In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Respondent,** **v.** **JOHNNY DUANE MILES,** **Appellant.**	**CAPITAL CASE** Case No. S086234

San Bernardino County Superior Court Case No. FSB09438
Honorable James A. Edwards, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
JULIE L. GARLAND
Senior Assistant Attorney General
RONALD A. JAKOB
Deputy Attorney General
SETH M. FRIEDMAN
Deputy Attorney General
State Bar No. 186239
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-3199
Fax: (619) 645-2191
Email: Seth.Friedman@doj.ca.gov
Attorneys for Respondent

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STATEMENT OF THE CASE

On February 1, 1999, the San Bernardino County District Attorney filed a 19-count information against Miles arising from three separate incidents in February 1992.[1] (14 CT 4012-4024.) The information charged Miles with one count of murder in violation of Penal Code[2] section 187, subdivision (a) (count 1), five counts of forcible rape in violation of section 261, subdivision (a)(2) (counts 2, 8, 10, 16, 17), four counts of second degree robbery in violation of section 211, subdivision (a) (counts 3, 6, 11, 13), one count of commercial burglary in violation of section 459 (count 4), four counts of false imprisonment by violence in violation of section 236 (counts 5, 7, 12, 15), two counts of anal or genital penetration by a foreign object in violation of section 289, subdivision (a) (counts 9, 14), and two counts of being a felon in possession of a firearm in violation of section 12021, subdivision (a)(1) (counts 18, 19). (14 CT 4012-4024.)

As to count 1, the information specially alleged that Miles committed the murder while engaged in the commission of a rape, robbery, or burglary (Pen. Code, § 190.2, subd. (a)(17)(A), (a)(17)(C) & (a)(17)(G)) and that the murder was intentional and involved infliction of torture (Pen. Code, § 190.2, subd. (a)(18)). Regarding counts 6, 7, 11, 12, 13, and 15, the information specially alleged that Miles personally used a firearm (Pen. Code, §§ 1203.06, subd. (a)(1), 12022.5, subd. (a)). With respect to counts 8, 9, 10, 14, 16, and 17, the information specially alleged the use of a firearm (Pen. Code, § 12022.3, subd. (a)). (14 CT 4012-4024.)

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[1] The district attorney initially filed a 35-count information against Miles relating to seven separate incidents, but the trial court granted Miles's motion to sever some of the counts. (5 CT 1312-1338; 13 CT 3620.)

[2] All further statutory references are to the Penal Code unless otherwise noted.

On March 17, 1999, a jury convicted Miles of counts 1 through 9 and 11 through 16 and found true the special allegations relating to those counts.[3] (13 RT 4619-4625; 14 CT 4012-4024; 15 CT 4203-4231.)

After the guilt phase and before the penalty phase, the trial court suspended the proceedings for a competency hearing under section 1368. (13 RT 4749, 4751; 15 CT 4433.) On July 19, 1999, a jury was empaneled to determine Miles's competency and, on August 19, 1999, the jury found Miles competent. (16 CT 4510-4511, 4549; 17 RT 5919-1.)

The penalty phase began on August 30, 1999, in front of the original jury, with two of the original jurors having been excused and replaced by two of the alternates. (16 CT 4599-4600.) On October 4, 1999, the jury reached a verdict of death. (16 CT 4682.)

On February 8, 2000, the trial court denied Miles's motion to modify the death penalty verdict. The trial court sentenced Miles to death on count 1 and to a total determinate term of 60 years on counts 2, 8, 9, 14, and 16. The trial court stayed the sentences on the remaining counts. (16 CT 4711-4714, 4717-4720, 4724-4726.)

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

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[3] Four of the counts (10, 17, 18, and 19) did not go to the jury and the trial court later dismissed them on the prosecutor's motion in the interest of justice. (12 RT 4374-4375; 16 CT 4718.)

STATEMENT OF FACTS

I. GUILT PHASE

In three separate incidents, Miles (1) raped, robbed, tortured, and murdered Nancy Willem, (2) raped and robbed Christine C., and (3) robbed Melvyn Osburn and Carol D. and raped Carol D. His modus operandi was to hunt for victims who were alone after business hours in commercial offices and tie them up with telephone cords. At each scene, Miles left behind telltale blood, semen, and DNA.

A. Prosecution Case

1. Counts 1-5: The Rape, Torture, and Murder of Nancy Willem

a. The Crimes

On the evening of February 4, 1992, Nancy Willem was working alone in the reception area of the Rialto Behavioral Services Clinic. (8 RT 2327; 9 RT 3359, 3361.) When Willem was late coming home that night, her roommate, Kristen Schutz, got worried. (8 RT 2326-2327.) Schutz started calling the clinic around 9:30 p.m. but the lines were busy, which was unusual since the clinic was closed to the public at that hour. (8 RT 2327.)

Eventually, Schutz drove to the clinic. (8 RT 2328.) Schutz let herself into the building through an unlocked back door, went down a hallway, and found the door to the clinic slightly ajar. (8 RT 2329-2330.) The door from the hallway into the clinic had been forced open. (9 RT 3415-3416.)

Schutz entered the clinic and saw that the reception area was in disarray, with open drawers and items scattered around. (8 RT 2330-2331; 9 RT 3390.) There was a pool of blood on the floor with a tooth and some hair in it. (8 RT 2331; 9 RT 3390, 3396, 3418.) Schutz followed a trail of

blood from the reception area to the office of one of the doctors who worked at the clinic. (8 RT 2331-2332.)

Inside the doctor's office, Schutz discovered Willem's naked body lying face-up on the floor between a couch and a coffee table. (8 RT 2332.) There was a sweater wrapped tightly around Willem's neck, a telephone cord tied to her right wrist, and a handwritten note left on her abdomen that read: "Feed the poor. Down with the goverenment [*sic*]." (8 RT 2334-2335; 10 RT 3659.) Willem's ATM card was missing, and was later used to withdraw $1,160 from ATM's in Pomona and Glendora. (8 RT 2335, 2337; 9 RT 3603-3606.)

Upon seeing Willem's body, Schutz immediately tried to call the police, but the phone cords that connected the handsets to the receivers were missing. (8 RT 2333; 9 RT 3416-3417.) Schutz was finally able to locate a cord and call 911. (8 RT 2333.)

The police arrived, confirmed that Willem was dead, and secured the scene. (8 RT 2344; 9 RT 3370.) Blood and other bodily fluids were all over the ransacked office suite. (9 RT 3367, 3390-3400, 3415-3429.) Willem was attacked in the reception area and then dragged to the office where her body was found. (9 RT 3391, 3399, 3418, 3425-3426.) There was semen on the carpet near Willem's body and in her vagina. (9 RT 3426; 10 RT 3765.)

Willem was killed by a combination of multiple blunt force injuries and manual strangulation. (10 RT 3668, 3672-3673, 3681, 3688-3690.) She was savagely beaten before she died. (10 RT 3663, 3666, 3670, 3673, 3678, 3680, 3682, 3684-3685.)

Willem's injuries were as bad as if she had been in a car accident and were very painful for as long as she was conscious. (10 RT 3687-3689.) Externally, Willem had lacerations on her scalp, severe bruising from head to toe, a broken lower jaw, a missing tooth, defensive injuries on her hands

and arms, an apparent cigarette-type burn on her breast, and redness in her vagina. (10 RT 3660-3663.) Internally, Willem had general bruising, subcutaneous hemorrhaging, hemorrhaging in her scalp and brain, hemorrhaging in her eyes, hemorrhaging in her neck, a broken hyoid bone and related injuries in her neck caused by fighting the strangulation, eight broken ribs, bruised lungs, a punctured left lung, a bruised heart, and a laceration of her liver. (10 RT 3663-3680.)

b. The Physical Evidence Implicating Miles

The police determined that the non-victim blood and semen collected at the crime scene came from a type AB secretor (someone whose blood type is secreted into bodily fluids besides blood) who was probably of African-American heritage.[4] (10 RT 3767-3769, 3773-3774, 3787.) Miles is African-American, has type AB blood, and is a secretor.[5] (9 RT 3631-3632; 10 RT 3803, 3807.)

The police compared a sample of Miles's blood to the non-victim blood and semen from the crime scene. (10 RT 3798-3799, 3803.) A serological analysis revealed that 12 genetic markers in Miles's blood matched 12 genetic markers in the crime-scene blood, which would be expected in only 1 in 10 million African-American people. (10 RT 3804.) Genetic markers in Miles's blood also matched genetic markers in the crime-scene semen, which would be expected in only 3 in 1 million African-American men. (10 RT 3787, 3804.) Finally, Miles's genetic markers matched the combined genetic markers from the crime-scene blood

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[4] Willem was a type A non-secretor. (10 RT 3768.)

[5] On June 16, 1992, Miles was arrested in Torrance in connection with a robbery, rape, and kidnapping that are not the subject of this appeal. (16 CT 4743-4744.) Following Miles's arrest, the police obtained a sample of his blood. (11 RT 4168.)

and semen – i.e., assuming the crime-scene blood and semen came from the same person – which would be expected in just 1 in 333 million African-American males.[6] (10 RT 3806-3807; 11 RT 3949-3951.)

The police also performed a DNA analysis of the crime-scene samples and Miles's blood. (11 RT 3990, 3992-3993, 3999.) Miles's DNA profile matched the crime-scene DNA profile. (11 RT 4023, 4026.) Only 1 in 180-280 million African-American people would be expected to have the DNA profile from the crime scene.[7] (11 RT 4034-4035, 4037- 4040.)

Miles's connection to the crime did not stop with the genetic evidence. There was also the "Down with the goverenment [*sic*]" note found on Willem's body. The police compared the note to known samples of Miles's handwriting. (11 RT 4179.) There were similarities between the handwriting on the note and Miles's handwriting samples such that Miles could not be eliminated as the author of the note. (11 RT 4180-4181.) Moreover, Miles refused to comply with a court order to provide additional handwriting samples that could aid in determining whether he wrote the note. (11 RT 4184-4186, 4203.)

