does not challenge any specific responses of the *seated* jurors as indicating they could not be fair and unbiased. It is also important to note that the jury actually found appellant not guilty on counts 4 and 5, which tends to negate his contention that the jury was actually biased against him. Appellant simply fails to show that he, in fact, did not receive a fair trial by an impartial jury.

In addition, none of the seated jurors were challenged for cause. (20 RT 4524; 21 RT 4696, 4704, 4858, 4944; 22 RT 5118, 5197; 23 RT 5294; 24 RT 5534, 5613, 5655, 5668; see *People v. Farley* (2009) 46 Cal.4th 1053, 1085, citing *Beck v. Washington* (1962) 369 U.S. 541, 557-558 [the circumstance that the defendant did not challenge for cause any of the jurors selected "is strong evidence that he was convinced the jurors were not biased"].) Nor did defense counsel use all of their 20 allotted peremptory challenges to excuse jurors from the panel. (26 RT 5993, 6006.) As this Court has repeatedly affirmed, "The failure to exhaust peremptories is a strong indication that the jurors were fair, and that the defense itself so concluded." (*People v. Dennis*, *supra*, 17 Cal.4th at p. 524, citing *People v. Price* (1991) 1 Cal.4th 324, 393 [internal quotation marks omitted].) This last point has proved decisive in affirming the denial of a motion to change venue. (See *People v. Dennis*, *supra*, 17 Cal.4th at p. 524; *People v. Sanders* (1995) 11 Cal.4th 475, 507; *People v. Daniels* (1991) 52 Cal.3d 815, 853-854.) Respondent recognizes that defense counsel stated on the record that they were not satisfied with the final panel of jurors but were purposefully not going to use their final peremptory challenge because the prosecutor still had several peremptories left. (26 RT 5993, 6006.) Respondent submits the likelihood of any attorney being completely satisfied with a jury is presumably quite rare. Furthermore, it seems likely that had defense counsel believed someone remaining on the jury panel was actually biased against appellant, they would have exercised their last peremptory challenge even if that may have allowed someone equally undesirable onto the panel. To hold any differently would effectively negate the prior cited authority on this point.

Appellant makes several other contentions related to the change of venue motion. First, appellant claims the trial court erroneously excluded the expert's opinion that appellant could not begin his trial with the

presumption of innocence intact. (AOB 100.) The authority that appellant cites does not support his claim that the trial court erroneously excluded this portion of the expert's testimony. It merely states that a court *may* base its decision on whether to grant or deny a change of venue motion on opinion testimony offered by individuals. (*Williams v. Superior Court*, *supra*, 34 Cal.3d at p. 588.) Furthermore, appellant has failed to show how he was prejudiced by the trial court's exclusion of this testimony. Thus, this claim should be rejected.

Second, appellant attempts to distinguish his case from *Prince* and *Ramirez*, recent cases in which this Court affirmed denials of change of venue motions in high-publicity cases. (AOB 134-138.) Respondent fails to see any meaningful distinction between these cases and appellant's case. In *People v. Prince*, *supra*, 40 Cal.4th 1179, the defendant was sentenced to death after being convicted of six counts of first degree murder, five counts of burglary, and one count of rape. (*Id.* at p. 1189.) In *People v. Ramirez*, *supra*, 30 Cal.4th 398, the defendant was sentenced to death after being convicted of 12 counts of first degree murder, one count of second degree murder, five counts of attempted murder, four counts of rape, three counts of forcible oral copulation, four counts of forcible sodomy, and 14 counts of first degree burglary. (*Id.* at p. 407.) Respondent submits that the nature of these crimes which involved multiple murders with sexual undertones would be more, not less, prejudicial than the nature of appellant's crime which was one murder with sexual undertones. Furthermore, the same potential for racial prejudice that appellant claims was present in his case was also present in *Prince*, but to an even higher degree because all of the victims were white women and the defendant was a black man. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1214.) Yet this Court still affirmed the denial of the change of venue motion in that case, finding that the publicity did not emphasize the defendant's race and this type of potential prejudice

would follow the case to any other venue. (*Ibid.*) Respondent submits the same reasoning applies to appellant's case.

Appellant attempts to distinguish his case from *Prince* and *Ramirez* by the nature and amount of pretrial publicity. (AOB 134-138.) In *Ramirez*, however, the trial court characterized the media coverage as "saturation." (*People v. Ramirez*, *supra*, 39 Cal.4th at p. 434.) The media coverage in appellant's case was substantial, as the trial court noted, but it can hardly be characterized as saturation. Furthermore, as was also found in *Prince*, the initial frenzy of publicity that occurred right after the murder in this case had tapered off by the start of the trial two years later. In addition, as was also found in *Ramirez*, appellant has failed to show that the media was slanted against him and the trial court, in fact, found the coverage was evenhanded.

Appellant appears to argue that the most significant distinction between *Prince* and *Ramirez* and his case is the size of the community. (AOB 135, 137-138.) While San Diego and Los Angeles Counties did have larger populations than Kern County, it can hardly be said that Kern County was small. Furthermore, respondent submits this distinction alone is not enough to show that the reasoning employed by this Court in *Prince* and *Ramirez* to affirm the denial of the change of venue motions should not also be applied to appellant's case. As argued above, appellant has simply failed to show that the trial court's denial of his change of venue motion was erroneous.

Lastly, appellant claims the pretrial publicity also biased the jury in favor of the death penalty. (AOB 157.) Appellant cites few facts and no legal authority in support of this claim. (See Cal. Rules of Court, rule 8.204(a)(1)(B).) The only support appellant gives for this claim is that the media humanized the victim and made multiple references to the death penalty. (AOB 157.) Appellant does not make specific claims of prejudice

against actual jurors, and respondent submits such claims would not be supported by the record. This claim should be rejected for lack of factual and legal support.

In sum, the trial court properly denied appellant's change of venue motion, because examination of the relevant factors did not show a reasonable likelihood that a fair trial could not be had in Kern County. Moreover, appellant has failed to show a reasonable likelihood that he in fact did not receive a fair trial. As such, appellant's claim must be rejected.

II. THE TRIAL COURT SUFFICIENTLY QUESTIONED PROSPECTIVE JURORS ON RACIAL BIAS THROUGH THE USE OF A JUROR QUESTIONNAIRE AND INDIVIDUALIZED VOIR DIRE

Appellant claims the trial court erred in limiting questions relating to race in the juror questionnaire and in individualized voir dire. (AOB 159-172.) Respondent disagrees.

A. Relevant Record

Prior to trial, appellant filed in limine motions to allow extensive questioning regarding racial bias (14 CT 3850-3855) and attorney conducted, individual sequestered voir dire (14 CT 3890-3902). Appellant also submitted a proposed juror questionnaire which included questions on racial bias. (16 CT 4462-4486.) The trial court excluded five of the defense's proposed questions on racial bias and allowed nine such questions to remain on the questionnaire. (16 CT 4479-4482; 18 CT 5059-5061; 18 RT 4178-4187.) The trial court denied appellant's motions to allow extensive questioning regarding racial bias (18 RT 4206-4207) and attorney conducted, individual sequestered voir dire (18 RT 4214). The trial court indicated, however, that during individual voir dire, it would allow further questioning related to answers given to questions on the juror questionnaire. (18 RT 4207-4208.)

B. Law and Analysis

In California, voir dire in criminal cases is governed by Code of Civil Procedure, section 223. This section requires that initial examination of prospective jurors be conducted by the court, which may include questions requested by the parties as the court deems proper. After the initial examination by the court, the parties have the right to question the prospective jurors. The court, however, has the discretion to limit oral and direct questioning of jurors by counsel. Unless the exercise of this discretion results in a miscarriage of justice under Section 13 of Article VI of the California Constitution, reversal of a conviction cannot be based on the trial court's exercise of discretion under this section. (Code Civ. Proc., § 223.)

The United States Supreme Court has held that a

> capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.

(*Turner v. Murray* (1986) 476 U.S. 28, 36-37; see also *People v. Holt* (1997) 15 Cal.4th 619, 661.) Even with this requirement,

> the trial judge retains discretion as to the form and number of questions on the subject, including the decision whether to question the venire individually or collectively.

(*Turner v. Murray*, *supra*, 476 U.S. at p. 37.) Furthermore, "a defendant cannot complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry." (*Ibid.*)

Here, appellant's claim that the trial court improperly restricted questioning of prospective jurors on racial bias is simply without merit. The trial court allowed nine questions on racial bias proposed by appellant to remain in the juror questionnaire. (16 CT 4479-4482.) In addition, the

trial court further examined prospective jurors on their answers to these questions during individual voir dire. (19 RT 4350-4513; 20 RT 4514-4661; 21 RT 4662-4956; 22 RT 4957-5219; 23 RT 5221-5514; 24 RT 5515-5766.) The first of the five rejected questions that appellant complains of asked prospective jurors for their opinions on interracial marriage. (16 CT 4480.) Any information about racial bias that could have been revealed by this question would have likely been revealed by question number 50, which asked for prospective jurors' opinions on interracial sexual relationships. In addition, as the trial court noted, interracial marriage was a collateral issue. (18 RT 4181-4182.) This question was both redundant and irrelevant to the facts of the case and the trial court properly excluded it from the questionnaire.

The second question that the trial court excluded asked for the racial composition of the jurors' neighborhoods. (16 CT 4480.) Defense counsel indicated the objective of this question was to reveal social or personal contacts. (18 RT 4182.) As the trial court correctly found, the fact that a juror lives in a neighborhood with two black families does not itself indicate that the juror has any feelings about those families either positive or negative. (18 RT 4182-4183.) Furthermore, question number 52 directly asked jurors whether they socialized with people of ethnic backgrounds different from their own, which would have directly yielded information on the jurors' personal and social contacts.

The trial court rejected question number 60 because it started with the presumption that black people complain about racial discrimination. (16 CT 4481;18 RT 4185.) The trial court rejected question number 61 because it believed that the same, if not more, information would be revealed by a previous question. (18 RT 4185.) The form of question 62 was such that the trial court thought it could not be salvaged, and it was rejected for that reason. (18 RT 4187.) As noted above, the trial court retains wide

discretion in determining the number and form of questions on racial bias. (*Turner v. Murray*, *supra*, 476 U.S. at p. 37.) The court's rejection of these three questions was thus a proper exercise of its discretion.

Furthermore, the trial court was *not* required '"to ask any particular number of questions on the subject, simply because requested to do so by [appellant]."' (*People v. Wilborn* (1999) 70 Cal.App.4th 339, 348.) Under this standard, appellant has failed to show how the trial court's exclusion of the five previously mentioned questions from the juror questionnaire constituted an abuse of discretion. Respondent submits appellant has also failed to show how further questioning by counsel would have revealed racial bias that was not revealed by the nine questions on racial bias in the juror questionnaire and the court's follow-up in individual voir dire on the answers to those questions.

Appellant cites several cases that all provide the correct legal standard when dealing with racial bias in jury selection (AOB 167-169), but none of those cases actually support his claim that the trial court abused its discretion in the present case. In *Turner* and *Wilborn*, *supra*, the trial court refused to make any inquiry into racial bias or prejudice of prospective jurors. (*Turner v. Murray*, *supra*, 476 U.S. at pp. 31-32; *People v. Wilborn*, *supra*, 70 Cal.App.4th at p. 343.) On appeal, the trial courts' failure to make *any* inquiry into racial bias of prospective jurors was found to be a violation of appellant's constitutional rights to a fair trial and impartial jury. (*Turner v. Murray*, *supra*, 476 U.S. at p. 36; *People v. Wilborn*, *supra*, 70 Cal.App.4th at p. 348.) Here, the trial court *did* inquire into potential racial bias of prospective jurors through both the juror questionnaire and follow-up on individual voir dire, thus, distinguishing appellant's case from both *Turner* and *Wilborn*.

Appellant also cites *People v. Holt*, *supra*, in which prospective jurors had to complete a juror questionnaire, which was supplemented by

additional questioning by the court and counsel. (*People v. Holt, supra*, 15 Cal.4th at p. 661.) After reviewing the record of voir dire, this Court determined that the inquiry into racial bias met the constitutional requirements of the Sixth and Fourteenth Amendments. (*Ibid.*) Appellant's case is similar to *Holt* in that prospective jurors had to fill out a questionnaire which included nine questions on racial bias and those inquiries were supplemented by further questioning during individual voir dire. While the follow-up questioning here was done by the court alone, the court did allow counsel to submit a list of questions from the questionnaire for each prospective juror that they wanted the court to make further inquiries about. (18 RT 4208.) Based on the factual similarities in the types of questioning, respondent submits that this Court's ruling in *Holt* supports rather than negates a finding that the trial court in appellant's case made an adequate inquiry into racial bias of prospective jurors.

Not only has appellant failed to demonstrate how the trial court's inquiry into racial bias violated his federal constitutional rights to a fair trial and impartial jury, but he has also failed to show abuse of discretion under state law standards. As noted above, state law requires initial questioning of prospective jurors be conducted by the judge and allows for limited questioning by counsel at the court's discretion. (Code Civ. Proc., § 223.) That is precisely what occurred here. After filling out the questionnaire, each of the prospective jurors was individually questioned by the court regarding the answers they gave and then counsel were given a limited opportunity for questioning. Respondent submits the method of conducting voir dire in this case fell within the bounds of Code of Civil Procedure section 223.

Assuming, arguendo, there was error, appellant fails to show prejudice under state or federal standards. Under state law, the trial court's exercise of discretion cannot be the basis of a reversal unless it constitutes a

"miscarriage of justice." (Code Civ. Proc., § 223.) As determined by this Court, a "miscarriage of justice" occurs when it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Under federal constitutional standards, an error is not prejudicial if it can be found harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Based on the above analysis, respondent submits it is not reasonably probable that further questioning would have yielded a more favorable result, and any error was harmless beyond a reasonable doubt.

In sum, under both federal and state standards, the trial court properly exercised its discretion and error, if any, was harmless.