Lastly, the police discovered a handwritten document in Miles's truck when he was arrested. (11 RT 4213.) The document appeared to be poetry

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[6] Although 12 genetic markers could be determined from the crime-scene blood sample, two more were indeterminable. The semen sample was used to fill in the missing two markers from the blood sample, for a combined total of 14 genetic markers. Miles's blood matched each of the 14 markers.

[7] Miles tries to denigrate the sheriff's crime lab, where the 1992 DNA analysis was done, based on a 1995 American Society of Crime Lab Directors accreditation report (Exhibit 148) that was not admitted into evidence. (AOB 20-21; 10 RT 3894; 11 RT 4208, 4220.) Accreditation is a voluntary, not mandatory, process and the crime lab ultimately received the accreditation (10 RT 3894, 3934.)

or rap lyrics and, like the note left on Willem's body, misspelled the word government. (11 RT 4214; 12 RT 4224.) In particular, the document read, "Enough of this belittlement," and, "We'll be wiped out by the governement [*sic*]." (11 RT 4214.)

2. Counts 6-11: The Rape and Robbery of Christine C.

a. The Crimes

On February 25, 1992, Christine C. was working at the Desert Communities United Way in Victorville. (9 RT 3445.) She was in the office alone around 6:30 p.m. (9 RT 3445-3446.)

Christine heard crashing sounds in the building. (9 RT 3446.) Miles forced his way through the door to the office. (9 RT 3446-3447, 3475-3476.) He was wearing a ski mask and holding a silver handgun in his left hand. (9 RT 3447-3449.) Christine knew from Miles's hands that he was African-American. (9 RT 3453.) She could tell that he was over six feet tall, had a slim build, and was in his twenties.[8] (9 RT 3467-3468.)

Miles asked, "Where's the money?" (9 RT 3449.) Christine gave him the $10 that she had in her purse and explained that there was no other money because the business was a charity. (9 RT 3449-3451.) Miles told Christine to give him her ATM card along with the code, but Christine said that she did not know the code. (9 RT 3461.)

Next, Miles ordered Christine to lie down on the floor and be quiet, which she did. (9 RT 3451.) He rummaged through the office for a while before making Christine move to a different room. (9 RT 3452.) Then, he tied Christine's arms behind her back with a telephone cord and took her

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[8] Miles is about 6'6" tall, and was 25 years old and weighed approximately 210 pounds in early 1992. (9 RT 3631-3632; 18 RT 6158-6159; 16 CT 4744-4745.)

ring, watch, and earrings. (9 RT 3452-3454.) He told her, "Don't look at me." (9 RT 3452-3453.)

After rooting around the office some more, Miles came back, pulled up Christine's skirt, and pulled down her pantyhose. (9 RT 3455.) When she asked what he was doing, he said, "Be quiet. You're going to enjoy this." (9 RT 3455.) He penetrated Christine's vagina with his fingers and then his penis until he ejaculated on her thighs. (9 RT 3458-3459.) All of the penetration was from behind, with Christine lying on her stomach. (9 RT 3467.)

When Miles was done, he wiped off Christine's thighs, pulled her skirt down, and used telephone cords from the office to bind her feet together and tie her to the leg of a conference table. (9 RT 3460-3461, 3465, 3475.) Then, he left. (9 RT 3466.) It took some time for Christine to untie herself but, once she did, she called 911. (9 RT 3466.)

b. The Physical Evidence Implicating Miles

The police analyzed semen left on napkins at the crime scene. (10 RT 3791-3792.) The resulting serological profile matched the profile from the Willem crime scene, which matched the genetic markers in Miles's blood. (10 RT 3794, 3805.) Again, this profile would be expected in only 3 in 1 million African-American men. (10 RT 3794, 3805.)

Likewise, the police analyzed the non-victim crime-scene DNA and compared it to Miles's DNA. (11 RT 3990, 3997, 3999.) Miles's DNA matched the crime-scene DNA, which, in turn matched the Willem crime-scene DNA. (11 RT 4026-4029.) Just 1 in 180 million African-American people would be expected to have the DNA profile from the crime scene. (11 RT 4040.)

3. Counts 12-16: The Robbery of Melvin Osburn and the Robbery and Rape of Carol D.

a. The Crimes

At about 7:00 p.m. on February 26, 1992, Melvin Osburn, a family therapist, was alone in the reception area of his office suite in San Bernardino. (9 RT 3514-3515.) Miles, wearing a ski mask, came in holding a silver handgun. (9 RT 3515-3516, 3526, 3536-3537.) Osburn could discern that Miles was in his 20's and at least 6'1" tall. (9 RT 3517, 3526, 3537.)

Miles told Osburn to get on the floor and not to look at him. (9 RT 3518.) He took Osburn's wallet and repeated, "Don't look at me." (9 RT 3519-3520.) He removed $100 from the wallet and asked Osburn about his ATM card, but Osburn said it was maxed out. (9 RT 3520, 3522.) Then, he tied Osburn's hands and feet with telephone cords from the office, and forced a ring off of Osburn's finger. (9 RT 3520, 3524-3525, 3531.)

Miles rummaged around the office suite. (9 RT 3520-3521.) He bragged about being on parole and kept telling Osburn, "Don't look at me or I'll kill you." (9 RT 3519, 3521, 3526-3527.) It seemed like he was getting ready to leave when Osburn's next client, Carole D., walked in. (9 RT 3523, 3536.)

Miles took Carol into one of the offices. (9 RT 3523, 3537-3538.) He asked if she had an ATM card (she did not), ordered her to get down on the floor, and told her not to look at him. (9 RT 3538-3539, 3545.) He took Carol's wedding ring. (9 RT 3546.) Then, he tied her up with her purse strap and some telephone cords. (9 RT 3539-3541.)

Miles pulled Carol's pants and underwear down, picked her up, and laid her over an ottoman in the office. (9 RT 3541-3542.) From behind, he penetrated Carol's vagina with his fingers and his penis, causing significant

trauma. (9 RT 3542-3544, 3560.) When he was finished, he wiped her off and pulled her pants up. (9 RT 3544-3545.)

Throughout his assault on Carol, Miles expressed anger at society, the court system, and the way life was treating him. (9 RT 3547.) Nevertheless, he did not raise his voice. (9 RT 3547.)

After raping Carol, Miles took Osburn's keys, left the suite, and drove away in Osburn's car. (9 RT 3524, 3529.) He abandoned the car in the parking lot of an apartment complex about 2½ blocks away. (9 RT 3577-3580.)

Osburn freed himself and Carol. (9 RT 3524-3525, 3548.) Osburn could not call for help because the phone cords were removed, so he set off the office's burglar alarm. (9 RT 3525.) When Osburn's next client arrived, he asked her to call the police and the police responded. (9 RT 3525.)

b. The Physical Evidence Implicating Miles

The police analyzed semen taken from Carol's underwear. (10 RT 3795-3796.) Although the sample yielded less serological information than the Willem and Christine C. samples, the determinable genetic markers matched those from the other crime scenes as well as those in Miles's blood, and would be expected in 1 in 8,500 African-American males. (10 RT 3796-3797, 3805.)

The police also conducted a DNA comparison between the non-victim crime scene DNA and Miles's DNA. (11 RT 3991, 3997, 3999.) While there was less testable DNA from the Carol D. scene, the detectable DNA profile matched both Miles's DNA and the DNA from the Willem and Christine C. crimes. (11 RT 4027-4029, 4152.) The police concluded that the partial DNA profile from the crime scene would be expected in 1 in 920 African-Americans. (11 RT 4040-4042.)

B. Defense Case

Miles called a pathologist who testified that he could not tell whether all of Willem's injuries were inflicted before she died and that it was impossible for him to say that she was tortured. (12 RT 4237-4245.) A research methodology expert told the jury about the role of error rates in statistical analysis of DNA matches. (12 RT 4281-4328.) Finally, one of the investigating detectives confirmed that the police did not find any fingerprints matching Miles's at the crime scenes and that, during residence searches that occurred several months after the incidents, the police did not recover any of the property stolen from the crime scenes or any incriminating clothing belonging to Miles. (12 RT 4357-4361.)

II. PENALTY PHASE

A. Prosecution Case

1. Miles's 1992 Violent Crime Spree

The crimes for which Miles was convicted in this case were part of an overall rampage that he went on during the first half of 1992. The prosecution presented evidence of five other instances of Miles's violent criminal behavior before he was finally caught in June 1992.

a. The Robbery of Paula Yenerall at Gunpoint

At about 7:00 p.m. on January 6, 1992, Paula Yenerall was working alone in an office in Rialto. (17 RT 5976-5977.) Miles broke into a reception area just outside the office. (17 RT 5977-5978.) He was wearing a stocking-type cap, a jacket, and gloves. (17 RT 5978-5979, 5983.)

Miles saw Yenerall reach for the telephone and told her, "Stay away from the fucking phone." (17 RT 5979.) He climbed through a window opening that separated the reception area from the office and held a chrome, semi-automatic handgun to Yenerall's head. (17 RT 5979-5980.) He demanded whatever money was in the office, but Yenerall told him there

was no money. (17 RT 5979-5980.) So Miles asked Yenerall if she had any money, which she did in a purse at her desk. (17 RT 5980.)

Miles dragged Yenerall by her arm over to her desk to get the money. (17 RT 5980-5981.) He repeatedly said, "Don't look at me, bitch." (17 RT 5981.) Miles also told Yenerall, "I'm a murderer and I'll kill you, too." (17 RT 5981.) He was calm and soft-spoken. (17 RT 5988.)

Miles took $1,200 from Yenerall's purse. (17 RT 5981-5982.) He also pulled two rings off of her fingers and yanked a gold chain from her neck. (17 RT 5982.) Then, Miles tied Yenerall's hands behind her back with the telephone cord and forced her under the desk. (17 RT 5982-5983.) Miles told Yenerall to stay there and he left the office. (17 RT 5983.)

b. The Robbery of Janet Heynen at Gunpoint

Around 8:00 p.m. on January 21, 1992, Janet Heynen was working as a receptionist in an office in Upland. (17 RT 5993.) She noticed Miles leaning into the reception window from the patient waiting area. (17 RT 5994.) He was wearing a brown beanie cap, a jacket, and gloves. (17 RT 5995-5996.)

Miles pointed a chrome handgun in Heynen's face, told her not to look at him, and demanded money. (17 RT 5995-5996, 5998.) Heynen gave Miles $90 from her wallet. (17 RT 5996.)

Next, Miles told Heynen to sit down while he went to a back office. (17 RT 5998-5999.) After a few minutes, he returned from the back office, told Heynen not to call the police, and left. (17 RT 5999.) Miles was calm throughout the incident. (17 RT 6002.)

c. The Robberies of Paul Crawford, Mary Crawford, and John Kendrick at Gunpoint

Accountant John Kendrick was in his Ontario office with two clients (Paul and Mary Crawford) at approximately 7:00 p.m. on February 19,

1992. (18 RT 6030.) Miles entered the office wearing a gray stocking cap and pointed a gun at Kendrick. (18 RT 6031-6034.)

Miles demanded money from all three of them. (18 RT 6034-6035.) Kendrick gave Miles between $200 and $300, Paul Crawford gave him $300, and Mary Crawford gave him $100. (18 RT 6034-6035.) Miles, who was calm the whole time, repeatedly said, "Don't look at me, man." (18 RT 6035-6036, 6042.) He told them not to call the police for 30 minutes and left. (18 RT 6037.)

d. The Robberies of Arnold and Sharyn Andersen

On February 21, 1992, Arnold and Sharyn Andersen were working alone in their San Bernardino insurance business office around 7:30 p.m. (18 RT 6067-6068.) They heard crashing sounds, and then Miles appeared through the back door. (18 RT 6069, 6079, 6081-6083, 6087.) Miles pointed a chrome, automatic handgun in Arnold's face.[9] (18 RT 6070.) Miles was wearing a beanie, was calm, and repeatedly told the Andersens not to look at him. (18 RT 6070, 6076.)

Miles demanded money but Arnold told him he did not have any. (18 RT 6071.) Miles forced Arnold to lie down and took a few dollars from Arnold's wallet. (18 RT 6071.) He did the same thing with Sharyn, taking two $5 bills from her purse. (18 RT 6072, 6083-6084.)

Arnold was getting worried about what Miles might do, so he told Miles he might have some more money in an office down the hall. (18 RT 6072-6073.) Despite Arnold's efforts to hide it, Miles saw that Arnold had a money clip with $1,200, which Miles took. (18 RT 6073-6074.) That seemed to satisfy Miles and he left. (18 RT 6074.)

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[9] Respondent refers to the Andersens by their first names to avoid confusion.

e. The Rape and Robbery of Bridget E. and the Beating and Forced Oral Copulation of Steve H.

About 5:30 p.m. on June 16, 1992, Bridget E. and her boss, Steve H., were working in an appraisal office in Torrance. (18 RT 6045-6046.) Miles came into the office wearing a red bandana over his nose and mouth and pointed a gun at Bridget and Steve. (18 RT 6047-6048.) He repeatedly told both Bridget and Steve, "Don't look at me, man. Don't look at me." (18 RT 6050-6051, 6060.)

Miles demanded money from Bridget's purse, which she gave him. (18 RT 6049-6050.) He searched throughout the office for more money. (18 RT 6051-6052.)

Miles came back and tied Steve's hands and feet with telephone cords and computer cords. (18 RT 6053-6054.) At some point, Miles likewise bound Bridget. (18 RT 6059-6060.)

Miles unzipped Bridget's pants, kicked Steve in the ribs multiple times, and then ordered Bridget to orally copulate Steve. (18 RT 6055.) Miles was pointing the gun at the back of Bridget's head and in her buttocks area as well as at Steve's chest. (18 RT 6056-6057.) Bridget complied with Miles's command and orally copulated Steve. (18 RT 6057.)

While Bridget was orally copulating Steve, Miles penetrated her, first with his fingers and then with his penis. (18 RT 6058-6059.) After a few minutes, Miles stopped raping Bridget but told her to continue orally copulating Steve. (18 RT 6059-6060.) Eventually, Miles left. (18 RT 6060.) Bridget was able to free herself and Steve and then call police. (18 RT 6060-6061.)

2. Miles's Prior Felony Convictions

Miles had 14 prior felony convictions for crimes he committed in 1984 (13 first degree residential burglaries plus 1 second degree robbery). (18 RT 6100-6101.)

3. Victim Impact Testimony

a. The Willem Family

Willem's father (Philip), mother (Charlene), and younger sister (Patricia) all testified.[10] (17 RT 6021; 18 RT 6106-6107.) Nancy was the oldest of six children. (17 RT 6022.) She was very close to her parents, and Charlene considered Nancy not just a daughter but also a friend. (17 RT 6023-6024; 18 RT 6107-6108.)

Nancy was even-tempered, honest, straightforward, faithful, and had a good sense of humor. (17 RT 6022; 18 RT 6109.) She had a strong belief in justice, spoke out against racism, was active in women's rights, and did her best to make the world a better place. (17 RT 6022; 18 RT 6104-6105, 6109.)

Nancy was also an accomplished singer and guitar player. (17 RT (17 RT 6023.) She had been teaching Charlene to play guitar for a couple of years. (18 RT 6108.) Nancy sang at the 1990 wedding of one of her younger sisters, a videotape of which was played for the jury. (18 RT 6109-6110.)

Besides music, Nancy liked quiet weekends in the mountains with her dog, going to movies, board games, tennis and shopping for books in small, out-of-the-way stores. (18 RT 6105, 6109.)

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[10] In this section, respondent refers to the Willem family members by their first names to avoid confusion.

Nancy provided inspiration and guidance to Patricia, who was 13 years Nancy's junior. (18 RT 6103.) Patricia had two young children for whom Nancy was a "great" aunt and always there. (18 RT 6104.) Patricia said the hardest part about Nancy's murder was that she would not be able to see Patricia's children grow up. (18 RT 6105.)

Nancy was the "catalyst of the family" and the family was not as close since her murder. (17 RT 6024.) The family missed Nancy's guidance and Philip lamented that the family was never able to say goodbye to her. (17 RT 6024; 18 RT 6105.)

b. Bridget E.

Bridget E. was three-to-four months pregnant when Miles raped her and she repeatedly told him so throughout the incident. (18 RT 6056, 6061.) She was concerned about contracting a sexually transmitted disease and passing it on to the baby and, it turned out, that she got chlamydia. (18 RT 6065.) Also, Bridget was unable to return to the appraisal business, suffered nightmares, and became more suspicious of people after the rape. (18 RT 6065-6066.)

B. Defense Case

1. Miles's Testimony

Miles testified against the advice of his counsel. (18 RT 6113, 6128.) He refused to take responsibility for any of his crimes. (18 RT 6168.)

Miles began his testimony with a story about confronting two individuals who had supposedly killed his cousin and a friend. (18 RT 6129-6130.) He said the second individual, whom he had met in prison, told him to testify about "Wilhelmena's murder." (18 RT 6130.) Miles claimed that he had been suffering from hallucinations since he was 15 years old and that "ill angels" were controlling him when he killed Willem

and committed the other crimes. (18 RT 6131-6134, 6139, 6151, 6153, 6160-6161, 6166-6167, 6169.)

Miles explained that "Wilhelmena" – i.e., Willem – had come to him and revealed what really happened the night of her murder. (18 RT 6131-6133.) Wilhelmena told Miles that the crime scene was altered to make it look worse than it really was. (18 RT 6133-6134.) According to Miles, Willem was beaten in the head with an object and raped, but not strangled. (18 RT 6133.)

Miles said the ill angels' voices in his head told him to tie Willem up and rape her. (18 RT 6133-6136.) He beat, kicked, and stomped Willem because the voices jumped out of his head and onto her body and he was trying to get them to stop. (18 RT 6136-6137, 6158-6159.) Miles remembered Willem screaming while he did this. (18 RT 6136.) The voices then took over the left side of Miles's body and forced him to write the "Down with the goverenment [*sic*]" note. (18 RT 6137.)

Finally, Miles described Wilhelmena as a "good angel" who has helped him understand his situation. (18 RT 6139-6140.) He also believed that Wilhelmena intervened to save the lives of Carol D. and Christine C. (18 RT 6140, 6150-6151, 6180.)

2. Evidence Regarding Miles's Mental Health

Apart from his own testimony, Miles's mitigation evidence focused on his purported mental health issues. (18 RT 6114-6127.) Dr. Joseph Lantz opined that Miles had a low I.Q. and had long-suffered from schizophrenia. (18 RT 6198-6204, 6218-6220, 6233-6234.) Dr. Richard Dudley believed that Miles suffered from schizo-affective disorder. (19 RT 6353.) Dr. Joseph Wu testified that a PET scan of Miles's brain showed defects indicative of schizophrenia. (18 RT 6310-6314, 6331.) Dr. Ernie Meth said that a SPECT scan of Miles's brain revealed abnormalities

consistent with the abnormalities that Dr. Wu found in the PET scan. (19 RT 6453.)

Miles also called non-experts to testify about what he was like before and around the time of his 1992 crimes. Miles's childhood friend, the friend's mother, and the friend's aunt testified that Miles was always mild-mannered and gentle despite having a rough home life. (19 RT 6578-6584, 6599-6602, 6613-6616.) They said that Miles began acting strangely around the age of 16 after he had foot surgery, namely, he was angry, complained of headaches, was worried that people were out to get him, and claimed voices were telling him to do something evil. (19 RT 6585-6591, 6603-6608, 6620-6620.)

Miles's former girlfriend claimed that Miles lived a normal life with her and her children in Atlanta during the late 1980's until he left for work one day and never returned. (19 RT 6535-6543.) A social worker testified that Miles had sought psychiatric help in April 1992. (19 RT 6465-6468.)

Lastly, a retired correctional officer told the jury that, should Miles be sentenced to life without parole, the Department of Corrections could safely house him. (19 RT 6491, 6512-6513.)