III. THE TRIAL COURT PROPERLY DENIED APPELLANT'S *BATSON/WHEELER* CHALLENGE TO THE PROSECUTOR'S PEREMPTORY STRIKES OF TWO AFRICAN-AMERICAN JURORS

Appellant contends that the trial court erred in denying his *Batson/Wheeler*[41] motion. Specifically, he contends the court erroneously found no prima facie case of purposeful discrimination in the prosecutor's use of peremptory challenges to strike two African-Americans from the jury. (AOB 173-191.) Appellant's contention should be rejected. The trial court correctly found that appellant failed to show a prima facie case of group bias.

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[41] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

A. Relevant Proceedings

The defense brought a *Wheeler* motion[42] after the prosecution exercised peremptory challenges against two African-American jurors; the following proceedings ensued:

> [DEFENSE COUNSEL] Yes, your Honor. As the court is well aware, we are very sensitive to the fact that the African-Americans are under represented in this panel. We have precious few. One African-American, Mr. Clark (190001863), was excused peremptorily. I did not make an objection at that time because my understanding of *Wheeler* is one peremptory won't do it. However, for the record, I did feel that Mr. Clark (190001863) was qualified and I don't think he showed any bias one way or another. At any rate, your Honor, Ms. Porche (190003287) was also a woman of mixed races, but the African-American in her was obvious. I don't think there was anything that she said during the voir dire that showed a bias or unwillingness or inability to be fair and impartial in this trial. And I believe that she was excluded because she was at least partially African-American.
>
> And I do need to add, your Honor, that during the last trial – I need to get it on the record. During the last trial we had – there was one African-American and the rest were essentially Caucasians, one lady did have a Spanish surname but she did have reddish hair and very light skin. And, the one person who was the hold out, that is, the one person who would not vote for Mr. Harris' guilt, was African-American. And I am concerned that Mr. Somers is excusing African-Americans on their race because he feels that they will not vote guilty this time. And it is an unconstitutional exclusion.
>
> Did you want to add anything Ms. Mueller? Submit it on that, your Honor.

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[42] An objection referencing only *Wheeler* is sufficient to preserve a *Batson* claim being raised for the first time on appeal because the claims are so closely related. (*People v. Cornwell* (2005) 37 Cal.4th 50, 66, fn. 3.)

THE COURT: Wasn't Ms. Porche (190003287) the young college lady, who actually even brought in paperwork? Not brought in paperwork, but raised twice with us her concern about being in college and being held up by not getting into summer session?

[DEFENSE COUNSEL]: She may have been, your Honor. But the judge did not find that sufficient for challenge for cause.

THE COURT: Correct. We are talking peremptories now, of course. In any event, I do not, based upon those two peremptories, find a prima facie showing of willful exclusion of a racial group. However, as is my custom and practice, I will hear from you, Mr. Somers, if you wish to do so. With that not being taken as an indication that the court finds there is a prima facie showing.

[PROSECUTOR]: At this point in time, your Honor, since there is no finding of a prima facie showing, I will not state for – the reasons for the challenge. Also, I would like to make just a couple of notes as to the prima facie case.

First of all, it has been indicated by counsel, there is – basically counsel says that African-Americans are severely under represented in the panel. Actually, assuming Ms. Porche (190003287) is treated as African-American, which, obviously, she is for purposes of the motion by the defense or we would not be here, actually we had three out of 69 jurors who were at least – portion or bulk of African-Americans represented, which one calculates it out, works out to roughly five percent population in the county. So I don't think they can be characterized as under represented in the panel.

Second of all, I would just note, obviously we are all aware of, for the record, that Mr. (Xxxxx) (092105), who was African-American, was the hold-out juror on several panels. Of course, did vote to convict on Count 8 of the amended information. I would make those notes.

But I don't have any reasons to state at this time, in view of the court's finding there is no prima facie showing.

(26 RT 5983-5986.)

B. Applicable Legal Principles

Both the state and federal Constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on race. (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; *Batson v. Kentucky*, *supra*, 476 U.S. at p. 97.) The discriminatory use of peremptory challenges

> violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution . . . [and] the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution.

(*People v. Avila* (2006) 38 Cal.4th 491, 541.)

It is presumed that a prosecutor who uses a peremptory challenge does so for a purpose other than to discriminate. (*People v. Griffin* (2004) 33 Cal.4th 536, 554; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 278.) The first step in a *Batson/Wheeler* analysis requires a defendant to make a prima facie case of discrimination. (*Johnson v. California* (2005) 545 U.S. 162, 168; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 93-94; *People v. Bonilla* (2007) 41 Cal.4th 313, 341; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 280-281.) Second, if a defendant has made a prima facie case of purposeful discrimination, a prosecutor must then provide race-neutral reasons explaining his or her use of peremptory challenges as to the excluded jurors in question. (*Johnson v. California*, *supra*, 545 U.S. at p. 168; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 341; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 281-282.) Third, a trial court must then determine whether the defendant proved purposeful discrimination. (*Johnson v. California*, *supra*, 545 U.S. at p. 168; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 341; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 282.) The same three-step procedure applies to state constitutional claims. (*People v. Bell* (2007) 40 Cal.4th 582, 596.)

A prima facie case of discrimination is established when a defendant produces

> "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." [Citation.] An inference is a logical conclusion based on a set of facts.

(*People v. Lancaster* (2007) 41 Cal.4th 50, 74, quoting and citing *Johnson v. California*, *supra*, 545 U.S. at p. 168, fn. 4, 170.) The proof of a prima facie case may depend upon all relevant evidence in a trial court record. (*People v. Bell*, *supra*, 40 Cal.4th at p. 597.) This Court has found the following types of evidence particularly relevant in this context: (1) that the prosecutor "struck most or all of the members of the identified group from the venire, or has used a disproportionate number of peremptories against the group;" (2) that the only shared characteristic between the challenged jurors is their membership in the group and in all other respects they are indistinguishable from any other member of the community; (3) that the prosecutor failed to engage these jurors in meaningful voir dire; and (4) that the defendant is a member of the excluded group. (*Ibid.*) The reviewing court "will affirm the ruling where the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question." (*People v. Farnam* (2002) 28 Cal.4th 107, 135.)

While it is proper for the trial court to examine the responses of other jurors in considering whether the defendant has made a prima facie case of a *Wheeler* violation "such an examination for the first time on appeal is unreliable." (*People v. Cornwell* (2005) 37 Cal.4th 50, 71, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) Comparative juror analysis has little or no use where a group bias analysis does not hinge on the prosecution's actual proffered rationales for peremptory challenges. Moreover, *Miller-El v. Dretke* (2005) 545 U.S. 231, does not mandate comparative analysis when a *Batson/Wheeler*

motion was denied after the trial court concluded defendant had not made a prima facie showing of discriminatory exercise of peremptory challenges. (*People v. Howard* (2008) 42 Cal.4th 1000, 1019.) In considering the denial of a prima facie showing, a reviewing court should not attempt its own comparative analysis for the first time on appeal. (*People v. Yeoman* (2003) 31 Cal.4th 93, 116.)

C. Discussion

As appellant asserts (AOB 178), in this case the trial court did not expressly state the standard it used in determining whether appellant had made a prima facie case of race-based peremptory strikes (26 RT 5983-5986).

> Where it is unclear whether the trial court applied the correct standard, we review the record independently to "apply the high court's standard and resolve the *legal* question whether the record supports an inference that the prosecutor excused a juror" on a prohibited discriminatory basis.

(*People v. Bell*, *supra*, 40 Cal.4th at p. 597, quoting *People v. Cornwell*, *supra*, 37 Cal.4th at p. 73; emphasis in original.) Respondent submits that an independent review of the record and relevant factors support the trial court's finding of no prima facie case of racial discrimination.

Appellant claims the prosecutor challenged Jurors H.C. (190001863) and K.P. (190003287) because they were African-Americans. (AOB 173-191.) The record, however, suggests group-neutral reasons for the prosecutor's challenges. Juror H.C. was the head basketball coach at CSUB, and he indicated that he knew eight of the potential witnesses in the case because they all worked at CSUB. (24 CT 6690-6697; 23 RT 5234-5235.) Juror H.C. specifically mentioned that potential witness Jim Ave was his team's athletic trainer. (23 RT 5235.) Juror H.C. also expressed concern that, in working at CSUB, he may have crossed paths with the victim or appellant. (24 CT 6702.) Based on these responses, the

prosecutor could have reasonably concluded that Juror H.C. was too closely connected to the case to sit as an impartial juror. Particularly because Juror H.C. appeared to have a relationship with Ave, who lived in the same apartment complex as the victim and who would be offering testimony about his observations of the victim's car on the night of the murder. What is even more troubling is Juror H.C.'s response to Question 59 of the juror questionnaire, which asked whether the fact that appellant was African-American would make it more difficult to consider all of the facts objectively than if he were not a Black man. (18 CT 5061.) Juror H.C. marked yes in response to this question and the following explanation occurred during individual voir dire:

> [THE COURT]: Question 59 asked would the fact that Mr. Harris is African-American – it says African America, but it's supposed to be African-American – make it more difficult for you to consider all the facts in the case objectively than if he were not a black man, and you checked yes.
>
> Could you tell us a little bit about that?
>
> [JUROR H.C.]: Well, I just know – you know, even when I walked in the courtroom the very first day, I think, which was Monday, any time you look up – I'm trying to explain it the best way.
>
> If I'm in a ballpark and if I see someone else who is black, then I make eye contact with that person.
>
> [THE COURT]: Sure.
>
> [JUROR H.C.]: It's an unwritten rule somewhere along the line that that's what happens, and so it's just that I think people –you know, perceptions would look and say okay, he is black and he is black and there's going to be some tie in there, and there's probably something there along the line, though, but the point that he is black and he is here and I am here, there's always going to be something there, but I will be able to listen to the facts and make a decision on the facts, yes, but there is

> something that's there that, as I'm finding out right now, is unexplainable, but there's something there.

(24 CT 6700; 23 RT 5238-5239.) Respondent submits no reasonable prosecutor would have kept Juror H.C. on the panel after learning that he felt an unspoken connection with the defendant.

The record also suggests race-neutral reasons for the prosecutor's challenge of Juror K.P. Juror K.P.'s brother had been arrested for possessing marijuana for sale, and proceedings were currently pending in Kern County juvenile court. (21 RT 4913-4914.) The prosecutor could have reasonably concluded that Juror K.P. might harbor bias against the prosecution because her brother was currently going through juvenile delinquency proceedings in the same county and instituted by the same prosecuting agency, or that she may develop a bias against the prosecution depending on how her brother's case progresses. Juror K.P. also informed the court that she was starting summer school the following week and if she was selected to serve on the jury she would have to drop two classes which would prevent her from completing her degree requirements that fall, and would ultimately force her to postpone transferring to a four-year college in the spring. (21 RT 4927-4929; 25 RT 5849-5850.) From this, the prosecutor could have reasonably concluded that, if chosen to sit on the jury, Juror K.P. would have been distracted by the fact that she was missing summer school and would have to postpone her plans of completing her AA requirements and transferring to another school, and would not be devoting her full attention to the case.

Additional factors further support the trial court's finding. Only two of the prosecutor's 20 peremptory challenges were exercised against African-Americans. (See *People v. Bell*, *supra*, 40 Cal.4th at p. 598 [finding prosecutor did not use disproportionate number of peremptory challenges against particular group when only two out of 16 peremptory

challenges were exercised against that group].) While the prosecutor did exercise peremptory challenges against two out of three African-Americans, "the small absolute size of the sample makes drawing an inference of discrimination from this fact alone impossible." (*Id.* at pp. 597-598; see also *People v. Farnam*, *supra*, 28 Cal.4th at pp. 136-137 [finding no prima facie showing where only stated bases for disputing the peremptory challenges were (1) four of the first five peremptory challenges were against African-Americans, and (2) a small minority of the panel members were African-American].)

Appellant acknowledges in his opening brief that this Court has disapproved the use of juror question-and-answer comparisons at the first stage of *Batson* analysis (AOB 180, 187, 189), but then proceeds to conduct the very analysis that he acknowledges is inappropriate (AOB 181-186). Appellant further compounds the erroneous nature of this analysis by limiting its scope to only those questions and answers relating to death qualification. As respondent has detailed above, there were several reasons, unrelated to death qualification, why the prosecutor would have exercised peremptory challenges against the two jurors in question. Respondent submits a comparison analysis is inappropriate and unreliable in this case, and a review of the appropriate factors shows race neutral reasons for the prosecutor's dismissal of Jurors H.C. and K.P.

Furthermore, appellant fails to make any meaningful distinction between his case and *People v. Bell*, *supra*, 40 Cal.4th 582. (AOB 187-191.) Appellant claims that a different outcome is warranted in this case because he is a member of the disfavored group (African-Americans), unlike the defendant in *Bell* who was not a member of the disfavored group (African-American women). (AOB 188.) Whether the defendant is or is not a member of the excluded group is not a prerequisite to a *Batson/Wheeler* challenge, but only one factor that the court may consider.

(*Id.* at p. 597.) As discussed above, the weight of the remaining factors cut against appellant's argument of error.

In sum, the record shows that the trial court here properly performed its duties and correctly found no prima facie case of group bias. Reversal is therefore unwarranted.

IV. The Trial Court Acted Within Its Broad Discretion In Denying Appellant's Challenge for Cause

Appellant asserts the trial court erroneously denied the defense's challenge for cause against Alternate[43] Juror R.C. (190089910). (AOB 192-207.) Appellant did not preserve this issue for appeal as he did not exercise a peremptory challenge against Alternate Juror R.C., exhaust all of his peremptory challenges, or express dissatisfaction with the panel of alternates ultimately sworn. (26 RT 6007-6009.) Further, because Alternate Juror R.C. was never substituted in for one of the 12 sworn jurors and did not render a verdict in this case, appellant cannot demonstrate he was denied his right to an impartial jury. Finally, review of the record demonstrates that the trial court properly denied appellant's request to excuse Alternate Juror R.C. for cause. For all these reasons, this claim lacks merit.

A. Relevant Proceedings Below

In his Juror Questionnaire, Alternate Juror R.C. indicated he was a registered nurse who worked at the Kern County Jail (Lerdo Facility), his wife was a certified shorthand reporter, and his brother was a deputy sheriff. (29 CT 8251, 8253.) He also indicated that he was the victim of a car theft in 1988, he knew potential witness Mike Baird, and he may have

[43] Appellant fails to mention that Juror R.C. was an *alternate* juror who was never substituted in for one of the 12 sworn jurors, and who did not actually render a verdict in this case.

had contact with appellant because he works at the facility where appellant was being held. (29 CT 8254, 8257, 8268.)

During individual questioning by the trial court, Alternate Juror R.C. confirmed that he worked as a nurse at the Lerdo Facility and he had previously treated Mike Baird who was an inmate at that facility and also a potential witness in this case. In response to the court's question of whether this interaction would affect his ability to judge this witness' testimony, Alternate Juror R.C. responded, "No. None at all." Regarding contact he may have had with appellant, Alternate Juror R.C. thought he previously treated appellant but they did not talk about the case and he did not even know appellant was involved with this case at the time. He also indicated that the previous day he heard a detention officer at the jail mention the jury was being picked for the second trial and that appellant was a "scumbag" or "scum." He assured the court that this would not affect his ability to be a fair and impartial juror in this case. He also assured the court that his wife being a certified shorthand reporter and his brother being a deputy sheriff would not affect his ability to be a juror in this case. (22 RT 5024-5028.) Alternate Juror R.C. also stated he would have no problem returning a verdict of not guilty if that is what he believed to be the appropriate verdict, even knowing he would have to go back to work and face his co-workers at the jail. (22 RT 5033.)

Defense counsel challenged Alternate Juror R.C. for cause:

> The problem is that he works around detention officers all day every day. And by that one comment about Mr. Harris being scum, I cannot help but believe that it would create a hostile work environment for him, and he is going to have to come to that realization that if he came back and found Mr. Harris not guilty. And no one wants to work in a hostile work environment. I think he would be tempted to see the evidence more toward a prosecution standpoint to avoid that possibility. And, therefore, I don't think he can be a fair and impartial juror. I think he may be a fair and impartial person, but because of his

situation, I don't think practically speaking he is going to be able to render a fair verdict.

(22 RT 5053.)

The trial court denied the challenge:

I have to make this call based upon what he has told us. He has told us he can be fair. And I am going to deny the motion. It is my intention, should he serve on the jury, to order that he is not to attempt to work, let's say, shifts on the side or something like that during the time that he is in trial here. He will be paid for his time so there is no reason to be concerned about that. But, in any event, the motion is denied.

(22 RT 5053.)

Ultimately, a jury that did not include Alternate Juror R.C. was sworn to try appellant's case. Thereafter, alternate jurors were selected. Defense counsel did not exercise a peremptory challenge against Alternate Juror R.C. After both sides passed on peremptory challenges and indicated their acceptance of the alternate as seated, the panel of four alternates, which included Alternate Juror R.C., was sworn. (26 RT 6007-6009.) Alternate Juror R.C. was never a seated juror during the trial.

B. Appellant Failed to Preserve This Claim

To preserve a claim of error based on the denial of a challenge for cause, appellant must show: (1) he used a peremptory challenge to remove the juror in question; (2) he exhausted his peremptory challenges or can justify failure to do so; and (3) he objected to the jury as finally constituted. (*People v. Hinton* (2006) 37 Cal.4th 839, 860.) Appellant did not exercise a peremptory challenge against Alternate Juror R.C., nor did he exhaust all of his peremptory challenges as to prospective alternate jurors, and he did

not express dissatisfaction with the panel of alternates that were sworn.[44] (26 RT 6007-6009.) Thus, this claim has been forfeited.

C. The Trial Court Properly Declined to Excuse Alternate Juror R.C. for Cause; Any Error was Harmless

It is within the broad discretion of the trial court to determine whether a prospective juror will be "unable to faithfully and impartially apply the laws in the case." Where a prospective juror gives "conflicting or confusing answers regarding his or her impartiality or capacity to serve, . . . the trial court must weigh the juror's responses in deciding whether to remove the juror for cause." The trial court's determination of the factual question is binding on appeal if supported by substantial evidence. (*People v. Moon* (2005) 37 Cal.4th 1, 14.) If the prospective juror's statements are consistent, then the trial court's ruling will be upheld if supported by substantial evidence. (*People v. Schmeck* (2005) 37 Cal.4th 240, 262; *People v. Horning* (2004) 34 Cal.4th 871, 896-897.)

Applying the foregoing principles to appellant's case, the trial court did not abuse its discretion in denying the defense's for cause challenge against Alternate Juror R.C. As outlined above, there were no conflicts or inconsistencies in Alternate Juror R.C.'s answers. He consistently indicated that his ability to serve as a fair and impartial juror in this case would not be affected by outside factors or influences. Respondent submits

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[44] The bulk of appellant's argument (AOB 197-207) appears to focus on the validity of the defense's justification for not using all of their peremptory challenges during selection of the 12 seated jurors. The defense did not state any reasons for not using all of their peremptories during the selection of the four alternate jurors. (26 RT 6009.) Considering the challenged juror here was an *alternate* juror and not one of the 12 seated jurors, respondent submits the defense's reasons for not using all of their peremptories in the selection of the 12 jurors who actually tried the case have no bearing on appellant's claim of error here.

the responses he gave during voir dire provided ample evidence of his impartiality and capacity to serve.

Further, even if the trial court erred in refusing to dismiss Alternate Juror R.C. for cause, appellant is not entitled to a reversal of his convictions since he cannot demonstrate he was denied an impartial jury. Where a prospective juror did not even serve on the defendant's jury, there is no merit to a claim that the trial court erred in failing to excuse the juror for cause, since the defendant could not possibly have suffered prejudice as a result of the trial court's refusal to excuse the juror. (*People v. Hinton*, *supra*, 37 Cal.4th at p. 860, fn. 7; see also *People v. Hillhouse* (2002) 27 Cal.4th 469, 487-488.) Alternate Juror R.C. was never seated as an actual juror during trial. Thus, he could not possibly have compromised the impartiality of the jury.

In sum, appellant forfeited his claim of error, substantial evidence supported the trial court's denial of the defense's challenge for cause, and error, if any, was harmless.

V. THERE ARE NO PRE-TRIAL ERRORS TO ACCUMULATE

Appellant argues that even if no single pre-trial error acted to deprive him of a fair trial, the many errors he has identified, when accumulated, must have done so. (AOB 208-210.) Respondent, however, has shown that none of appellant's contentions have merit. Moreover, appellant has failed to establish prejudice from any of the claims he raises. Accordingly, his claim of cumulative error must be rejected. (See *People v. Lewis* (2001) 25 Cal.4th 610, 635; *People v. Staten* (2000) 24 Cal.4th 434, 464.)

Guilt Phase

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE FACTS OF THE TORIGIANI BURGLARY UNDER EVIDENCE CODE SECTION 1101, SUBDIVISION (B)

Appellant argues the trial court abused its discretion in allowing the facts of the Torigiani burglary to come in under Evidence Code section 1101, subdivision (b). (AOB 211-226.) Respondent disagrees.

Evidence Code section 1101, subdivision (b) reads as follows:

> Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident, or whether a defendant in a prosecution for an unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

Evidence Code section 352 reads as follows:

> 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.

In general, proof of other crimes may not be introduced in a criminal prosecution. However, proof of other crimes, though inadmissible to show a propensity to commit crimes, may be admissible for other purposes where its probative value to establish a fact at issue outweighs its possible prejudicial effect. While such evidence should be received with caution, determination of admissibility is left to the sound discretion of the trial court. (*People v. Gray* (2005) 37 Cal.4th 168, 202.)

Here, the prosecution moved to have the facts of the Torigiani burglary admitted under Evidence Code section 1101, subdivision (b), to show intent and identity. (18 RT 4222-4237.) In support of his motion, the prosecutor stated the following similarities between the Torigiani burglary and the Manning rape/murder: (1) similar apartments; (2) inhabited by women; (3) located in close proximity to one another; (4) committed within three weeks of one another; (5) within walking distance of appellant's

apartment; (6) committed late in the evening; (7) similar items taken, including a VCR; and (8) the perpetrator armed himself with a weapon from inside the apartment. (18 RT 4226-4228.) Appellant objected to the admission of the facts of the Torigiani burglary as irrelevant to prove any fact in issue. (18 RT 4223-4224, 4230-4232.) The trial court found the facts of the Torigiani burglary, not the conviction itself, to be more probative than prejudicial and relevant to show intent and identity. (18 RT 4237.)

Appellant subsequently filed points and authorities and moved to exclude the evidence, arguing insufficient similarity between the two crimes and the potential prejudice outweighed the probative value. (14 CT 3920-3926; 18 RT 4273-4284.) The trial court denied the motion and once again found the evidence to be admissible to show intent and identity. (14 CT 3919; 18 RT 4282-4285.) The trial court did, however, grant appellant's request for a limiting instruction. (14 CT 3919; 18 RT 4285.) Prior to deliberations, the trial court instructed the jury as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed a crime other than those for which he is on trial.
>
> This evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show the existence of the intent, which is a necessary element of the crime charged; the identity of the person who committed the crime, if any, of which the defendant is accused.
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in this case.
>
> You are not permitted to consider such evidence for any other purpose.

> Within the meaning of the preceding instruction that I just read to you, the prosecution has the burden of proving by a preponderance of the evidence that the defendant committed a crime other than those for which he is on trial.
>
> You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that the defendant committed the other crime.
>
> The preponderance of the evidence means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

(15 CT 4114-4120; 33 RT 7655-7657.)

> The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts.

(*People v. Ewoldt* (1994) 7 Cal.4th 380, 403, citing *People v. Miller* (1990) 50 Cal.3d 954, 987.)

As previously stated, the similarities between this case and the Torigiani burglary were that the apartments were both inhabited by women; they were located within close proximity to one another; they were located within walking distance of appellant's apartment; the crimes were committed within three weeks of one another; they were committed at night; the perpetrator stole similar items; and the perpetrator armed himself with a weapon from inside the residence. Respondent submits the trial court did not abuse its discretion in admitting this evidence because, even though these factors taken individually would not be sufficient to raise the inference that appellant committed both crimes, when combined they are relevant to prove identity through a common scheme or plan. (*People v.*

Haston (1968) 69 Cal.2d 233, 245-246 ["[T]he inference need not depend upon one or more unique or nearly unique features common to the charged and uncharged offenses, for features of substantial but lesser distinctiveness, although insufficient to raise the inference if considered separately, may yield a distinctive combination if considered together."].)

Furthermore, the crimes were sufficiently similar to prove intent. "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402, citing *People v. Robbins* (1988) 45 Cal.3d 867, 880.)

> To be admissible to show intent, "the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance."

(*People v. Cole* (2004) 33 Cal.4th 1158, 1194, quoting *People v. Yeoman*, *supra*, 31 Cal.4th at p. 121.) The facts of the Torigiani burglary showed that appellant entered a woman's apartment, within walking distance of his own apartment, at night, armed himself with a weapon from inside the apartment, and stole several items including a VCR. Respondent submits these facts were sufficiently similar to the facts of the charged offense to support an inference that appellant probably had the intent to steal when he entered Alicia's apartment.

Moreover, the admission of this evidence did not contravene the limitations of Evidence Code section 352, because its probative value was not substantially outweighed by its potential prejudicial effect. The probative value of the evidence of the Torigiani burglary was its tendency to show that appellant was the person who committed the charged offenses and that he entered Alicia's apartment with the intent to steal.

> The probative value of evidence of uncharged misconduct is [] affected by the extent to which its source is independent of the evidence of the charged offense.

(*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) The source of the uncharged misconduct in this case was the victim Bree Torigiani, who was not connected to or influenced by the evidence of the charged offenses. This fact bolsters the probative value of the uncharged misconduct. (See *ibid.*) The fact that appellant was previously convicted of the Torigiani burglary further enhances the probative value of this evidence. (*Id.* at p. 405.) Furthermore, the fact that the testimony describing the Torigiani burglary was no more inflammatory than the testimony describing the charged offenses lessens the potential for prejudice. (*Ibid.*) All of these factors support the trial court's finding that the probative value of the prior acts evidence was not substantially outweighed by the potential for prejudice.

Even assuming the trial court erred in admitting evidence of the Torigiani burglary for these purposes, any error was harmless because it is not reasonably probable that the outcome would have been different if the challenged evidence had been excluded. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; see also *People v. Malone* (1988) 47 Cal.3d 1, 22 [*Watson* applies to erroneous admission of other crimes evidence].) First, the prosecutor presented strong evidence of appellant's guilt in this case, including appellant's semen being found on the victim (28 RT 6493, 6495-6499, 6501-6503), appellant's lack of an alibi for the time of the murder (29 RT 6683-6687, 6689, 6707), appellant's proximity to the victim's apartment (29 RT 6662-6663), appellant's own conflicting statements about having consensual sex with the victim and being at her apartment the night of the murder (29 RT 6763-6768, 6790-6795, 6798-6799, 6817-6819), and appellant's attempts to sell items matching those taken from the victim's apartment after the murder (30 RT 7000-7001, 7024-7027; 31 RT 7065-7066). Second, as previously noted, the testimony describing the Torigiani burglary was much less inflammatory than the testimony describing the charged offenses, which makes it unlikely that the jury would have

disregarded the evidence of the charged offenses and convicted appellant based on the evidence of the Torigiani burglary or that the jury's passions were inflamed by the evidence of the Torigiani burglary. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405.) Lastly, the trial court instructed the jury that they could not consider the evidence of the uncharged offense to prove that appellant had a bad character or was predisposed to commit crimes. (33 RT 7656.) "Jurors are presumed to understand and follow the court's instructions." (*People v. Holt*, *supra*, 15 Cal.4th at p. 662.) Any prejudice flowing from the trial court's admission of evidence of the uncharged offense was dissipated by the court's limiting instruction. Moreover, the fact that the jury did not convict appellant of the burglary special circumstance or the separate burglary charge shows they actually did follow the court's instructions. For these reasons, respondent submits that the absence of evidence of the Torigiani burglary would not have compelled a different result in this case.