C. Prosecution Rebuttal[11]

The prosecution called Deputy Jonathan Billings, who worked in the jail where Miles was housed during the trial. (20 RT 6642-6643.) Deputy Billings made a videotape of Miles behavior in jail. (20 RT 6643-6644.) On the tape, which was shown to the jury, Miles can be seen watching television, playing chess, and acting normally. (20 RT 6644-6651.)

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[11] Because of time constraints and the fear of losing jurors, the trial court precluded the prosecution from putting on most of its intended rebuttal case. (19 RT 6562-6577; 16 CT 4636, 4638.) But the trial court did permit the prosecution to present some rebuttal evidence.

Deputy Billings explained that this was a representative example of Miles's behavior. (20 RT 6647, 6651.)

The prosecution also called Dr. Rajeesh Patel, a lead psychiatrist of jail services for San Bernardino County. (20 RT 6672-6673.) Dr. Patel evaluated Miles in March 1998 after Miles, who was then incarcerated, claimed he was suicidal. (20 RT 6675-6676, 6681.) Dr. Patel found that Miles was manipulative and malingering mental illness to avoid being housed in an undesirable area of the jail. (20 RT 6683, 6687-6694.)

ARGUMENT

I. THERE WAS NO *BATSON/WHEELER* ERROR

Miles contends that the prosecution unconstitutionally exercised its peremptory challenges when it struck two prospective African-American jurors, SG and KC. (AOB 45-76.) He argues that SG and KC were great prospective jurors from the prosecution's perspective and race could have been the only reason why the prosecutor challenged them. (AOB 46-47, 55-56, 65.) In particular, Miles claims that reversal is required because the prosecutor's race-neutral reasons for striking these prospective jurors were a pretext for discrimination. (AOB 55.) The record, however, does not support Miles's claim.

A. Proceedings Below

Following the trial court's excusal of potential jurors for hardship reasons and death qualification of the remaining venire under *Hovey v. Superior Court* (1980) 28 Cal.3d 1, there were 70 potential jurors left. (6 RT 1668, 1684.) The clerk randomly selected 12 prospective jurors to sit in

the jury box. (6 RT 1685.) Among them were KC and SG, both of whom were African-American men. (6 RT 1685; 21 JQ 5975; 24 JQ 6825.[12])

After the prosecutor and defense counsel conducted their for-cause inquiries of the 12 prospective jurors in the box, the prosecutor did not challenge any of them for cause. (6 RT 1692- 1702.) Defense counsel successfully challenged an African-American juror (not SG or KC) for cause. (6 RT 1702-1703; 20 JQ 5502.)

The parties then moved on to the exercise of peremptory challenges. The prosecutor used his first peremptory challenge on a Hispanic woman (6 RT 1704; 23 JQ 6417), his second peremptory on KC (6 RT 1705), his third peremptory on a white woman (6 RT 1707; 16 JQ 4415), his fourth peremptory on SG (6 RT 1708), his fifth peremptory on a white man (6 RT 1709; 22 JQ 6179), and his sixth peremptory on an African-American woman (prospective juror IB) (6 RT 1718; 19 JQ 5333).

At this point, defense counsel made a motion under *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Batson/Wheeler*).[13] The trial court found that Miles had made out a prima facie case. (6 RT 1720.) The court indicated that it understood why the prosecutor struck IB based on her statements during the death qualification portion of jury selection. (6 RT 1720.) But the trial court required the prosecutor to explain his reasons for striking KC and SG. (6 RT 1720-1721.)

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[12] JQ refers to the volume of the clerk's transcript containing the jury questionnaires.

[13] Despite Miles's contention that SG and KC were excellent jurors for the prosecution, his defense counsel passed when he had the chance to peremptorily challenge them. (6 RT 1705, 1707, 1708.)

The prosecutor articulated several reasons why he challenged SG. First, on his jury questionnaire, SG wrote in response to a question regarding the burden of proof beyond a reasonable doubt, "If I have any ~~doubt~~ feeling that he might not have done it, hes [*sic*] innocent." (6 RT 1720-172; 21 JQ 5994.) Second, SG also wrote in his jury questionnaire that "I like my opinion over other peoples [*sic*]." (6 RT 1720; 21 JQ 5982.) Third, SG indicated that he was not upset with the jury's verdict in the O.J. Simpson case. (6 RT 1721; 21 JQ 5993.)

The prosecutor was most uneasy about the questionnaire response where SG affirmatively crossed out the word "doubt" and wrote instead that if he had "any *feeling* that [Miles] might not have done it, [Miles's] innocent." (21 JQ 5994, italics added.) The prosecutor was so concerned that he specifically questioned SG about this in voir dire, during which SG attempted to retract his statement. (6 RT 1699-1700.) Nevertheless, the prosecutor was worried that SG "was going to be basically basing [his decision] on a hunch, or a feeling, which was, as the presenter of evidence, I'm powerless to overcome." (6 RT 1721.)

Similarly, the prosecutor gave three reasons for his peremptory challenge to KC. First, KC compared DNA evidence to a polygraph. (6 RT 1720; 24 JQ 6842). Second, KC gave tentative responses to questions about the death penalty, including indication of a moral, philosophical, or religious objection to the death penalty because "God should decide life or death," claiming that his religion's view on the death penalty, which he agreed with, was "thou should not kill," answering that the death penalty law was unfair, stating that "I like to decide who could stay in society but not who stays on earth," and responding that he would be reluctant to personally sign the death-sentence verdict form and face the defendant with the verdict. (6 RT 1720; 24 JQ 6849-6851.) Third, KC was not upset by the O.J. Simpson verdict, explaining, "To[o] hard to believe one man did it

all, I believe biases created a lot of the circumstantial evidence." (6 RT 1720; 24 JQ 6843.)

After hearing the prosecutor's reasons, the trial court concluded that "I will make a finding that there have been valid reasons to justify excusing those ... prospective jurors pursuant to a peremptory challenge" and denied defense counsel's motion.[14] (6 RT 1722-1723.)

B. Applicable Law and Standard of Review

The essence of a *Batson/Wheeler* motion is that the prosecution's use of peremptory challenges to remove prospective jurors based on group bias, such as race or ethnicity, violates a defendant's right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution and his right to equal protection under the Fourteenth Amendment to the United States Constitution. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1319.)

A *Batson/Wheeler* motion triggers a three-step inquiry. First, the defendant must make out a prima facie case of discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. (*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129].) Second, once the defendant has made out a prima facie case, the burden shifts to the prosecution to adequately explain the racial exclusion by offering permissible, race-neutral justifications for the strikes. (*Ibid.*) Third, if a race-neutral explanation is

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[14] Later, the prosecutor used a peremptory challenge on an African-American woman, MB, after she stated, "I don't believe in the death penalty," and after the prosecutor had unsuccessfully challenged her for cause. (6 RT 1734-1740; 24 JQ 6757.) Defense counsel made another *Batson/Wheeler* motion as to this prospective juror, which the trial court denied based on the prospective juror's statements about the death penalty. (6 RT 1740-1741.) Miles's *Batson/Wheeler* argument does not pertain to either IB or MB. (AOB 55, fn. 9.)

tendered, the trial court must decide whether the defendant has proved purposeful racial discrimination. (*Ibid.*; see also *People v. Thomas* (2011) 51 Cal.4th 449, 473.) The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613.)

While the trial court must make a sincere and reasoned effort at the third stage to evaluate the nondiscriminatory justifications offered, the trial court is not required to explain on the record its ruling on a *Batson/Wheeler* motion. (*People v. Vines* (2011) 51 Cal.4th 830, 850.) When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. (*Ibid.*; see also *People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1054 [trial court's "terse ruling" on *Batson/Wheeler* motion does mean the trial court failed to make a sincere and reasoned effort to assess the prosecutor's reasons].)

Review of a trial court's denial of a *Batson/Wheeler* motion is deferential, examining only whether substantial evidence supports its conclusions. (*People v. Lenix, supra*, 44 Cal.4th at p. 613.) When, as here, the trial court finds that the defendant established a prima facie case and requires the prosecutor to explain his reasons for the challenges, the sole issue on appeal is the trial court's performance at the third stage of the *Batson/Wheeler* inquiry. (*Id.* at p. 613, fn. 8.)

The critical question at the third stage is the persuasiveness of the prosecutor's justification for his peremptory challenges. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 338-339 [123 S.Ct. 1029, 154 L.Ed.2d 931].) "We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses." (*People v. Manibusan* (2013) 58 Cal.4th 40, 76, internal quotation marks omitted.)

A prosecutor asked to explain his or her conduct must provide a clear and reasonably specific explanation of legitimate reasons for exercising the challenges. (*Batson, supra*, 476 U.S. at p. 98, fn. 20.) The justification need not support a challenge for cause and even a trivial reason, if genuine and neutral, will suffice. (*People v. Lenix, supra*, 44 Cal.4th at p. 613.) Indeed, a prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. (*Ibid.*; see also *People v. Reynoso* (2003) 31 Cal.4th 903, 924 ["The proper focus of a *Batson/Wheeler* inquiry, of course, is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of those reasons"].)

Resolution of the third stage usually comes down to whether the trial court finds the prosecutor's race-neutral explanation to be credible. (*Miller-El v. Cockrell, supra*, 537 U.S. at p. 339.) Credibility can be measured by, among other factors, the prosecutor's demeanor, by how reasonable or how improbable the explanations are, and by whether the proffered rationale has some basis in accepted trial strategy. (*Ibid.*)

Thus, in the typical peremptory challenge inquiry, the decisive question will be whether the prosecutor's race-neutral explanation for a peremptory challenge should be believed. (*People v. Riccardi* (2012) 54 Cal.4th 758, 787.) There will rarely be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. (*Ibid.*) As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province. (*Ibid.*, see also *Miller-El v. Cockrell, supra*, 537 U.S. at p. 339.)

Consequently, this Court reviews a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges with great restraint. (*People v. Thomas* (2011) 51

Cal.4th 449, 474.) Because the trial court is well positioned to ascertain the credibility of the prosecutor's explanations and a reviewing court only has transcripts at its disposal, the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact accorded great deference on appeal and will not be overturned unless clearly erroneous. (*Miller-El v. Cockrell, supra*, 537 U.S. at pp. 339-340; *People v. Lenix, supra*, 44 Cal.4th at p. 627.)