VII. THE ROBBERY AND ROBBERY SPECIAL CIRCUMSTANCE VERDICTS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

Appellant claims there is insufficient evidence to support his robbery conviction and the true finding of the robbery special circumstance, because the evidence does not support a conclusion that the requisite intent was formed prior to the murder. He further contends an omission in the prosecutor's closing argument and instructional error undermined the integrity of the robbery and robbery special circumstance verdicts. (AOB 227-241.) Respondent disagrees.

A. Standard of Review

To determine sufficiency of the evidence, the appellate court must determine whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Hodgson* (2003) 111 Cal.App.4th 566, 573.) The court reviews the whole record in the light

most favorable to the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) Substantial evidence is that which is reasonable, credible, and of solid value. (*Id.* at p. 578.)

In cases where the People mainly rely on circumstantial evidence, the standard of review is the same. (*People v. Hodgson*, *supra*, 111 Cal.App.4th at p. 574.) As stated in *Hodgson*:

> 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.] Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.

(*Ibid.*)

B. There Is Sufficient Evidence to Support a Finding That the Intent to Rob Was Formed Before the Murder

Section 211 defines robbery as follows:

> Robbery is the felonious taking of personal property in the possession of another, from the person or immediate presence, and against his will, accomplished by means of force or fear.

A robbery that is committed in an inhabited dwelling house is classified as robbery in the first degree. (§ 212.5, subd. (a).) Section 190.2, subdivision (a)(17)(A) states:

> (a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:
>
> (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of,

> attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies:
>
> (A) Robbery in violation of Section 211 or 212.5.

For the jury to have found appellant guilty of robbery, they must have determined that he formed the intent to steal prior to or during the application of force used to accomplish the taking. (*People v. Lewis* (2008) 43 Cal.4th 415, 464.) Similarly,

> the special circumstance of murder during the commission of a robbery requires that the murder be committed 'in order to advance [the] independent felonious purpose' of robbery, but the special circumstance is not established when the felony is merely incidental to the murder.

(*People v. Burney* (2009) 47 Cal.4th 203, 253, quoting *People v. Green* (1980) 27 Cal.3d 1, 61.) In finding appellant not guilty of burglary, the jury must have concluded appellant did not enter the apartment with the intent to steal Alicia's property or to rape her. (§ 459.) Appellant, therefore, must have informed the intent to steal after entering the apartment but prior to or during the murder.

Appellant claims there was insufficient evidence upon which the jury could determine whether he formed the intent to steal prior to the murder, or as an afterthought once Alicia was already dead. (AOB 229.) Respondent submits the jury had sufficient evidence to make this determination. The evidence shows that appellant called the apartment three times on the night of the murder, once at 6:15 p.m., again at 9:00 p.m., and the last call was at 9:30 p.m. (27 RT 6204-6205; 6296-6297.) The jury could have reasonably concluded that these phone calls were an attempt to contact Bucholz, because appellant told the detectives he called the apartment that night looking for Bucholz (29 RT 6816-6817), and he paged Bucholz around 6:15 p.m. asking her if they could meet up later and she told him to page her between 9:00 and 9:30 p.m. (27 RT 6169-6170,

6211). It is likely that appellant received the answering machine when he made these calls, because Lane testified that Alicia said she was purposefully letting the answering machine pick up and then she would write down the messages and leave them for Bucholz. (30 RT 6934.) Moreover, appellant himself told Detectives Stratton and Herman that he left at least one message on the answering machine that evening. (29 RT 6816-6817.) From this, the jury could reasonably conclude that appellant went to the apartment looking for Bucholz because he was unable to contact her and he wanted to meet up with her that night. The not guilty verdicts on the burglary and burglary special circumstance support this conclusion.

When appellant arrived at the apartment it is likely that Alicia, recognizing him as a friend of Bucholz, opened the door, which is why there were no signs of a forced entry. (28 RT 6348.) Once inside the apartment, appellant looked around and realized Bucholz was not there and Alicia was alone. The jury could have reasonably concluded that at this point appellant saw an opportunity to rob Alicia, because she was alone and he would be able to overpower her. The evidence shows that appellant had been to the apartment many times prior to the night of the murder, so he would have already known what items were inside the apartment that he could easily take and resell. (27 RT 6155-6156.) Moreover, the short amount of time that appellant had to rob, rape, and murder Alicia further supports the jury's finding that the intent to steal was formed prior to the murder. The evidence shows that appellant hit Alicia over the head with three different glass objects (27 RT 6323-6324, 6327), he stabbed her over 50 times with two different knives (28 RT 6518-6522), which meant he likely made two different trips to the kitchen, and he cleaned up afterward (27 RT 6290). It is not reasonable to think that the decision to steal Alicia's property was merely an afterthought, because there just would not have

been enough time for appellant to come up with a plan to steal these items and figure out how he would get them back to his apartment after he had raped and murdered Alicia. Particularly because he would have been more focused on cleaning up and getting out of the apartment before Bucholz returned. Respondent submits the jury's conclusion that appellant formed the intent to steal after entering the apartment once he saw that Alicia was alone was reasonable and supported by sufficient evidence.

Even if this Court finds there was insufficient evidence to support the robbery-murder special circumstance, the death judgment need not be reversed. The United States Supreme Court has upheld a death penalty judgment despite invalidation of one of several aggravating circumstances (*Zant v. Stephens* (1983) 462 U.S. 862, 881), and this Court is in accord (see e.g., *People v. Silva* (1988) 45 Cal.3d 604, 632-636 [affirming despite the jury's consideration of invalid special circumstance findings]). Moreover, section 190.2, subdivision (a) only requires one of the enumerated special circumstances to be found true to qualify a defendant for the death penalty. As there was more than sufficient evidence (Argument VIII, *infra*) to support the rape-murder special circumstance, appellant's judgment of death should be affirmed.

C. The Prosecutor Did Not Misstate the Law on Intent As It Related to the Robbery Special Circumstance

Appellant contends the prosecutor failed to adequately explain the intent requirement as it related to the robbery special circumstance in his closing argument, and that amounted to a misstatement of the law. (AOB 231-233.) This argument fails for several reasons.

First, appellant did not object at trial to the prosecutor's closing argument as it related to the explanation of the intent required for the robbery special circumstance. (33 RT 7474.) Accordingly, appellant

forfeited any claim of misconduct based on this argument. (*People v. Williams* (1997)16 Cal.4th 153, 254.)

Second, the prosecutor did not misstate the law. The specific portion of the prosecutor's argument that appellant contends is erroneous reads as follows:

> The only way you would reach the lesser offense of petty theft is if you found that Miss Manning's property was taken, but it wasn't taken by means of force or fear. In that case, the offense would be petty theft.
>
> Obviously, however, the taking of her items here was accomplished by the stabbing and bludgeoning of her which led to her death, and that is robbery. It is not petty theft.

(33 RT 7474.) This portion of the prosecutor's argument does not even relate to the intent required for the robbery special circumstance. The prosecutor was merely explaining the difference between robbery and petty theft. This explanation is consistent with the Penal Code and CALJIC definitions of those crimes. (See §§ 211, 487; CALJIC Nos. 9.40, 14.02.)

Lastly, the prosecutor's closing argument is not evidence and the jury was so instructed. (CALJIC No. 1.02; 15 CT 4088-4089.) The jury is presumed to have followed this instruction. (*People v. Avila* (2009) 46 Cal.4th 680, 719.) Therefore, contrary to appellant's claim (AOB 233), the statements made by the prosecutor did not lure the jury into an erroneous finding of the robbery special circumstance.

D. The Special Circumstance Instruction Was Not Erroneous and the Trial Court Had No Sua Sponte Duty to Instruct On When the Intent to Rob Was Formed

Appellant claims the trial court erroneously instructed the jury with CALJIC No. 8.81.17 by connecting paragraphs one and two with "or" instead of "and." He further claims the trial court erred in failing to sua sponte give additional instruction on when the intent to rob was formed,

and both of these errors were prejudicial. (AOB 233-238.) Respondent disagrees.

The trial court orally instructed the jury with CALJIC 8.81.17 as follows:

> To find that the special circumstance referred to in these instructions as murder in the commission of rape, sodomy, robbery or burglary is true, it must be proved: One, that the murder was committed while the defendant was engaged in the commission or attempted commission of a rape, sodomy, robbery and/or burglary; *and* two, that the murder was committed in order to carry out or advance the commission of the crime of rape, sodomy, robbery or burglary, or to facilitate the escape therefrom, or to avoid detection. In other words, the special circumstances referred to in these instructions are not established if the rape, sodomy, robbery or burglary was merely incidental to the commission of the murder.

(33 RT 7672-7673; emphasis added.) Appellant acknowledges that the oral instruction was correct as given, but claims the written instruction was erroneous because it connected the two findings the jury needed to make with "or" instead of "and." (AOB 233-235.) This Court has found that the use of the disjunctive "or" between the elements of CALJIC No. 8.81.17 is error. (*People v. Friend* (2009) 47 Cal.4th 1, 79.) That, however, is not what happened here. The written instruction provided to the jury in this case, as modified by the court, omitted any connector between the two elements:

> To find that the special circumstance, referred to in these instructions as murder in the commission of rape, sodomy, robbery, or burglary, is true, it must be proved:
>
> 1a. The murder was committed while the defendant was engaged in the commission or attempted commission of a rape, sodomy, robbery, and/or burglary.
>
> 2. The murder was committed in order to carry out or advance the commission of the crime of rape, sodomy, robbery, or burglary or to facilitate the escape therefrom or to avoid

> detection. In other words, the special circumstance referred to in these instructions is not established if the rape, sodomy, robbery, or burglary was merely incidental to the commission of the murder.

(15 CT 4171-4172.)

In *People v. Friend*, *supra*, this Court found that the giving of CALJIC 8.81.17 without any grammatical connectors between the elements did not make the instruction so ambiguous as to make it reasonably likely that the jury would have "construed them in a manner that violate[d] the defendant's rights." (*Id.* at p. 79.) This Court further held that it was not "reasonably likely the jury understood the elements to be in the disjunctive" and

> [a]bsent the insertion of express disjunctives, the listing of three separate elements that must be proved clearly implied that proof of *each* was independently necessary.

(*Ibid.*; emphasis in original.) As such, this Court rejected appellant's claim that the instruction permitted the jury to find the special circumstance true based on only one element. (*Ibid.*)

Applying this Court's analysis in *People v. Friend*, *supra*, to appellant's case leads to the same conclusion, namely, that the lack of a grammatical connector between the two elements of CALJIC 8.81.17 did not make it reasonably likely that the jury thought they were permitted to find the robbery special circumstance true based on only one element. The trial court's oral instruction which included the conjunctive "and" between the two elements further supports the conclusion that the jury understood that each element had to be proven in order to find the robbery special circumstance true. Therefore, appellant's claim should be rejected.

Even if this Court agrees with appellant's reading of the written instruction as including the disjunctive "or," reversal of the robbery special circumstance finding is not warranted because any error was harmless. The

error appellant complains of is reviewed under the *Chapman* standard of harmless error review. (*People v. Prieto* (2003) 30 Cal.4th 226, 256; see *Chapman v. California*, *supra*, 386 U.S. at p. 24 [error must be found harmless beyond a reasonable doubt].) Here, the trial court instructed the jury with CALJIC Nos. 9.40[45] (robbery defined) and 8.21[46] (felony

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[45] The trial court instructed the jury with CALJIC No. 9.40 as follows:

> Defendant is accused in Count 2 of having committed the crime of robbery, a violation of section 211 of the Penal Code.
>
> Every person who takes personal property in the possession of another, against the will and from the person or immediate presence of that person, accomplished by means of force or fear and with the specific intent permanently to deprive that person of the property, is guilty of the crime of robbery in violation of Penal Code section 211.
>
> "Immediate presence" means an area within the alleged victim's reach, observation or control, so that he or she could, if not overcome by violence or prevented by fear, retain possession of the subject property.
>
> "Against the will" means without consent.
>
> In order to prove this crime, each of the following must be proved:
>
> 1. A person had possession of property of some value, however, slight;
>
> 2. The property was taken from that person or from her immediate presence;
>
> 3. The property was taken against the will of that person;
>
> 4. The taking was accomplished either by force or fear; and
>
> 5. The property was taken with the specific intent to permanently deprive that person of the property.

(continued...)

murder). (15 CT 4151, 4179-4181; 33 RT 7665-7666, 7675-7676.) This Court has previously found that "'CALJIC Nos. 9.40 and 8.21 together adequately cover the issue of the time of the formation of the intent to steal.'" (*People v. Friend*, *supra*, 47 Cal.4th at p. 50 [internal quotations omitted], citing *People v. Valdez* (2004) 32 Cal.4th 73, 112 and *People v. Hughes* (2002) 27 Cal.4th 287, 359.) Therefore, the jury in this case was adequately instructed on when the intent to steal needed to be formed, and any error in the use of the disjunctive "or" was harmless beyond a reasonable doubt.

Appellant makes an additional claim of instructional error in that the trial court failed to sua sponte instruct on when the intent to steal arose. (AOB 235-237.) Contrary to appellant's claim, the trial court did not have a sua sponte duty to instruct on when the intent to steal was formed. (*People v. Webster* (1991) 54 Cal.3d 411, 443-444 [no sua sponte duty to instruct that if defendant formed intent to steal only after killing he was only guilty of theft]; *People v. Carter* (1957) 48 Cal.2d 737, 758 [no error in failing to instruct that homicide was not in perpetration of robbery if intent to steal arose after attack on deceased, where defendant never

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(...continued)
(15 CT 4179-4181.)

[46] The trial court instructed the jury with CALJIC No. 8.21 as follows:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of rape, sodomy, robbery, or burglary is murder in the first degree when the perpetrator had the specific intent to commit that crime.
>
> The specific intent to commit rape, sodomy, robbery, or burglary and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.

(15 CT 4151.)

contended he formed intent only after attacking the victim, and denied the attack altogether].) Moreover, appellant never requested a special instruction on after-acquired intent, nor did he claim that he formed the intent to steal only after he attacked and killed Alicia. On the contrary, appellant claimed he did not kill Alicia or steal her property. As the court was under no duty to give such an instruction, its failure to do so could not have been error.