Finally, part and parcel of Miles's argument is a comparative analysis of the prospective jurors that the prosecutor challenged versus some of those that he did not. (AOB 53; see *Miller-El v. Dretke* (2005) 545 U.S. 231, 241 [125 S.Ct. 2317, 162 L.Ed.2d 196].) But "comparative juror analysis on a cold appellate record has inherent limitations." (*People v. Riccardi, supra*, 54 Cal.4th at p. 788, internal quotation marks omitted.) Therefore, comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination. (*People v. Lenix, supra*, 44 Cal.4th at p. 622.)

C. There was Substantial Evidence to Support the Trial Court's Finding that the Prosecutor's Reasons for Challenging SG Were Valid

The trial court was plainly concerned about the prosecutor's challenges to SG and KC, telling the prosecutor, "I don't understand as to [KC] and as to [SG]. You'll have to explain those." (6 RT 1720.) The trial court's initial skepticism indicates that it made a sincere and reasoned effort to evaluate the nondiscriminatory justifications that the prosecutor offered. (*People v. Williams* (2013) 58 Cal.4th 197, 283-284.)[15]

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[15] Even if the trial court's findings are not given deference, this Court must review the record to resolve the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race. (*People v. Avila* (2006) 38 Cal.4th 491, 554.)

SG's suggestion that he may decide that Miles was innocent based on a "feeling that he might not have done it" was alarming enough on its own. (21 JQ 5994.) But it was compounded by SG's statement that he would "like my opinion over other peoples [*sic*]." (21 JQ 5982.) Thus, the prosecutor was faced with a prospective juror who might vote not guilty because of a "feeling" and then refuse to budge in the face of what other jurors might think based on the actual evidence.

Then, there was SG's indicated comfort with the O.J. Simpson verdict. (21 JQ 5993.) This case had a lot of similarities to the O.J. Simpson case. In particular, and especially as to murder victim Willem, the prosecutor relied entirely on blood and DNA analysis performed by the police and presented through police witnesses. The prosecutor was justifiably concerned about a prospective juror who was not troubled by the O.J. Simpson verdict rejecting this very type of evidence. (See *People v. Montes* (2014) 58 Cal.4th 809, 851; *People v. Vines, supra*, 51 Cal.4th at p. 851; *People v. Mills* (2010) 48 Cal.4th 158, 184.)

Arguing to the contrary, Miles attempts a comparative analysis of SG and other prospective jurors whom the prosecutor did not challenge. (AOB 57-64.) He may raise this now even though he did not raise it below. (*People v. Lenix, supra*, 44 Cal.4th at p. 622.)

Nevertheless, "a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial." (*Snyder v. Louisiana* (2008) 552 U.S. 472, 483 [128 S.Ct. 1203, 170 L.Ed.2d 175].) In that situation, the reviewing court should be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable. (*Ibid.*) Accordingly, defendants who wait until appeal to argue comparative juror analysis must be aware that such evidence will be considered in view

of the deference accorded the trial court's ultimate finding of no discriminatory intent. (*People v. Lenix, supra*, 44 Cal.4th at p. 624.)

Here, Miles's comparative analysis fails right out of the gate because Miles cites no other prospective juror who stated that he might decide that Miles was innocent based on a "feeling," which is what troubled the prosecutor most about SG. The best Miles can do is Juror 5, who said that she would "try to follow instructions." (AOB 60; 5 JQ 1334.) A prospective juror saying she would try to follow instructions is a far cry from another prospective juror who suggests that he will not follow instructions and instead decide based on a "feeling." That is an apples-to-oranges comparison with no probative value. (See *People v. DeHoyos* (2013) 57 Cal.4th 79, 107 ["In order for a comparison to be probative, jurors need not be identical in all respects [citation], but they must be materially similar in the respects significant to the prosecutor's stated basis for the challenge"]; *People v. Lewis* (2008) 43 Cal.4th 415, 480.)

As to SG's view of the O.J. Simpson verdict, Miles takes the prosecutor to task for telling the trial court, "If you'll notice across the board, I've excused jurors I believe of Hispanic origin and Caucasian origin, and the common denominator, essentially, is that they were not, were not upset by the O.J. Simpson verdict, which was a DNA, circumstantial case[] [a]nd I think those, those raise significant concerns in my mind as a guilt phase juror and the type of case that I'm dealing with."[16] (6 RT 1721.) Miles contends that this "*is not even close to what the record shows.*" (AOB 57, original italics.)

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[16] Miles misreads the record as the prosecutor having stated that "he had struck *all* prospective jurors who were not upset with the O.J. Simpson verdict, regardless of skin color." (AOB 57, italics added; see also AOB 63.) That is not what the prosecutor said.

In fact, the prosecutor's statement was totally consistent with the record. (*People v. Lenix, supra*, 44 Cal.4th at p. 624 [trial court's finding is reviewed on the record as it stands at the time the *Batson/Wheeling* ruling is made].) The first prospective juror that the prosecutor peremptorily challenged was a Hispanic woman who was not upset with the O.J. Simpson verdict. (23 JQ 6435.) The fifth prospective juror the prosecutor challenged was a white man who was not upset with the O.J. Simpson verdict. (22 JQ 6197.) Thus, just as the prosecutor told the trial court, he had peremptorily challenged jurors, regardless of race, based on the "common denominator" of not being upset by the O.J. Simpson verdict. (6 RT 1721.) Moreover, the prosecutor later peremptorily challenged another prospective juror, a Hispanic man, who was not upset with the O.J. Simpson verdict. (6 RT 1748; 7 JQ 1627, 1645.)

Nevertheless, Miles contends that, because the prosecutor did not peremptorily challenge two other prospective jurors – Alternate Juror 5 (a white man) and Juror 6 (a Hispanic woman) – who were not upset by the O.J. Simpson verdict, this reason was really a pretext to excuse African-American jurors. (AOB 57-58.) It is not that simple.

Two prospective jurors might give similar answers to a given question, yet the risk posed by one of them might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. (*People v. Riccardi, supra*, 54 Cal.4th at p. 788.) "These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (*Ibid.*, internal quotation marks omitted.) In this case, unlike SG, both Alternate Juror 5 and Juror 6 indicated that they could follow the instruction on the presumption of innocence without any qualification. (4 JQ 1164; 5 JQ 1402.)

For the same reasons, Miles's comparison of SG's statement about liking his opinion over others with Juror 1's isolated response that she liked to make her own decisions does not hold water. (AOB 59; 4 JQ 1152.) Juror 1, unlike SG, had previously served on a jury, which reached a verdict. (4 CT 1152, 1154.) Juror 1, unlike SG, indicated without any qualification that she could follow the instruction on the presumption of innocence. (4 JQ 1164.) And Juror 1, unlike SG, was upset by the O.J. Simpson verdict because "I believe he was guilty." (4 JQ 1163.)

Miles also points to the prosecutor's failure to question the prospective jurors about their views of the O.J. Simpson verdict. (AOB 57-58; *Miller-El v. Dretke, supra*, 545 U.S. at pp. 246, 250, fn. 8.) While that is true, the prosecutor did question SG about the topic that concerned him the most: that SG might decide the case based on a "feeling." (6 RT 1699-1700.) "[T]he prosecutor's failure to question the [peremptorily challenged] prospective juror[] about each and every area of articulated concern does not undermine the conclusion that h[is] stated race-neutral reasons for excusing the[] prospective juror[] were genuine and not pretextual." (*People v. Cowan* (2010) 50 Cal.4th 401, 451 [noting that the prosecutor asked challenged jurors about topic that apparently concerned her most]; *People v. Jones* (2011) 51 Cal.4th 346, 363 ["The prosecutor questioned G.G. extensively about defense counsel's 'scapegoat' theory. It is not suspicious that the prosecutor did not further question him about all other concerns. A party is not required to examine a prospective juror about every aspect that might cause concern before it may exercise a peremptory challenge"].)

In any event, whether a prosecutor questions a given prospective juror is not a sine qua non of pretext, particularly where each prospective juror

has already filled out a 31-page questionnaire containing 130 questions, with subparts.[17] (See *People v. Edwards* (2013) 57 Cal.4th 658, 698-699 [explaining that where, "before voir dire, M.M. had completed a 14-page questionnaire containing 38 questions with subparts," "we place little weight on the prosecutor's failure to ... more thoroughly question a prospective juror before exercising a peremptory challenge" (internal quotation marks omitted)]; *People v. Taylor* (2010) 48 Cal.4th 574, 615 ["[T]he prosecutor's failure to ask T.B. any questions is not significant here. [Citation.] Notably, before excusing T.B., the prosecutor had reviewed T.B.'s answers on a questionnaire containing 98 questions"].)

Lastly, if the prosecutor was really using satisfaction with the O.J. Simpson verdict as a pretext for striking prospective jurors based on race, then he would have also struck Alternate Juror 2, who was African-American and not upset with the O.J. Simpson verdict. (4 JQ 1009, 1027.) But the prosecutor did not strike Alternate Juror 2.[18] (6 RT 1759, 1761-1762.)

The prosecutor likely kept Alternate Juror 2 because she stated that, although she was not upset by the O.J. Simpson verdict, "[t]he evidence was there which told me he was guilty." (4 JQ 1027.) This tends to show that the prosecutor was motivated by the jurors' individual views instead of their race. (*People v. Hartsch* (2010) 49 Cal.4th 472, 487.) The prosecutor's acceptance of a panel including a member of the allegedly

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[17] As the trial court told the prospective jurors before voir dire, "most of the questions that we normally ask prospective jurors have already been asked and answered by you in your questionnaire, so this saves a lot of time and a lot of duplication of efforts[] [s]o we'll try not to ask the same questions that you've already given us answers to." (6 RT 1684.)