E. Appellant Was Properly Convicted of Robbery

Appellant claims there was also insufficient evidence to support the robbery conviction, the prosecutor committed error in closing argument, and the trial court erred when it failed to instruct sua sponte on when the intent to steal was formed. (AOB 238-241.) For the same reasons as argued above in relation to the robbery special circumstance, respondent submits there was sufficient evidence to support the robbery conviction, the prosecutor did not misstate the law, and there was no instructional error.

In sum, there was sufficient evidence to support both the true finding on the robbery special circumstance and the robbery conviction. Moreover, the prosecutor did not misstate the law regarding the formation of intent and the trial court did not commit instructional error. For these reasons, appellant's claims should be rejected.

VIII. APPELLANT'S RAPE CONVICTION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

Appellant claims there was insufficient evidence to support a finding of lack of consent necessary for rape. He further claims the trial court abused its discretion by admitting two letters written by Alicia the week prior to her murder, and erred in sustaining relevance objections to evidence showing problems in Alicia and Charles' relationship. (AOB 242-260.) Respondent disagrees.

A. Standard of Review

To determine sufficiency of the evidence, the appellate court must determine whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Hodgson*, *supra*, 111 Cal.App.4th at p. 573.) The court reviews the whole record in the light most favorable to the judgment. (*People v. Johnson*, *supra*, 26 Cal.3d at pp. 576-577.) Substantial evidence is that which is reasonable, credible, and of solid value. (*Id.* at p. 578.)

In cases where the People mainly rely on circumstantial evidence, the standard of review is the same. (*People v. Hodgson*, *supra*, 111 Cal.App.4th at p. 574.) As stated in *Hodgson*:

> 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.] Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.

(*Ibid.*)

B. There Is Sufficient Evidence to Support a Finding of Lack of Consent

Section 261, subdivision (a)(2) defines rape as:

> (a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:
>
> (2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of another.

"Against a person's will" is defined as being without the person's consent. (CALJIC No. 10.00.) The prosecution must prove a lack of consent beyond a reasonable doubt. (*People v. Key* (1984) 153 Cal.App.3d 888, 895.)

Appellant claims the only pieces of evidence that supported the rape conviction were the fact that Alicia was murdered and that she had a boyfriend. (AOB 245-246.) Appellant paints a less than complete picture of the evidence supporting the rape conviction, which was more than sufficient to find a lack of consent. On the other hand, the only evidence supporting a finding of consensual sex was appellant's own self-serving statement that he and Alicia had consensual sex on the night she was murdered. Considering the number of conflicting statements appellant made regarding what, if any, sexual contact he had with Alicia, it is likely that the jury completely disregarded this statement as untrustworthy. The evidence supporting lack of consent, however, was substantial.

First, the evidence showed that appellant and Alicia had a less than amicable relationship, which would support a finding of lack of consent. Alicia was irritated by appellant's constant phone calls to the apartment because they were disrupting her studying. She was so irritated that she confronted Bucholz about the calls and asked her to tell appellant to stop calling the apartment. Even after Bucholz told appellant to page her instead of calling the apartment he continued to call the apartment. (27 RT 6157-6160, 6204-6205, 6296-6297) Alicia also told Lane that appellant called so frequently she had purposefully stopped answering the phone. (30 RT 6934.) Moreover, appellant's girlfriend had called the apartment looking for Bucholz and she threatened Alicia, prompting her to call the police. (27 RT 6163; 29 RT 6621.) Alicia was so upset by this that she confronted appellant and Bucholz about the threats the day before her murder, and she told him to tell his girlfriend not to call the apartment again. (27 RT 6161-

6165.) From this evidence, the jury could have reasonably concluded that Alicia would not have had a consensual sexual relationship with appellant.

Second, Alicia and Charles were in a serious and committed relationship that was certainly not as rocky as the defense wanted the jury to believe. The evidence showed that Alicia and Charles planned to move to the east coast together after Alicia graduated. (30 RT 6950.) Charles admitted that he and Alicia contemplated breaking up, but decided to stay together and continue with their future plans. (30 RT 6959, 6967-6968, 6983-6984.) The fact that Alicia and Charles had dinner and spent the evening together the night before Alicia's murder (27 RT 6165; 30 RT 6935, 6953-6954) further shows that they were still committed to their relationship. Moreover, the "Charles sweetheart" letter that was written by Alicia sometime in the week leading up to her murder indicates Alicia was still deeply in love with Charles, and does not show any signs of an imminent break-up. The evidence of Alicia and Charles' relationship further supports the jury's finding of lack of consent.

Third, the physical injuries to Alicia's body support a finding of lack of consent. Appellant claims that the lack of vaginal trauma supports his claim of consensual sex (AOB 243-244), but the totality of the evidence supports a different conclusion. A piece of glass was found underneath the plaid shorts that were lying on the floor close to Alicia's feet (27 RT 6299-6306; 28 RT 6396; 29 RT 6676), indicating she was hit with at least one glass object before her shorts were removed. Dr. Brown testified that it was likely that Alicia was rendered unconscious by the blunt force trauma to her head. (28 RT 6518.) From this, the jury could have reasonably concluded that Alicia was unconscious during the sexual assault, which would explain the lack of vaginal trauma during nonconsensual sexual intercourse. Further, Dr. Brown testified that a lack of vaginal trauma is not uncommon in cases of rape. (28 RT 6526, 6534.) Even the defense's

own expert, Dr. Stanley, testified that in some cases of rape there is no vaginal injury, and the most scientifically valid, large scale studies show that only 20 to 40 percent of cases of sexual assault involve vaginal injury. (31 RT 7142.) He further testified that external injuries to the body, including bruising, scratches, scrapes, cuts, stab wounds, and blunt force trauma, occur in 80 percent of sexual assault cases. (31 RT 7145-7148.) It is not just the simple fact that Alicia was murdered, as appellant claims (AOB 245), that supports a finding of non-consent, but it is that fact combined with the physical injuries and the testimony of the experts which support a finding of rape.

Finally, Alicia's behavior upon finding out that she might have an STD shows she was not having a sexual relationship with anyone except her boyfriend. On May 15, Alicia went to the health center to get a birth control refill and to get checked for a possible urinary tract infection. The nurse practitioner performed a full examination and tested Alicia for STDs. (30 RT 6987-6988.) On the weekend of May 17, Alicia visited Charles at his parents' house in Tulare and she told him she might have an STD and he must have given it to her. (30 RT 6925, 6951-6952, 6959.) Alicia did not find out that all of the tests came back negative until May 19. (30 RT 6987-6988.) If Alicia was having a sexual relationship with appellant, it would make no sense for Alicia to tell Charles she thought he gave her an STD. Particularly if you believe appellant's story that they just started having sex about a month prior, because it would make more sense in that situation for appellant to be the one who gave her the STD. Had Alicia been having sex with someone other than Charles, it would have been more reasonable for her to remain silent until she got the test results, because if they were negative Charles would never have to know about her affair. The fact that she not only told Charles before getting the results, but also told him she thought he had given her the STD shows that she was not having

sex with anyone else. Respondent submits all of this evidence taken together is more than sufficient to support the jury's finding of lack of consent necessary for rape.

C. The Trial Court Properly Admitted Two Letters Written By Alicia Within a Week of Her Murder to Show Her State of Mind

Appellant claims the trial court erred in admitting two letters written by Alicia during the week prior to her murder. (AOB 248-254.) He makes two specific claims of error relating to the admission of these letters. First, the trial court erroneously found that the defense put Alicia and Charles' relationship in issue, and, second, the letters were irrelevant and unreliable. (AOB 250-251.) Respondent submits the letters were authenticated, relevant to prove a fact in issue, and reliable to show Alicia's state of mind.

The prosecution sought to admit two letters purported to have been written by Alicia within the last week of her life, to show her state of mind regarding her relationship with Charles. In the first letter, referred to as the "Charles sweetheart" letter, Alicia professed her love for Charles and said she wished she did not have to work on her paper so she could spend more time with him. In the second letter, referred to as the "Dear Dave" letter, Alicia wrote to her best friend from home about her plans to move back to the east coast with Charles after graduation. The defense objected to the introduction of these letters as late discovery (30 RT 6892-6893) and irrelevant (30 RT 6898-6900). The trial court found that the defense had equal access to the letters, the defense put Alicia and Charles' relationship at issue, the letters were relevant to that issue, and the prosecution could recall Bucholz to authenticate the letters. (30 RT 6900-6904.)

Bucholz testified that Alicia had a habit of writing letters to people and Charles was a frequent recipient of her letters. (30 RT 6906.) Bucholz identified the handwriting in both of the letters as Alicia's handwriting. (30

RT 6911, 6913.) The "Charles sweetheart" letter referenced Alicia's work on a paper, which Bucholz testified was her voting paper that Alicia had started working on the week before her murder. (30 RT 6911-6912.) The court found that the "Dear Dave" letter was self-authenticating as to the date it was written because the body of the letter indicated there were only 31 days until graduation. (30 RT 6900-6901.) Bucholz testified that their graduation was scheduled for June 14 (30 RT 6913), which indicated the letter was written the week prior to Alicia's murder. Both letters were ultimately admitted into evidence. (30 RT 6921-6922.)

Evidence Code section 351 states that all relevant evidence is admissible. Relevant evidence is:

> evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

(Evid. Code, § 210.) Hearsay evidence, however, is inadmissible unless it falls under one of the legally recognized exceptions. (Evid. Code, § 1200.) Evidence Code section 1250 provides:

> (a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
>
> (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
>
> (2)The evidence is offered to prove or explain acts of conduct of the declarant.
>
> (b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

Evidence Code section 1252 precludes the admission of statements offered under Evidence Code section 1250, if those statements were made "under circumstances such as to indicate [their] lack of trustworthiness." (Evid. Code, § 1252.)

Appellant claims the trial court made two crucial errors. First, the trial court erred in finding that Alicia and Charles' relationship was put in issue by the defense. Second, the trial court erred in admitting the two letters into evidence because they were irrelevant, unreliable hearsay declarations. (AOB 250-254.) Both of these claims lack merit.

First, whether the defense put the relationship in issue or not, evidence showing the status of Alicia and Charles' relationship was relevant. Evidence showing problems in their relationship would have a tendency to support appellant's claim of consensual sex, because it would be more likely for Alicia to cheat on Charles with appellant if she and Charles were having problems in their relationship. On the other hand, evidence showing a loving, committed relationship would have a tendency to support the prosecution's theory that appellant raped and murdered Alicia, because it would be less likely for Alicia to cheat on Charles with appellant if she and Charles were not having problems in their relationship. Whether it was consensual sex versus rape was a disputed fact of consequence to this case and the status of Alicia and Charles' relationship had a tendency to prove or disprove that fact, making it relevant evidence. (See Evid. Code, § 210.) Therefore, respondent submits the trial court's finding that the defense put the relationship in issue had no bearing on the ultimate admissibility of the letters.

Second, appellant's claims of relevancy and reliability also lack merit. The trial court had wide discretion in determining relevance and its ruling should not be overturned absent an abuse of discretion. (*People v. Valencia* (2008) 43 Cal.4th 268, 286.) As stated above, relevant evidence means

evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Moreover,

> [e]vidence is relevant not only when it tends to prove or disprove the precise fact in issue but when it tends to establish a fact from which the existence or nonexistence of the fact in issue can be directly inferred.

(*People v. Warner* (1969) 270 Cal.App.2d 900, 908.) Appellant claims the letters were not relevant to show Alicia's state of mind regarding her relationship with Charles because they were written the week before her murder, and the only relevant time period is the day of her murder. (AOB 250-252.) Respondent submits, however, that appellant's interpretation of the relevant time period is too narrow. While respondent agrees that the relevant question is whether Alicia consented to having sex with appellant on the night of her murder, respondent also submits that Alicia's feelings for Charles and what their future plans were a week prior to her murder would still be relevant to show how she felt about Charles and what their future plans were the day of her murder. As already stated above, evidence showing the status of Alicia and Charles' relationship was relevant to the issue of whether the sex was consensual or not. While the probative value of the letters may have been higher had they been written on the day of the murder, respondent submits the fact they were written a week before the murder does not diminish their probative value to such an extent that they would be considered completely irrelevant. As such, the trial court was well within its discretion to allow their admission.

Appellant further claims that the letters were unreliable as an exception to the hearsay rule, because they were written a week before Alicia's murder and they had never been sent to their intended recipients. (AOB 252-253.) Hearsay statements sought to be admitted under Evidence Code section 1250 are subject to the restrictions of Evidence Code section

1252, which looks to the circumstances under which the statements were made to determine their trustworthiness. (Evid. Code, §§ 1250, 1252.) There is no indication from the record that Alicia wrote these letters under circumstances that would indicate their lack of trustworthiness. Appellant's two complaints, that the letters were written a week before her murder and were never sent to their intended recipients, are not circumstances under which the letters were written and, as such, have no bearing on their trustworthiness as it is determined under Evidence Code section 1252. They are simply facts that appellant was free to argue to the jury as having a tendency to reduce the probative value of the evidence. For these reasons, appellant's claim that the court abused its discretion in admitting the letters should be rejected.

D. The Trial Court Did Not Erroneously Exclude Evidence of Alicia and Charles' Relationship

Appellant claims the trial court erroneously sustained relevance objections to testimony offered by the defense during the first trial to show problems in Alicia and Charles' relationship. (AOB 254-259.) Respondent submits whatever evidentiary rulings the trial court made during the first trial are irrelevant to the appeal that is before this court. Appellant does not claim that these same evidentiary rulings were also made in the second trial. In fact, the defense did elicit testimony from Bucholz and Charles during the second trial that showed problems in Alicia and Charles' relationship. On cross examination, Bucholz testified that on the night before her murder Alicia told Bucholz that she was not sure if Charles was ready to move across the country and start a new job or if he was really the right guy for her. (27 RT 6229-6230.) Furthermore, on cross examination, Charles testified that he and Alicia had discussed the possibility of breaking up the Friday before her murder, because she felt he was spending too much time with his friends. (30 RT 6967-6968.) Respondent is not sure

why appellant is making arguments regarding evidentiary rulings that occurred during the first trial, but, as they are irrelevant to the case before this Court, they should be rejected.