[18] At the outset of the penalty phase, Alternate Juror 2 replaced another juror and served for the duration of the trial. (16 CT 4599.)

discriminated against group is an indicia of his good faith in exercising his peremptory challenges. (*People v. Hartsch* (2010) 49 Cal.4th 472, 487; *People v. Streeter* (2012) 54 Cal.4th 205, 224; *People v. Lewis, supra*, 43 Cal.4th at p. 480; *People v. Huggins* (2006) 38 Cal.4th 175, 236.)

D. There was Substantial Evidence to Support the Trial Court's Finding That the Prosecutor's Reasons for Challenging KC Were Valid

KC was a prospective juror in a death penalty case who, at a minimum, had reservations about the death penalty. (6 RT 1720; 24 JQ 6849-6851.) That, by itself, is a legitimate reason for a peremptory challenge. (See *People v. Salcido* (2008) 44 Cal.4th 93, 139-140 ["A prosecutor may exercise peremptory challenges against prospective jurors who are not so intractably opposed to the death penalty that they are subject to challenge for cause under the *Witherspoon-Witt* standard, but who nonetheless are substantially opposed to the death penalty"]; *People v. Montes, supra*, 58 Cal.4th at p. 851 ["Opposition to the death penalty is a permissible, race-neutral reason for a peremptory challenge"].)

Beyond that, in a case that was a lot like the O.J. Simpson case – e.g., the evidence was primarily circumstantial DNA evidence that would be presented through police witnesses – KC was a prospective juror who thought that DNA evidence was no more reliable than polygraph evidence and who all but said that he believed O.J. Simpson was framed. (6 RT 1720; 24 JQ 6842-6843.) These are ample reasons other than racial bias for any prosecutor to challenge him. (*People v. Avila* (2006) 38 Cal.4th 491, 554, 556.)

Miles acknowledges that the prosecutor's reasons for challenging KC were facially race-neutral, but he contends that a comparative juror analysis exposes them as pretext. (AOB 66-75.) Once again, an after-the-fact comparison based on a cold appellate record may be very misleading when

alleged similarities were not raised at trial, making a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding. (*Snyder v. Louisiana, supra*, 552 U.S. at p. 483; *People v. Riccardi, supra*, 54 Cal.4th at p. 788.) In any case, the comparative analysis does not help Miles.

Beginning with KC's statement that DNA evidence is like a polygraph, Miles claims that other prospective jurors who the prosecutor did not challenge "expressed the very same concerns expressed by KC." (AOB 67-68.) Not really. In fact, none of the jurors' responses that Miles identifies says anything that remotely suggests that they believed DNA evidence is comparable to controversial polygraph testing, which is commonly known to be inadmissible in court because of its unreliability. (AOB 67-68; see Evid. Code, § 351.1, subd. (a); *People v. Wilkinson* (2004) 33 Cal.4th 821, 849-850.)

Miles's comparative analysis argument fares no better as to KC's troubling responses regarding the death penalty. While some of the non-challenged jurors that Miles identifies expressed, at most, ambivalence about the death penalty, none of them came close to KC's flat-out religious objection that "God should decide life or death" and that his religion's view on the death penalty, which he agreed with, was "thou should not kill." (24 JQ 6849-6851.)

In particular, Miles cites responses from Alternate Juror 1, Juror 8, Juror 9, Juror 5, and Alternate Juror 4. (AOB 69.) Unlike KC, however, these jurors had no moral, philosophical, or religious objection to the death penalty, had no negative religious view on the death penalty, did not believe the death penalty law was unfair, and would not be reluctant to sign the death-sentence verdict form or face the defendant. (4 JQ 999-1001, 1101-1103; 5 JQ 1339-1341, 1475-1477, 1543-1545.)

Miles also compares Juror 2. (AOB 69.) That juror's responses to a few of the questions were slightly closer to KC's, but not enough to establish pretext. Juror 2 indicated that he thought the death penalty was unfair and that he objected to it because he did not believe it deterred crime. (5 JQ 1271, 1273.) But in voir dire he stated that he would vote in favor of a death penalty law and that he could vote for a death verdict if he felt the evidence and law supported it. (6 RT 1591-1592.)

It is one thing to for a prospective juror, like Juror 2, to have reservations about the death penalty because he thinks it does not do what it is supposed to do. It is quite another for a prospective juror, like KC, to have a religious conviction against the death penalty. (*People v. Montes, supra*, 58 Cal.4th at p. 856 ["Excusing prospective jurors who hold religious views that make it difficult for them to impose the death penalty is a proper, nondiscriminatory ground for a peremptory challenge"].)

Furthermore, two prospective jurors might give similar answers to a given question, yet the risk posed by one of them might be offset by other answers that make one juror, on balance, more or less desirable. (*People v. Riccardi, supra*, 54 Cal.4th at p. 788.) Here, some of Juror 2's other responses make it obvious why the prosecutor did not peremptorily challenge him. Specifically, Juror 2 believed that DNA evidence is accurate and was upset with the O.J. Simpson verdict because "I believe it was proven beyond a reasonable doubt that he was guilty." (5 JQ 1264.)

Apart from the comparative analysis of the questionnaire responses, Miles asserts that the *Hovey* voir dire process in which the prosecutor questioned KC and some of the other prospective jurors also establishes pretext. (AOB 70-71.) It does not.

For starters, KC's voir dire answers hardly ameliorated the prosecutor's concerns about KC's death penalty views. As Miles notes, KC said that he could vote for a death verdict. (6 RT 1632.) But, at the same

time, KC confirmed that "I think God should decide" life or death and said "I feel uncomfortable about life or death, but incarcerated for the rest of their life, if they don't believe, I would probably go that way, you know." (6 RT 1630-1631.) KC's voir dire answers were, at best, ambiguous and the prosecutor had a legitimate race-neutral reason for peremptorily challenging him given his questionnaire responses. (See *People v. Cowan, supra*, 50 Cal.4th at pp. 450-451.)

Miles asserts that Juror 6 and Juror 8 were equally equivocal during their *Hovey* voir dire. (AOB 70-71.) Juror 6 said she could impose the death penalty, although she would feel guilty about it. (6 RT 1552-1554.) Juror 8 said he thought the death penalty was used too often and that life without parole is a more suitable punishment, but that he could vote for the death penalty if he felt the aggravating evidence outweighed the mitigating evidence. (6 RT 1588-1589.)

Once more, when asked to engage in comparative juror analysis for the first time on appeal, a reviewing court need not, and must not, turn a blind eye to reasons the record discloses for not challenging other jurors even if those other jurors are similar in some respects to excused jurors. (*People v. Chism* (2014) 58 Cal.4th 1319.) This is so because a party may legitimately challenge one prospective juror but not another to whom the same particular concern applies. (*Ibid.*)

Here, despite Juror 6's hesitance during voir dire, she stated in her questionnaire that, unlike KC, she had no moral, religious, or philosophical objection to the death penalty, that she would vote in favor of a death penalty law, that she thought the death penalty law was fair, that the death penalty was too seldom used, that she would have not be reluctant to sign the death verdict or face the defendant and, apart from all of that, that her opinion of DNA evidence was "very good." (5 JQ 1400, 1407-1409.)

Similarly, Juror 8, unlike KC, believed that DNA evidence is "an invaluable source," was upset by the O.J. Simpson verdict because "the amount of evidence was overwhelming," had no moral, philosophical, or religious objection to the death penalty, would vote in favor of a death penalty law, felt that the death penalty law was fair, and would not be reluctant to sign the death verdict or face the defendant. (5 JQ 1468-1469, 1475-1476.)

Next, Miles accuses the prosecutor of using SG's views on the O.J. Simpson verdict as a sham excuse for peremptorily challenging him. (AOB 72-74.) The prosecutor was concerned that SG suggested that he thought O.J. Simpson was framed by planted evidence. (24 JQ 6843.) Miles finds this "puzzling" because, he says, the case against him involved no suggestion that the DNA evidence was planted. (AOB 72.)

Miles's puzzlement is itself puzzling. To begin with, any prosecutor would have legitimate concerns about a prospective juror who indicates that he believes the police framed a defendant. Furthermore, in this case, the prosecutor could not know for sure at the time of jury selection what Miles's defense was going to be. In light of how overwhelming the DNA evidence was, it was certainly plausible that Miles might argue that it was planted. And, in fact, Miles apparently wanted to take the stand and say exactly that. (15 RT 5166, 5168, 5271, 5294-5295, 5378, 5386, 5388, 5407; (*People v. Lenix, supra*, 44 Cal.4th at p. 624 [trial court's finding is reviewed on the record as it stands at the time the *Batson/Wheeling* ruling is made].)

In any event, Miles fails in his attempt to compare SG's views on the O.J. Simpson verdict to those of other prospective jurors because no other prospective juror expressed an opinion as extreme as SG's. (AOB 73.) A prospective juror's comfort with the O.J. Simpson verdict is not the same thing as implying that O.J. Simpson was framed. (See *People v. DeHoyos,*

supra, 57 Cal.4th at p. 107 ["In order for a comparison to be probative, jurors need not be identical in all respects [citation], but they must be materially similar in the respects significant to the prosecutor's stated basis for the challenge"].)

Miles also highlights the prosecutor's failure to question prospective jurors about all of the reasons he cited for challenging KC. (AOB 68, 73-74.) Again, although relevant, this circumstance is of little importance here given the information otherwise available to the prosecutor regarding the prospective jurors. (*People v. Dement, supra*, 53 Cal.4th at p. 20.) Namely, every prospective juror completed a 31-page, 130-question questionnaire. And "[a] party is not required to examine a prospective juror about every aspect that might cause concern before it may exercise a peremptory challenge." (*People v. Jones, supra*, 51 Cal.4th at p. 363.) Accordingly, this Court has routinely rejected "perfunctory voir dire" arguments in cases like this. (See, e.g., *People v. Edwards, supra*, 57 Cal.4th at pp. 698-699; *People v. Dement, supra*, 53 Cal.4th at pp. 20-21; *People v. Taylor, supra*, 48 Cal.4th at p. 615; *People v. Bell* (2007) 40 Cal.4th 582, 598-599, fn. 5 [noting the trial court's remark that when every juror has answered an extensive questionnaire, "'it can never be a perfunctory examination'"].)