E. The Trial Court Did Not Commit Prejudicial Error

Appellant, without citation to authority (see Cal. Rules of Court, rule 8.204(a)(1)(B)), contends the trial court's admission of the two letters and its exclusion of defense evidence to rebut the prosecution's claim of lack of consent was prejudicial. (AOB 260.) As the admission of the two letters was not an abuse of discretion (see Arg. VIII.C., *supra*) and the trial court did not make evidentiary rulings excluding evidence proffered by the defense on the issue of consent in the *second* trial (see Arg. VIII.D., *supra*), respondent submits appellant suffered no harm.

IX. The Trial Court's Evidentiary Rulings Were Not Erroneous Or Prejudicial

Appellant claims the trial court made numerous evidentiary rulings that were erroneous and, while some of them may not have been prejudicial on their own, taken together they were prejudicial. (AOB 261-282.) Respondent disagrees.

A. The Trial Court Properly Determined That the Prosecution Could Present Evidence of Blood Found on Appellant's Shoe If Appellant Presented Evidence of the Lack of Blood on his Shirt

Prior to the first trial, the defense made an oral motion in limine to exclude evidence of the blood found on appellant's shoe. They argued this evidence was not relevant and was potentially prejudicial because the sample was too small to definitively say the blood belonged to the victim. The prosecutor indicated he did not intend to introduce that evidence at that point in time, but if he should feel that it was relevant at some later point he would alert the court and counsel prior to introducing it. In light of this, the

trial court simply found that the prosecutor would have to make a further showing prior to introducing this evidence. (5 CT 1115; 2 RT 607-608.)

During the first trial, defense counsel attempted to question Findley about a black Budweiser shirt that she claimed appellant was wearing the night of the murder. (11 RT 2719-2720.) The prosecutor objected to this line of questioning as irrelevant and being in violation of an in limine ruling. (11 RT 2720.) The trial court overruled the objection on relevance but sustained the objection as to the violation of the in limine ruling. (11 RT 2720.) Defense counsel requested a sidebar and the parties discussed the issue with the court in chambers. (11 RT 2721-2726.)

The prosecutor argued that if defense counsel introduced evidence of the black Budweiser shirt to show that appellant did not have blood on the clothes he purportedly wore the night of the murder, then he should be able to introduce evidence of the blood that was found on appellant's shoes. (11 RT 2721-2722.) Defense counsel argued evidence of the blood on appellant's shoes should be excluded because the test results were inconclusive, but the lack of blood on his shirt tended to show that he did not murder Alicia. (11 RT 2722-2723.) In response, the prosecutor argued it would be deceptive to allow testimony regarding the lack of blood on appellant's shirt and not allow testimony regarding the blood found on his shoe that could have belonged to the victim. (11 RT 2723-2724.) The trial court ruled that the evidence of the blood on appellant's shoe would be admissible if the defense introduced evidence about the lack of blood on his shirt. (11 RT 2725.) Defense counsel ultimately decided to introduce evidence of the lack of blood on appellant's shirt, even though the prosecutor would be allowed to introduce evidence of the blood found on appellant's shoe. (12 RT 2769-2770.)

In line with the trial court's ruling, Detective Herman testified that during the execution of a search warrant at appellant's apartment, on June

11, he seized four pairs of shoes that Findley told him belonged to appellant. Detective Herman stated that he saw what appeared to be blood on one or more of the individual shoes. (12 RT 2783-2784, 2794.) Word subsequently testified that her lab tested six stains on a pair of shoes and all six areas contained human DNA. (12 RT 2853.) Word testified that testing on one of the stains revealed DNA from more than one donor, and Alicia was excluded as the primary source but she could not be definitively included or excluded as the secondary source because the results were too faint. (12 RT 2854-2856.)

Prior to the second trial, the defense filed a motion in limine to exclude the shoe-blood evidence as irrelevant, prejudicial, and potentially misleading. (14 CT 3856-3864.) At the hearing on the motion, defense counsel again argued that the shoe-blood evidence was potentially misleading, irrelevant, and more prejudicial than probative under Evidence Code section 352. (18 RT 4209-4210.) The prosecutor conceded the motion, stating there was a foundational problem because the sample was below the level required for conclusive analysis. (18 RT 4210-4212.) The trial court found that the expert would be restricted to testifying that the sample came from two sources, only one of which was at a level susceptible of testing by her lab, and testing on that source ruled out all five people tested. (18 RT 4212.)

On cross examination of Criminalist Spencer during the second trial, defense counsel requested a sidebar to discuss questioning Spencer about the lack of blood on appellant's black Budweiser shirt. (29 RT 6641-6642.) The prosecutor claimed the introduction of evidence to show the lack of blood on appellant's clothing would open the door to testimony regarding the blood found on his shoes. (29 RT 6443.) The trial court agreed with the prosecutor and ruled that if the defense presented evidence about the lack of blood on appellant's shirt, the prosecution could introduce evidence

that blood was found on appellant's shoe but the sample was not strong enough to determine the source. (29 RT 6443.) In light of this ruling, the defense decided not to question Spencer about the lack of blood on appellant's shirt in order to prevent the shoe-blood evidence from being presented to the jury. (29 RT 6443.)

On appeal, appellant claims the trial court's ruling was error because the shoe-blood evidence was irrelevant and more prejudicial than probative. (AOB 261-269.) More specifically, appellant claims the trial court failed to make an explicit determination that the probative value of the evidence outweighed its prejudicial effect, which, standing alone, constitutes error, and had it made such a determination it would have been an abuse of discretion. (AOB 266-268.) These claims lack merit.

The trial court's failure to explicitly state that it found the shoe-blood evidence more probative than prejudicial was not error.

> Although the record must "affirmatively show that the trial court weighed prejudice against probative value" [Citation], the necessary showing can be inferred from the record despite the absence of an express statement by the trial court. [Citation].

(*People v. Prince*, *supra*, 40 Cal.4th at p. 1237.) Here, one of the defense's main arguments, starting in the first trial and continuing in the second, was that this evidence was more prejudicial than probative. During the sidebar in the second trial, defense counsel explicitly stated his belief that this evidence was prejudicial under Evidence Code section 352. (29 RT 6442.) From this, it can be inferred that the trial court was aware of its duty to make a prejudice determination under Evidence Code section 352. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 135.) Moreover, the trial court limited the evidence that the prosecutor could present to the fact that blood was found on appellant's shoe and the source could not be determined. This ruling further supports the inference that the trial court was aware of the requirements of Evidence Code section 352 because the court was only

willing to allow introduction of the most relevant and probative aspect of the shoe-blood evidence while excluding other testimony that may have confused or prejudiced the jury.

The threshold question of admissibility is whether the evidence is relevant. (See Evid. Code, § 350.) In *People v. Burgener* (1986) 41 Cal.3d 505, the defendant argued that evidence of blood on his shoe was irrelevant and thus inadmissible, because the test results could not definitively determine whether it was human blood or blood at all. (*Id.* at p. 526, overruled on other grounds by *People v. Reyes* (1998) 19 Cal.4th 743, 753.) This Court held the shoe-blood evidence was relevant, because the

> presence of a substance which might be blood on the defendant's shoes certainly has *some* tendency in reason to prove that he might have been present at the scene of a bloody shooting the night before his arrest.

(*Id.* at p. 527.) Similarly, here, the shoe-blood evidence did have at least *some* tendency in reason to prove that appellant might have been present at the scene of a violent and bloody murder. Appellant claims *Burgener* is distinguishable from his case, because he and Alicia were both ruled out as primary sources of the blood stain on his shoe. (AOB 267.) Appellant's logic fails because the question of relevance in this case turns on the secondary source not the primary source, and neither he nor Alicia could be included or excluded as the secondary source. The lack of direct evidence that appellant was wearing these particular shoes the night of the murder does not change the outcome. In *Burgener*, blood was found on shoes appellant was wearing the day of his arrest, which was the day after the shooting and not at the exact time of the shooting. Here, there was evidence that the blood-stained shoes belonged to appellant and the fact that he owned shoes that contained blood that may or may not have belonged to the victim was relevant.

The trial court's determination that the probative value of the shoe-blood evidence outweighed the potential for prejudice was not an abuse of discretion.

> Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal *except* on a showing that the 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, 1124-1125; internal citations omitted.) Appellant claims the shoe-blood evidence was more prejudicial than probative, especially because it resulted in the exclusion of relevant and highly probative evidence of the lack of blood on appellant's shirt. (AOB 268.) Appellant wants to admit the evidence that tends to show his innocence while preventing the prosecution from presenting related evidence that tends to show his guilt. Respondent submits admission of the shirt without admission of the shoes would have misled the jury into thinking there was absolutely no blood on appellant's clothes.

> The evidence barred by Evidence Code section 352 is evidence that uniquely causes the jury to form an emotion-based bias against a party and that has very little bearing on the issues of the case.

(*People v. Thornton* (2007) 41 Cal.4th 391, 427.) Respondent submits the shoe-blood evidence did not have a tendency to evoke emotional bias against appellant and it did have substantial probative value.

Moreover, even assuming error, reversal is not required because any error was harmless. The erroneous admission of evidence requires reversal only when "the admitted evidence should have been excluded on the ground stated . . . and the errors complained of resulted in a miscarriage of

justice." (Evid. Code, § 353, subd. (b); see also *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson*, *supra*, 46 Cal.2d at p. 836 [error is harmless under state constitutional standards unless it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error"].) Appellant claims the federal constitutional standard of prejudice should be used because the court's ruling implicated his Sixth Amendment right to present a defense. (AOB 269.) Respondent submits any error was harmless under either standard. The only evidence that appellant was wearing that shirt the night of the murder came from the testimony of his girlfriend, and her testimony also provided the only evidence that the shirt had not been washed since that night. It is likely that the jury would have given this evidence very little weight because its probative value depended on the testimony of a witness who was biased in favor of appellant. Weighed against the evidence of appellant's guilt, respondent submits any error in not admitting the shirt was harmless beyond a reasonable doubt.

B. The Trial Court Properly Limited Testimony of the Defense Expert

The defense called Dr. Ament to testify as a sexual assault expert. Defense counsel asked Dr. Ament to describe standard procedures and testing when examining a potential rape victim. (31 RT 7132-7134.) After Dr. Ament described the standard procedures and testing, the following exchange occurred:

> Q. In any of the information that you read concerning this case, were any of those procedures followed?
>
> [PROSECUTOR]: I am going to object, your Honor, as calling for hearsay.
>
> THE COURT: It is sustained.

Q. To your knowledge, were any of those procedures followed in this particular case?

[PROSECUTOR]: Objection as calling for - - lack of personal knowledge.

THE COURT: It is sustained.

(31 RT 7134.)

Appellant claims the trial court's rulings were error, because hearsay and lack of personal knowledge are not proper objections to questions asked of an expert. (AOB 271.) While it is true that expert testimony in the form of an opinion can be based on hearsay and facts outside the personal knowledge of the expert (Evid. Code, § 801), the questions asked by defense counsel here called for factual statements not opinions. The questions, as worded, asked Dr. Ament to tell the jury whether any of the procedures he just outlined were followed in this case, which would have amounted to factual statements of which he had no personal knowledge, and would have only known through the hearsay statements contained in the medical examiners reports. As such, respondent submits the objections were properly made and sustained.

Furthermore, error, if any, was harmless. The question called for a yes or no answer and that answer was yes, because several of the tests described by Dr. Ament were performed in this case. (28 RT 6412-6413.) Respondent submits it is not reasonably probable that a result more favorable to appellant would have occurred had Dr. Ament been allowed to answer the question (*People v. Watson*, *supra*, 46 Cal.2d at p. 836), and appellant makes no argument to the contrary (AOB 272).

C. The Trial Court Properly Denied Appellant's Motion Requesting a Mistrial Following The Admission of Appellant's Prior Statement Referring to Alicia as "The Bitch"

Prior to the first trial, the defense filed a motion in limine to exclude certain statements appellant made to Detective Stratton in which he referred to Alicia as "the bitch," as being more prejudicial than probative. (4 CT 959-966.) The trial court ruled the term "bitch," while commonly used by young African-American men to refer to all women, was still offensive in the Anglo culture and should be excluded under Evidence Code section 352. (2 RT 678-679.) The prosecutor indicated he would instruct the detective on the court's ruling. (2 RT 679.)

Prior to the second trial, the trial court indicated all in limine rulings from the first trial would carry over to the second trial. (18 RT 4249.) During the second trial, Detective Stratton testified that during an interview with himself and Detective Herman appellant stated, "I'm conniving just like you're conniving, but I didn't kill the bitch." (29 RT 6800.) Defense counsel objected to the statement, moved to strike it, requested that the trial court instruct the jury not to consider it, and asked the court to declare a mistrial. (29 RT 6800-6801.) The trial court offered to either strike the statement or to instruct the jury that young African-American males use the word bitch in a non-pejorative manner, but declined to declare a mistrial. (29 RT 6802.) The defense chose the latter and the trial court instructed the jury as follows:

> Ladies and gentlemen, you just heard the officer testify to a quotation from the defendant and I'll take judicial notice of something.
>
> Judicial notice is sort of like a stipulation, that the attorneys stipulate to certain facts, you accept them as true. Judicial notice is a notice by the Court that something is accurate or factual,

> such as that the 19th of May in 1997 was a Monday, for example. That would be judicial notice.
>
> I'll take judicial notice that in our society young African-American males frequently use the word bitch in a non-pejorative fashion, whereas it is generally true that Caucasian males and Hispanic males, if they use that word, are using it in an angry fashion with regard to females.

(29 RT 6802-6804.)

Appellant claims, without citation to authority (see Cal. Rules of Court, rule 8.204(a)(1)(B)), that the trial court erred in refusing to grant a mistrial. (AOB 273-275.) While statements of a witness can form the basis of a motion for a mistrial, a court should only grant a mistrial if "'the court is apprised of prejudice that it judges incurable by admonition or instruction.'" (*People v. Wharton* (1991) 53 Cal.3d 522, 565, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 854.)

> Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.