Finally, it again should be noted that the prosecutor did not peremptorily challenge Alternate Juror 2, who was African-American and who was not upset with the O.J. Simpson verdict. (4 JQ 1009, 1027; 6 RT 1759, 1761-1762.) This is evidence of the prosecutor's good faith. (See, e.g., *People v. Hartsch, supra*, 49 Cal.4th at p. 487.)

E. There is No Other Basis for Reversal

Miles's last argument is that reversal is required if the Court finds that some, but not all, of the prosecutor's reasons for challenging SG and KC were "invalid." (AOB 76.) This argument has multiple flaws.

First, Miles's argument assumes that at least one of the prosecutor's stated reasons was "invalid." As discussed above, Miles has not come close to making this showing. The defendant's burden at the third stage of a *Wheeler/Batson* hearing is to establish that the prosecutor excused prospective jurors for discriminatory reasons, not merely that some of the nondiscriminatory reasons offered by the prosecutor are not supported by the record. (*People v. Hung Thanh Mai, supra*, 57 Cal.4th at pp. 1049-1050.]

As this Court has explained, "[i]n assessing the prosecutor's credibility, the trial court may, but is not required to, give weight to the fact that he or she has offered some reasons that do not withstand analysis." (*People v. Taylor* (2009) 47 Cal.4th 850, 891.) "While an attorney who offers unsupported explanations for excusing a prospective juror may be trying to cover for the fact his or her real motivation is discriminatory, alternatively this may reflect nothing more than a misguided sense that more reasons must be better than fewer or simply a failure of accurate recollection." (*Id.* at p. 896.)

Second, even if this were a case where the prosecutor's peremptory challenges were based on both discriminatory and race-neutral reasons, reversal would still not be required. Miles wants the Court to conclude that the existence of any discriminatory reason is a per se *Batson* violation. (AOB 78-79.) While the law on this point is unsettled, the law is clear that such a scenario is not per se reversible.

In particular, although this Court and the Supreme Court have not resolved precisely how to evaluate the presence of a discriminatory factor among other race-neutral factors, neither has intimated that this is a per se *Batson* violation. In *Snyder v. Louisiana*, the Supreme Court observed that the two alternative ways of dealing with this issue are (1) the presence of a discriminatory factor shifts the burden to the prosecution to show this factor

was not determinative or, (2) if there is a discriminatory factor, the court must decide if the prosecutor's challenge was "motivated in substantial part by discriminatory intent." (*Snyder v. Louisiana, supra*, 552 U.S. at p. 485.)[19] The Supreme Court declined to adopt the first approach in the *Batson* context. (*Ibid.*)

Following *Snyder*, the Ninth Circuit also rejected the first approach. (*Cook v. LaMarque* (9th Cir. 2010) 593 F.3d 810, 814-815.) In *Cook*, the court held that a reviewing court must limit its inquiry to whether the prosecutor was motivated in substantial part by discriminatory intent. (*Id.* at p. 815; see also *People v. Chism, supra*, 58 Cal.4th at pp. 1339-1340, conc. & dis. opn. of Liu, J. [applying motivated-in-substantial-part standard].)

The motivated-in-substantial-part standard remains deferential to the trial court and hinges on a comparative juror analysis. (*Cook v. LaMarque, supra*, 593 F.3d at p. 815.) In this case, for the reasons discussed above, Miles has not shown that the prosecutor's peremptory challenges of SG and KC were motivated at all – much less in substantial part – by discriminatory intent. (*Id.* at p. 819 [upholding peremptory challenge where record did not support two of the six reasons given by prosecutor].)

Finally, even if the Court were to apply the alternative standard that the *Cook* court rejected and which the Supreme Court explicitly declined to adopt in *Snyder*, the outcome should still be the same. Under that standard, the prosecutor must show that he would have challenged the prospective juror even absent the impermissible motivation – i.e., the discriminatory

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[19] Every case that Miles cites in support of his per se rule predates *Snyder*. (AOB 78-79.) "The discussion in *Snyder* leads to the conclusion that the per se approach is the incorrect analysis to apply." (*State v. Ornelas* (Idaho Ct.App. 2014) 330 P.3d 1085, 1094.)

motive was not a but-for cause of the challenge. (*Cook v. LaMarque, supra*, 593 F.3d at p. 814.)

Miles argues that the Court must reverse under this standard because the prosecution made no such showing. (AOB 80.) But, to the extent that the prosecutor did not make this showing, it was because Miles did not meet his burden in the first place of demonstrating that any of the prosecutor's reasons were pretextual.

Regardless, the Court should find that any alleged discriminatory motives on the part of the prosecutor were not a but-for cause of his peremptory challenges to SG and KC. As discussed above, the prosecutor had plenty of race-neutral reasons for challenging SG and KC. Accordingly, the Court should reject appellant's *Batson/Wheeler* claim.

II. THE TRIAL COURT PROPERLY EXCUSED TWO PROSPECTIVE JURORS FOR CAUSE BECAUSE OF THEIR VIEWS ON THE DEATH PENALTY

Miles contends that the trial court violated his constitutional right to an impartial jury when it excused two prospective jurors (44 and 63) based on their views of the death penalty. (AOB 81-98.) Since the trial court properly found that these jurors' views on the death penalty would prevent or substantially impair them from performing their duties in accordance with their instructions and their oath, the Court should reject Miles's argument. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522 [88 S.Ct. 1770, 20 L.Ed.2d 776]; *People v. Williams, supra,* 58 Cal.4th at p. 276; *People v. Schmeck* (2005) 37 Cal.4th 240, 261, overruled in part on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-638.)

A. Proceedings Below

1. Prospective Juror 44

In her jury questionnaire, Prospective Juror 44 clearly expressed her hesitance about the death penalty, stating, "I don't like it – it makes me uncomfortable." (8 JQ 1923.) She further said she would vote to abolish the death penalty, took no position whether the death penalty law was fair, and could not deny that she would "never be able to personally vote for the death of the defendant under any circumstances, but would always vote for a life sentence without possibility of parole." (8 JQ 1924-1925.)

There was more. Prospective Juror 44 answered that she would be reluctant to personally vote for the death sentence, sign the death-sentence verdict form, and face the defendant with the verdict. (8 JQ 1925.) She explained, "The day I am not reluctant to look a person in the face and sentence them to death will be the day I no longer belong to the human – or should I say humane – race." (8 JQ 1925.)

Notwithstanding all of that, Prospective Juror 44 answered that she was willing to consider all aggravating and mitigating factors before deciding the penalty. (8 JQ 1923.) She also denied that she would refuse to find the defendant guilty or refuse to find the special circumstance true in order to avoid having to decide on the death penalty and indicated that, while she had doubts about the death penalty, she would not vote against it in every case. (8 JQ 1926.)

During voir dire, Prospective Juror 44 confirmed that she had "doubts" about the death penalty. (6 RT 1522.) She said that it made her uncomfortable to turn on the television and "see a bunch of people cheering" an execution because that made her feel sad. (6 RT 1522.) When asked whether that feeling would affect her vote in this case, she responded, "I apologize, but I have no idea." (6 RT 1522.)

The prosecutor pressed Prospective Juror 44 further. He asked her whether, assuming the aggravating factors outweighed the mitigating factors, she could vote for the death penalty as instructed. (6 RT 1523.) She answered, "I don't know ... I just cannot tell you, unless I'm placed in that situation, unless I've gone through it ... I can't guarantee anything." (6 RT 1523-1524.)

The prosecutor also questioned whether Prospective Juror 44's feelings might affect the way she would view the evidence. (6 RT 1524.) She responded, "I don't know. I guess just feeling emotional, those feelings, you know, determine the way you feel about anything, I would imagine." (6 RT 1524.)

Defense counsel attempted to rehabilitate Prospective Juror 44. He tried to get her to say that she could follow the law. (6 RT 1525.) It did not work. Although Prospective Juror 44 stated that she did not think there was anything that would interfere with her ability to follow the law, in the next breath she candidly admitted, "I can't tell you, and I don't know if I could follow the law. There's – I'm – there's a just a good chance that I would or I wouldn't. You're going to have to pick me and have me sit here and see, because I just don't know." (6 RT 1525-1526.)

At the conclusion of Prospective Juror 44's voir dire, the prosecutor challenged her for cause. (6 RT 1526.) The trial court initially seemed to be leaning against the challenge, stating that "[s]he's not saying her views are such that it would substantially interfere with her ability to follow instructions, she just says she doesn't know, because it's such an emotional issue." (6 RT 1526.) In response, the prosecutor cited *People v. Holt* (1997) 15 Cal.4th 619 and *People v. Wash* (1993) 6 Cal.4th 215 "for the proposition that jurors who insist they do not know, or say I can't tell you if they could impose death, are properly excused." (6 RT 1526.)

The trial court took the matter under submission. (6 RT 1526.) Later, after reading the cases the prosecutor cited and re-reading the voir dire examination of Prospective Juror 44, the trial court explained that its "memory is refreshed that her answers basically were that she could not say whether she would be able to impose the death penalty, and it was not just that she didn't know whether in this case she could impose the death penalty, because obviously she wouldn't know until she got – she heard the evidence and the law." (6 RT 1659.) The trial court noted that "in any situation, basically, she didn't know until she was put in that situation whether she could do it, or whether she could follow the Court's instructions in this area." (6 RT 1659.)

Accordingly, over defense counsel's objection, the trial court found that "[Prospective Juror 44's] 'I don't know' responses are sufficiently equivocal to warrant a challenge for cause, so I will order that she be excused." (6 RT 1659.)

2. Prospective Juror 63

Prospective Juror 63's questionnaire was incomplete, which only raised more questions. He indicated that he did not even understand the introductory paragraph explaining how the guilt and penalty phases worked. (9 JQ 2160.) He also responded that he was not willing to weigh and consider all the aggravating and mitigating factors before deciding on the penalty. (9 JQ 2161.) Further, he completely skipped questions regarding his feelings about the death penalty, the severity of the death penalty versus life without parole, the purpose of the death penalty, whether the death penalty is used too much or too little, how he would vote on a death penalty law, whether he would be reluctant to personally vote for the death sentence in this case, and how he would characterize his views on the death penalty. (9 JQ 2161-2164.)