(*Ibid.*) Here, the trial court correctly found that the error could be cured by either striking the word or instructing the jury on different uses of the word. Defense counsel chose to have the court instruct the jury and the jury is presumed to follow those instructions. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.) Moreover, "[j]urors today are not likely to be shocked by offensive language." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1009; see *People v. Halsey* (1993) 12 Cal.App.4th 885, 891 [no abuse of discretion in allowing a witness' testimony as to defendant's statement that the deceased victim was a "son-of-a-bitch"].) Applying these principles, respondent submits the trial court properly denied appellant's motion for a mistrial, because admission of the word "bitch" was not incurably prejudicial.

D. The Trial Court Properly Sustained the Prosecution's Objection to Appellant's Closing Argument

Appellant claims the trial court erred in sustaining the prosecutor's objection, which was later withdrawn, to part of appellant's closing argument. (AOB 275-279.) Respondent disagrees.

During closing argument, defense counsel commented on the prosecutor's interview of Hiler during the first trial as follows:

> Remember, Lori Hiler is the very first - - the very first thing she says to Stratton as to the time, she says between 10:10, 10:15. Where in the heck does she come up with that time? Where does she come up with the time? We will get to the details about the time in a minute.
>
> Okay. One of the things I want to talk about is Mr. Somers, along with Mr. Bresson, went in for an interview. And you have to understand the context of this, they go in while the last trial was in progress. Listen to the tape. Five times, five times you will see that Mr. Somers says at this point in time. This point in time was December 1st of '98. At this point in time, Ms. Hiler, do you remember who you saw. At this point, says it five times. At this point in time, Ms. Hiler, can you tell me it was black or white or whatever. At this point in time. You will also notice on the tape he never says at the time you made the identification. At the time you were talking to Detective Stratton, what did you think. Were you lying to Stratton. Never says that.
>
> In addition to that important point is when she turns around and says 9:00, and even though he says - - he says it so many times, it is all really fast, just boom, boom, boom, boom. Listen to the tape. He repeats it, doesn't question her. He is looking for something that he can turn around and use against her later. Because if the time is so important, as you ladies and gentlemen know it is, the time is so important, why would he sit there and say, now you are saying nine o'clock now. Do you remember telling Detective Stratton you said 10:00. Wasn't it 10:00. Are you sure it was 9:00 and not 10:00. Why doesn't he ask those questions if it is so important. And the answer is, because he is not going there to investigate, he is going there to find something to use against her when she testifies because - -

(33 RT 7586-7587.) The prosecutor objected to this line of argument as being outside the scope of the evidence, but subsequently withdrew the objection. Despite the withdrawal, the trial court sustained the objection. (33 RT 7587.)

> While counsel is accorded "great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence [citation]," counsel may not assume or state facts not in evidence [citation] or mischaracterize the evidence [citation].

(*People v. Valdez, supra,* 32 Cal.4th at pp. 133-134.) Here, defense counsel was urging the jury to make conclusions about the prosecutor's motives based on pure speculation. Moreover, whatever the prosecutor's motives were in obtaining a second interview, they were simply not relevant to any issue before the jury. As such, respondent submits the trial court properly sustained the objection.

Assuming, arguendo, the trial court's ruling was error, it was harmless. Defense counsel was given an adequate opportunity to rehabilitate Hiler on cross-examination, and the jury had the benefit of that testimony in determining whether Hiler was a credible witness. Additionally, the jury was instructed that argument is not evidence (15 CT 4088-4089; 33 RT 7649) and they are presumed to have followed that instruction (*People v. Hovarter*, *supra*, 44 Cal.4th at p. 1005). It is, therefore, not reasonably likely that appellant would have obtained a more favorable result absent any error. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

E. The Trial Court Properly Instructed the Jury

Appellant claims the trial court erred in omitting a sentence from the defense's proposed instruction on third-party culpability. (AOB 279-281.) Respondent disagrees.

The proposed instruction read as follows:

> You have heard evidence that a person other than the defendant may have committed the offense with which the defendant is charged. The defendant is not required to prove the other person's guilt beyond a reasonable doubt. Defendant is entitled to an acquittal if the evidence raises a reasonable doubt in your minds as to the defendant's guilt. Such evidence may by itself raise a reasonable doubt as to defendant's guilt. However, its weight and significance, if any, are matters for your determination. If, after consideration of this evidence, you have a reasonable doubt that the defendant committed this offense, you must give the defendant the benefit of the doubt and find him not guilty.

(15 CT 4134.) The prosecutor objected to the fourth sentence as a comment on the weight of the evidence. (32 RT 7406-7407.) The trial court agreed to give the modified instruction as follows:

> You have heard evidence that a person other than the defendant may have committed the offense with which the defendant is charged. The defendant is not required to prove the other person's guilt beyond a reasonable doubt. Defendant is entitled to an acquittal if the evidence raises a reasonable doubt in your minds as to the defendant's guilt. Its weight and significance, if any, are matters for your determination. If, after consideration of this evidence, you have a reasonable doubt that the defendant committed this offense, you must give the defendant the benefit of that doubt and find him not guilty.

(15 CT 4134; 32 RT 7407-7408; 33 RT 7660.)

Pinpoint instructions "relate specific facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case." (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) A defendant is entitled to a pinpoint instruction upon request when there is evidence to support the defense's theory, but the trial court has no sua sponte duty to give such an instruction. (*Ibid.*) Appellant seems to argue that the instruction as given was required to, but did not, inform the jury of the standard of proof needed before it could consider evidence of third-party culpability. (AOB 280-282.) Respondent does not follow this argument, because it is clear from the face of the instruction that

appellant is not required to prove the other person's guilt beyond a reasonable doubt and the evidence of third-party culpability need only raise a reasonable doubt in the minds of the jurors for them to find appellant not guilty. Additionally, respondent submits the deleted sentence was repetitive and unnecessary because the sentence immediately preceding it and the last sentence of the instruction both indicate that third-party culpability evidence, if believed, is enough standing alone to raise a reasonable doubt as to a defendant's guilt. For these reasons, respondent submits the trial court did not err in giving the modified version of the instruction.

Assuming, arguendo, the trial court erred, any error was harmless. The question is whether "it is reasonably likely that the court's instruction[] caused the jury to misapply the law." (*People v. Carrington* (2009) 47 Cal.4th 145, 192.) A single jury instruction cannot be viewed in isolation, but must be examined with all of the instructions as a whole. (*Ibid.)* Here, the trial court instructed the jury on reasonable doubt and the burden of proof (15 CT 4132-4133; 33 RT 7660), and the jury could have acquitted appellant had it believed the testimony implicating Charles as the murderer. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 824-825.) Respondent submits that even if the standard is harmless beyond a reasonable doubt as appellant asserts (AOB 282), in light of the instructions as a whole, appellant was not prejudiced.

X. THERE ARE NO PRE-TRIAL OR GUILT PHASE ERRORS TO ACCUMULATE

Appellant argues that even if no single pre-trial or guilt phase error acted to deprive him of a fair trial, the many errors he has identified, when accumulated, must have done so. (AOB 283-285.) Respondent, however, has shown that none of appellant's contentions have merit. Moreover, appellant has failed to establish prejudice from any of the claims he raises.

Accordingly, his claim of cumulative error must be rejected. (See *People v. Lewis*, *supra*, 25 Cal.4th at p. 635; *People v. Staten*, *supra*, 24 Cal.4th at p. 464.)

Penalty Phase

XI. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A MISTRIAL AND PROPERLY DECLINED TO DISMISS A JUROR WHO REPORTEDLY SAW APPELLANT MOUTH THE WORDS "I HATE YOU" TO HER

Appellant claims the trial court should have declared a mistrial after a juror informed the court that she believed appellant had mouthed the words "I hate you" to her while staring at her in an angry manner, and she had communicated her observation to the other jurors. Appellant further claims that, at a minimum, the trial court should have dismissed that juror, and failure to do either of these was prejudicial. (AOB 286-297.) Respondent disagrees.

A. Factual and Procedural Background

Shortly after the jury retired for penalty phase deliberations, the trial court received a note from the jury foreperson indicating Juror No. 6 believed appellant was trying to intimidate her. (35 RT 8036.) Juror No. 6 was brought into the courtroom so the court and counsel could question her about the situation. (35 RT 8036.) Juror No. 6 indicated that during the testimony of a penalty phase witness earlier that day, appellant glared at her, mouthed some words, and shook his head. (35 RT 8037-8038.) Then, the following exchange occurred between the trial court and Juror No. 6:

> Q. [by The Court]: Okay. From what he was mouthing, what were you able to determine what he was saying to you?
>
> A. (Juror nods head affirmatively.) I could be wrong. I mean, I could have misunderstood what he was mouthing. But from what he said, I hate you.

> Q. All right. That was the impression that you got of what he was saying?
>
> A. (Juror nods head affirmatively.) I could be wrong. I could be wrong.
>
> Q. All right. If you misunderstood the words he said, did the visual confrontation, I mean, you know, looking at each other and locking eyes, concern you?
>
> A. I don't know. It was - - it was kind of like - - It wasn't like - - it was just kind of - - yes, in a way it did. But, it could have - - the way he was looking could have been took in different ways, depends. I mean, it looked kind of confrontational. But he could have - - he could have not meant to look that way. I mean, I look some ways sometimes and I don't mean to look that way. But it just - - that's what I got from it. It was confrontational and kind of a little bit - - kind of like anger look to it.
>
> Q. All right. Let me ask you this: Given that that was your impression that that was what was happening, do you feel that has affected your ability to be a fair and impartial decider of this matter?
>
> A. No.
>
> Q. You do not?
>
> A. No
>
> Q. Do you feel you can still go back, deliberate and make whatever decision you feel is appropriate?
>
> A. Yes.

(35 RT 8038-8040.)

Defense counsel asked Juror No. 6 if she had communicated any of this information to the rest of the jurors, and she said she had told them everything she had just told the court and counsel. (35 RT 8040.) She reiterated that she could have been mistaken about what appellant was mouthing, but she was confident that she understood him correctly. (35 RT

8040-8041.) She also stated appellant looked somewhat hostile and he shook his head at her. (35 RT 8041.)

The trial court again asked her if she felt like she could proceed as a juror in this case, and she indicated that she could. (35 RT 8042.) The court then told her to rejoin the rest of the jurors and admonished her not to discuss what had just occurred with the other jurors, and she assured the court that she would not. (35 RT 8042-8043.)

After Juror No. 6 returned to the jury room, defense counsel moved for a mistrial as to the penalty phase, arguing that Juror No. 6 had communicated her observations to the jury and those observations were prejudicial to appellant. (35 RT 8043-8044.) The prosecutor opposed the motion for a mistrial, stating there were other curative measures well short of a mistrial that could be used to address the issue. (35 RT 8044.) The trial court denied the defense's motion, stating the jury was free to observe the demeanor of the parties in the courtroom and actions taken by the defendant that are perceived as hostile are not grounds for a mistrial. (35 RT 8044-8045.) The trial court offered to discuss other remedial measures if the defense had any to offer. (35 RT 8044-8045.) Defense counsel indicated he did not have any immediate suggestions, but asked the court to dismiss the jury for the day so he and co-counsel could use the three-day holiday weekend to come up with some suggestions. (35 RT 8046.) Since it was the end of the day, the trial court dismissed the jury for the weekend. (35 RT 8046.)

On the following Tuesday morning, the defense presented the court with points and authorities and a request for a jury instruction. (35 RT 8050.) Defense counsel requested that the court bring Juror No. 6 back into the courtroom, because the defense wanted to ask her a few questions concerning her ability to read lips and exactly when this incident occurred. (35 RT 8050.) The trial court denied this request, stating she was already

asked the pertinent questions and further questioning would not be helpful. (35 RT 8050-8051.) The trial court found no problem with the jury using their observations of appellant's demeanor in the courtroom during their deliberations in the penalty phase. (35 RT 8055-8058.) After further discussion the court and counsel agreed on an instruction to give to the jury. (35 RT 8057-8063.) Defense counsel then requested that Juror No. 6 be excused, and the trial court denied that request. (35 RT 8063-8066.)

Thereafter, the trial court instructed the jury as follows:

> Ladies and gentlemen of the jury, as you know, you went out to deliberate on the penalty phase of the trial at about 3:30 p.m. on Friday afternoon. Thereafter, at about 4:30 p.m., actually it was 4:27 p.m., you sent out a note indicating that one of your number felt a threat, the defendant was trying to intimidate that juror. We spoke to the juror individually and the juror rejoined you briefly before we adjourned for the day. The juror told us they had shared with you the basis of their perception which was based on conduct of the defendant they had observed in the courtroom.
>
> Now, as jurors in the penalty phase of a capital trial, you can draw inferences based upon the defendant's demeanor in the courtroom, inasmuch as the defendant's character is at issue in this phase of the trial. However, you can only draw inferences based upon your personal observations, positive or negative, and not on what another juror may have observed. Nor may you speculate upon any ambiguous conduct of the defendant you have personally observed.

(35 RT 8066-8067.)

The court asked the jury collectively whether they could fairly decide the issue before them based on this instruction, and the jury affirmatively nodded their heads. (35 RT 8067.) The court then individually polled the jurors as to whether any one of them was concerned that they could not be fair and impartial after receiving the information about the juror's observation. (35 RT 8067.) Each juror answered "no." (35 RT 8067-8068.)

B. The Trial Court Properly Declined to Grant A Mistrial or Dismiss Juror No. 6

Appellant argues the juror's observation in this case was extra-judicial information brought into the deliberation room, because the other jurors did not personally observe the conduct in question. He further argues that the court's refusal to dismiss Juror No. 6 deprived him of his rights to confront witnesses against him and to a fair and impartial jury. (AOB 291.) Respondent disagrees.

Juror misconduct can form the basis of a motion for a mistrial, but a court should only grant a mistrial if "'the court is apprised of prejudice that it judges incurable by admonition or instruction.'" (*People v. Wharton*, *supra*, 53 Cal.3d at p. 565, quoting *People v. Haskett*, *supra*, 30 Cal.3d at p. 854.)

> Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.

(*Ibid.*)

> The court may discharge a juror and substitute an alternate if it finds a juror is unable to perform his or her duty. [Citation.] A trial court's decision to discharge a juror for misconduct is reviewed for abuse of discretion and is upheld if supported by substantial evidence. [Citations.] The juror's inability to perform must appear in the record as a demonstrable reality. [Citation.]

(*People v. Ledesma* (2006) 39 Cal.4th 641, 743.) Here, as demonstrated below, there was no misconduct and, even if there was, the court sufficiently admonished the jury to cure any potential prejudice to appellant.

In *People v. Heishman* (1988) 45 Cal.3d 147, this Court held a prosecutor's reference, during penalty phase argument, to the defendant's facial demeanor was proper, because the defendant had placed his character

at issue as a mitigating factor and the jury was allowed to draw inferences from their observations of the defendant in the courtroom. (*Id.* at p. 197.) In *People v. Williams* (1988) 44 Cal 3d 1127, some, but not all, of the jurors saw the defendant mouth the words, "I'm going to get each and every one of you mother fuckers" after the guilt phase verdict was returned. (*Id.* at pp. 1154-1155.) This Court noted that consideration of extra-judicial evidence by the jury is misconduct and grounds for a new trial if the defendant was prejudiced by it. (*Id.* at p. 1156.) This Court, however, found that this rule did not necessarily apply to jurors' perceptions of in-court conduct, particularly when the defendant engages in disruptive or improper conduct. (*Ibid.*) This Court further noted the general policy that a defendant cannot profit from his own misconduct, and ultimately found that if there was error it was harmless. (*Id.* at pp. 1156-1157.)

Here, there was no misconduct because appellant put his character for non-violence at issue during the penalty phase of the trial, and the jury was entitled to rely on in-court observations of appellant's demeanor in reaching their penalty verdict. (See *People v. Heishman, supra*, 45 Cal.3d at p. 197.) Appellant argues his case is distinguishable from cases in which the use of the defendant's actions and demeanor in court has been held proper, because his actions were only noticed by one juror. (AOB 291-295.) Respondent finds this argument unpersuasive. In *Heishman, supra*, it was the prosecutor who commented on the defendant's facial demeanor and this Court did not express any concern over the fact that the jurors may not have even observed the conduct the prosecutor was referencing. (*People v. Heishman, supra*, 45 Cal.3d at p. 197.) In *Williams, supra*, the alternate juror who brought the issue to the court's attention specifically said she did not personally witness the conduct and the jury foreman said he saw the defendant mouth something but did not hear what he said. (*People v. Williams, supra*, 44 Cal.3d at pp. 1154-1155.) Again, this Court did not

express concern about the fact that some of the jurors did not witness the conduct or hear the comment in question or that they were told about the defendant's conduct by other members of the jury who had witnessed it. (*Id.* at p. 1156.) Respondent submits the conduct in question in the present case was akin to the conduct in question in *Heishman* and *Williams* and, as such, could properly be considered by the jury.

Assuming, arguendo, this conduct was more akin to improper extra-judicial evidence, there was still no basis for a mistrial or removal of Juror No. 6. Consideration of extraneous material by a juror is misconduct and creates a presumption of prejudice that may be rebutted by a showing of no prejudice. (*People v. Williams* (2006) 40 Cal.4th 287, 333.) The effect of juror misconduct from receipt of information from extraneous sources can be non-prejudicial and is judged by review of the entire record. (*Ibid.*) The verdict will be set aside only if there appears a substantial likelihood of juror bias. (*In re Lucas* (2004) 33 Cal.4th 682, 696-697; *In re Carpenter* (1995) 9 Cal.4th 634, 653.) Juror bias may be demonstrated in two ways: (1) if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the jury, or (2) looking at the nature of the misconduct and the surrounding circumstances, it is substantially likely the jury was actually biased against the defendant. (*Ibid.*)

Respondent submits appellant mouthing the words "I hate you" was not so inherently prejudicial that it is substantially likely to have influenced the jury. (See e.g., *People v. Williams*, *supra*, 44 Cal.3d at pp. 1155-1157 [defendant mouthing the words "I'm going to get each and every one of you mother fuckers" found not prejudicial].) Furthermore, respondent submits the record indicates the jury was not actually biased against appellant. Here, the trial court instructed the jury that it could not draw inferences based on what another juror may have seen and they could not speculate about ambiguous conduct that they personally observed. (35 RT

8066-8067.) The jury is presumed to have followed this instruction. (*People v. Hovarter*, *supra*, 44 Cal.4th at p. 1005.) Finally, the court polled the jurors collectively and individually on whether they felt they could still be fair and impartial and each juror said that they could. (35 RT 8067-8068.) As such, appellant's claim should be rejected.

XII. The Prosecutor Did Not Commit Misconduct When He Used the Name "Willie Horton" In His Penalty Phase Closing Argument And The Trial Court Had No Duty To Admonish The Jury

Appellant claims the prosecutor committed misconduct when he referred to him as "Willie Horton" three times[47] during his penalty phase closing argument. He further claims that the trial court should have instructed the jury not to consider the Willie Horton matter in deciding appellant's case. (AOB 298-299.) Respondent disagrees with appellant's factual determinations and legal conclusions.

During his penalty phase closing argument, the prosecutor made the following statements:

> Mrs. Thompson came in two years later, she identified Mr. Harris in court. She had picked him out of a photo lineup at the time. And she was in the store with him. Because she hadn't just seen him when she was two feet away from him face to face as he snatched her purse, she also had seen him in the store a little bit earlier. And the photograph, People's No. 16, shows Mr. Harris in the store behind her at the counter. It is a side view of the face as you will see it if you look at the evidence during deliberations. But it is recognizable as him. He has the beard. She described at the time the short hair. You heard from *Mr. Horton* about jeri curls, but then what he saw, he said was jeri curls, I guess it is a matter of definition where the hair is really short. Even *Willie Horton* said he had on the hooded sweatshirt, the same type of garment, the same kind of - -

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[47] Appellant claims the name Willie Horton was mentioned three times by the prosecutor, but the record shows the prosecutor said "Mr. Horton" once and "Willie Horton" once. (35 RT 7998-7999.)

(35 RT 7998-7999.) At this point, the court interrupted stating, "You said Willie Horton." (35 RT 7999.) The prosecutor apologized and said, "Willie Harris followed Mrs. Thompson from that store and then he robbed her." (35 RT 7999.) Appellant did not object to the prosecutor's use of the name Willie Horton, nor did he request any type of admonition in relation to the name Willie Horton. (35 RT 7999.)

Appellant claims the name Willie Horton referred to a black man who murdered a white boy in Massachusetts while released from prison on a weekend pass while Michael Dukakis was the governor of Massachusetts, and this fact was used against Dukakis during his 1988 presidential campaign. (AOB 221-223, fn. 76; 298-299.) Appellant further claims the use of the name Willie Horton was prosecutorial misconduct and the trial court should have admonished the jury. (AOB 298-299.) All of these claims lack merit.

First, appellant forfeited his claims of prosecutorial misconduct and trial court error in not admonishing the jury by failing to timely object to the prosecutor's statement and to request that the jury be admonished regarding the alleged misconduct. (*People v. Stanley* (2006) 39 Cal.4th 913, 952.)

Second, and more importantly, there was no misconduct. During the penalty phase of the trial, the defense called Jack Lyle Horton as a witness. (35 RT 7888.) Horton was a witness to the purse snatching that the prosecution introduced as evidence of an uncharged crime against appellant. (35 RT 7888-7889.) Horton testified that the suspect had jeri curls and was wearing a blue hooded sweatshirt. (35 RT 7889, 7891-7892.) When the prosecutor said, "You heard from *Mr. Horton* about the jeri curls . . .," respondent submits he was talking about the testimony of Jack Lyle Horton. Two sentences later, when the prosecutor said, "Even *Willie Horton* said he had on the hooded sweatshirt . . .," respondent submits the

prosecutor simply misspoke but was again referencing the testimony of Jack Lyle Horton, not the Massachusetts murderer.

Assuming, arguendo, the prosecutor was referencing the murderer Willie Horton, appellant fails to show how he was prejudiced by it. Appellant claims that even though the ages of the jurors are not in the record it is still reasonable to assume that most or all of them would have known about the Willie Horton controversy, which occurred 11 years earlier. (AOB 299.) Respondent submits it is pure speculation to assume the jurors knew who Willie Horton was. It is equally possible that most or all of the jurors knew nothing about Willie Horton. If a juror was 18 years old at the time of trial, presumably the youngest a juror could be, he or she would have only been seven years old in 1988, and probably was not following the presidential campaign. Additionally, there was no mention in the record that there was a murderer from Massachusetts named Willie Horton. Therefore, even under the more stringent federal constitutional standard, any error was harmless beyond a reasonable doubt. (*People v. Adams* (1993) 19 Cal.App.4th 412, 444 [prejudice cannot be based on pure speculation].)

XIII. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY THAT THEY MUST IMPOSE A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE IF THEY HAVE ANY DOUBTS ABOUT IMPOSING DEATH

Appellant claims the trial court erred in refusing to give his proffered instruction which told the jury they must choose a sentence of life without parole if they had any doubt about which penalty to impose. (AOB 300-301.) Respondent disagrees.

The instruction in question read as follows:

> If you have a doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty at life in prison without the possibility of parole.

(16 CT 4375.) The trial court refused to give this instruction, stating its reference to the burden of proof had the potential to confuse the jury. (34 RT 7841.)

The trial court properly refused to give this instruction. There is no requirement that the court instruct the jury that it must find death to be the appropriate penalty beyond a reasonable doubt (*People v. Medina* (1995) 11 Cal.4th 694, 782; *People v. Berryman* (1993) 6 Cal.4th 1048, 1101; *People v. Diaz* (1992) 3 Cal.4th 495, 569), and the jury need *not* find the death penalty appropriate beyond a reasonable doubt. (*People v. Stanley*, *supra*, 39 Cal.4th at p. 963). The court was not required to give an instruction that incorrectly stated the law. (*People v. Gurule* (2002) 28 Cal.4th 557, 659.) Because the beyond a reasonable doubt standard does not apply in this context, the trial court properly declined to give appellant's proffered instruction.

XIV. THERE ARE NO CONSTITUTIONAL FLAWS IN THE CALIFORNIA DEATH PENALTY STATUTES WARRANTING REVERSAL OF APPELLANT'S SENTENCE

Appellant contends the California Death Penalty law has numerous constitutional defects. (AOB 303-309.) There are no such constitutional defects.

A. The California Death Penalty Law Does Not Fail To Adequately Narrow The Class Of Crimes Eligible For The Death Penalty

Appellant claims a violation of the Eighth Amendment requirement to narrow the class of death eligible persons. (AOB 303.) He contends the specified special circumstances are overly broad and have been construed so broadly that almost every first degree murder qualifies as death eligible. (AOB 303-304.) This claim has been previously rejected by this court. (*People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Gurule*, *supra*, 28 Cal.4th at pp. 663-664; *People v. Michaels* (2002) 28 Cal.4th 486, 541;

People v. Koontz (2002) 27 Cal.4th 1041, 1095; *People v. Hillhouse* (2002) 27 Cal.4th 469, 510; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064.)

B. There Is No Constitutional Violation For The Failure To Require The Jury To Unanimously Find Death Is The Appropriate Punishment Beyond A Reasonable Doubt

Appellant claims a violation of his Eighth Amendment right to a reliable death verdict by the failure to require the jury to unanimously find death is the appropriate punishment beyond a reasonable doubt. (AOB 305-306.) The absence of such a requirement is not unconstitutional. (*People v. Hoyos*, *supra*, 41 Cal.4th at p. 926; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1151; *People v. Michaels*, *supra*, 28 Cal.4th at p. 541; *People v. Koontz*, *supra*, 27 Cal.4th at p. 1095; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 410; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137.)

C. There Is No Constitutional Violation For The Failure To Require The Jury To Unanimously Find The Aggravating Factors True Beyond A Reasonable Doubt

Appellant claims a violation of his Sixth, Eighth, and Fourteenth Amendment rights for the failure to require the jury to unanimously find the aggravating circumstances true beyond a reasonable doubt. (AOB 307-308.) The absence of such a requirement is not unconstitutional. (*People v. Hoyos*, *supra*, 41 Cal.4th at p. 926; *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1151; *People v. Michaels*, *supra*, 28 Cal.4th at p. 541; *People v. Koontz*, *supra*, 27 Cal.4th at p. 1095; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 410; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1137.)

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

Appellant claims a violation of his Eighth Amendment right to be free from arbitrary and capricious imposition of a death sentence by the failure to require inter-case proportionality. (AOB 309.) There is no

constitutional requirement for inter-case proportionality review. (*People v. Gurule*, *supra*, 28 Cal.4th at p. 663; *People v. Michaels*, *supra*, 28 Cal.4th at p. 541; *People v. Koontz*, *supra*, 27 Cal.4th at p. 1095; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: December 9, 2009

Respectfully submitted,

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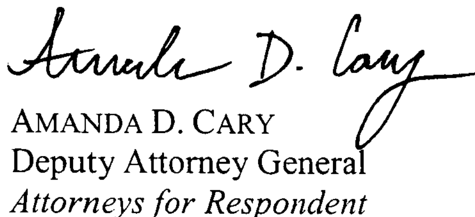

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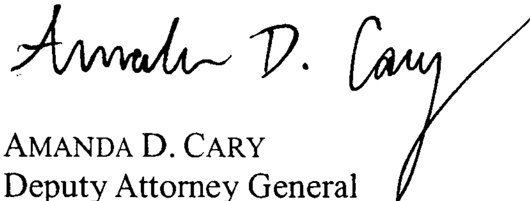
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 41,984 words.

Dated: December 9, 2009

EDMUND G. BROWN JR.
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Harris**
No.: **S081700**

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 December 16, 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 2550 Mariposa Mall, Room 5090, Fresno, CA 93721, addressed as follows:

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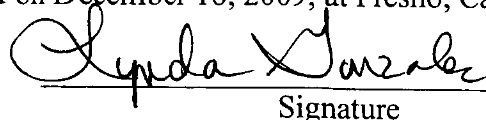
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 16, 2009, at Fresno, California.

Lynda Gonzales
Declarant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