On voir dire, the attorneys tried to fill in the blanks from the questionnaire. (5 RT 1409-1410.) Prospective Juror 63 said: he would not feel comfortable voting for death in a criminal case; he would be reluctant to vote death; his feelings about the death penalty might affect the way he judged guilt or innocence; his feelings might also affect the way he looked at the court's instructions about the death penalty; he did not know if he could follow the court's instructions on aggravating and mitigating factors; his feelings were based on religious, ethical, and personal grounds; sitting on this type of case would be difficult for him based on his feelings; and he would not want to vote for death. (5 RT 1410-1411.)

After Prospective Juror 63's voir dire, the prosecutor challenged him for cause. (5 RT 1412.) Defense counsel "submit[ted] it."[20] (5 RT 1412.) The trial court sustained the challenge and excused Prospective Juror 63. (5 RT 1412.)

B. Standard of Review

The applicable law is settled. (*People v. Schmeck, supra*, 37 Cal.4th at p. 261.) The trial court may excuse for cause a prospective juror whose views on the death penalty would prevent or substantially impair the performance of that juror's duties in accordance with the trial court's instructions and the juror's oath. (*Ibid.*; see *Wainwright v. Witt, supra*, 469 U.S. at p. 424; *Uttecht v. Brown* (2007) 551 U.S. 1, 7 [127 S.Ct. 2218, 167 L.Ed.2d 1014]; *People v. Jackson* (2014) 58 Cal.4th 724, 752.)

The standard of review of the trial court's ruling regarding the prospective juror's views on the death penalty is essentially the same as the standard regarding other claims of bias. (*People v. Horning* (2004) 34

[20] In *People v. McKinnon, supra*, 52 Cal.4th at p. 644, the Court held that the lack of a contemporaneous *Witherspoon/Witt* objection results in forfeiture. But, since this rule applies prospectively, there was no forfeiture here. (*Ibid.*; *People v. Jones* (2012) 54 Cal.4th 1, 44.)

Cal.4th 871, 896.) When the prospective juror's answers on voir dire are conflicting, equivocal, or ambiguous, the trial court's findings as to the prospective juror's state of mind are binding on appellate courts if fairly supported by the record. (*People v. Merriman* (2014) 60 Cal.4th 1, 50; *People v. Williams, supra,* 58 Cal.4th at p. 276.) When there is no inconsistency or ambiguity, the reviewing court will uphold the trial court's ruling if it is supported by substantial evidence. (*People v. Merriman, supra*, 60 Cal.4th at p. 50.)

C. The Trial Court's Excusal of Prospective Jurors 44 and 63 Was Not Error

1. Because the Prospective Jurors Gave Equivocal Answers, the Trial Court's Determination Is Binding Here

Miles concedes that Prospective Jurors 44 and 63 were equivocal about their views of the death penalty vis-à-vis their ability to discharge their duties in this case. (AOB 81.) That makes the trial court's determination of the for-cause challenges to these jurors binding on review. (E.g., *People v. Capistrano* (2014) 59 Cal.4th 830, 862.)

Nevertheless, Miles argues at length that, if a prospective juror's answers are merely equivocal, it is not enough to sustain a challenge for cause. (AOB 81-98.) He says that "this Court has taken a wrong turn" in the myriad cases holding that, when a trial court strikes for cause a juror who gives equivocal answers, the trial court's decision is binding if supported by the record. (AOB 82.) According to Miles, *Adams v. Texas* (1980) 448 U.S. 38 [100 S.Ct. 252, 165 L.Ed.2d 581] and other post-*Adams* cases like *Gray v. Mississippi* (1987) 481 U.S. 648 [107 S.Ct. 2045, 95 L.Ed.2d 622] show that "the United States Supreme Court embraces precisely the opposite view." (AOB 83.)

Miles cannot back up his statement. He does not cite a single Supreme Court case actually holding that equivocal responses are insufficient to dismiss a prospective juror for cause. Rather, Miles arrives at his conclusion by selectively citing some of the prospective jurors' supposedly equivocal responses in *Adams* and *Gray* (which responses are not contained in the actual opinions) and arguing that, because the purported equivocal responses were insufficient in those cases, equivocal responses are therefore always insufficient. (AOB 83-85.)

This Court has long-since addressed and dismissed Miles's theory. Specifically, in *People v. Schmeck, supra*, 37 Cal.4th at pp. 262-263, the defendant made the identical argument that Miles now makes. The Court could not have been more clear: "We reject defendant's contention." (*Id.* at p. 263.)

The Court reasoned that, in *Witt* – decided several years after *Adams* – "the high court clearly explained that despite 'lack of clarity in the printed record ... there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.... [T]his is why deference must be paid to the trial judge who sees and hears the juror.'" (*People v. Schmeck, supra*, 37 Cal.4th at p. 263, quoting *Wainwright v. Witt, supra*, 469 U.S. at p. 425-426.)

Moreover, "[n]othing in the high court's subsequent decision in *Gray*, *supra*, 481 U.S. 648, 107 S.Ct. 2045, purports to depart from or alter *Witt*'s holding with regard to the deference that properly must be accorded to a trial court's finding concerning a prospective juror's state of mind; indeed, the issue before the court in *Gray* did not involve the determination of the correct standard for excusing a prospective juror under *Witt* at all, but rather the standard of prejudice that applies when a prospective juror improperly has been excused for cause under *Witt*." (*People v. Schmeck, supra*, 37

Cal.4th at p. 263.) "Accordingly, there is no basis for reconsidering this court's uniform line of decisions on this point." (*Ibid.*)

Notwithstanding *Schmeck*'s categorical rejection of Miles's argument, he asserts that, "because *Schmeck* did not actually discuss the jury voir dire in either *Adams* or *Gray*, this aspect of *Schmeck* does not really resolve the issue." (AOB 91.) Miles is mistaken.

In *Schmeck*, just as in this case, the defendant relied on the jury voir dire transcripts from *Adams* and *Gray* to argue that they "'made clear that when a prospective capital case juror gives equivocal responses, the state has not carried its burden of proving that the juror's views would "prevent or substantially impair the performance of his duties as a juror."'" (*People v. Schmeck, supra*, 37 Cal.4th at p. 263.) Thus, regardless of whether *Schmeck* "discussed" the voir dire from *Adams* and *Gray*, it obviously considered that voir dire in connection with the defendant's argument, and it rejected the argument anyway. That means that *Schmeck* does resolve the issue, a principle this Court has repeatedly confirmed. (See *People v. Bryant* (2014) 60 Cal.4th 335 [2014 WL 4197804, at p. *38] [rejecting contention that affording deference to a trial court's resolution of ambiguities and inconsistencies is contrary to *Adams* and *Gray*]; *People v. Thomas* (2012) 53 Cal.4th 771, 790, fn. 3 [same]; *People v. McWhorter* (2009) 47 Cal.4th 318, 342, fn. 9 [same]; *People v. Lewis, supra*, 43 Cal.4th at p. 483 [same]; *People v. Moon* (2005) 37 Cal.4th 1, 14-15 [same].)

2. The Trial Court Did Not Abuse Its Discretion In Any Event

Putting aside whether the trial court's resolution of the for-cause challenges to Prospective Jurors 44 and 63 is binding, there is still no basis for reversal. A trial court's ruling on a challenge for cause is reviewed for abuse of discretion. (*People v. Merriman, supra*, 60 Cal.4th at p. 50.) The question is not whether a reviewing court might disagree with the trial

court's findings, but whether those findings are fairly supported by the record. (*Wainwright v. Witt, supra*, 469 U.S. at p. 434.)

Even if not binding, a trial court's determination of bias is entitled to deference on direct review in capital cases. (*Wainwright v. Witt, supra*, 469 U.S. at p. 428-429.) "[A]ppellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor) gleans valuable information that simply does not appear on the record." (*People v. Stewart* (2004) 33 Cal.4th 425, 451.) "As such, the reviewing court generally must defer to the judge who sees and hears the prospective juror, and who has the 'definite impression' that he is biased, despite a failure to express clear views." (*People v. Jones* (2012) 54 Cal.4th 1, 41, internal quotation marks omitted; see also *Uttecht v. Brown, supra*, 551 U.S. at p. 9.)[21]

Beginning with Prospective Juror 44, she expressed conflicting views about the death penalty and her ability to follow instructions. On the one hand, she indicated that she was willing to consider all aggravating and mitigating factors before deciding the penalty and that she would not vote against the death penalty in every case. (8 JQ 1923, 1926.) On the other hand, she said, among other things, that she did not like the death penalty,

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[21] Miles claims that, in *Greene v. Georgia* (1996) 519 U.S. 145, 146 [117 S.Ct. 578, 136 L.Ed.2d 507], the Supreme Court "made clear ... that this rule of deference is fundamentally inappropriate on direct appeal." (AOB 90.) *Greene* said or implied no such thing. Rather, *Greene* held that state courts are "free to adopt the rule [of deference] laid down in *Witt* for review of trial court findings in jury-selection cases," which is exactly what this Court has done. (*Ibid.*; *People v. Farnam* (2002) 28 Cal.4th 107, 132, fn. 6 ["Defendant cites *Greene v. Georgia* (1996) 519 U.S. 145, 117 S.Ct. 578, 136 L.Ed.2d 507 for the proposition that a state appellate court need not give deference to a trial court's findings relating to juror bias. The law in California, however, is settled on the point"].)

that the death penalty made her uncomfortable, that she had doubts about the death penalty, and that she could not say whether she would follow the trial court's instructions and the law regarding imposition of the death penalty. (8 JQ 1922-1926; 6 RT 1522-1526.)

Prospective Juror 63's qualms about the death penalty and following the trial courts instructions were even more clear. He said, for example, that he would not feel comfortable voting for death in a criminal case, his feelings about the death penalty might affect the way he judged guilt or innocence, and his feelings might also affect the way he looked at the court's instructions about the death penalty. (5 RT 1410-1411.) Indeed, Prospective Juror 63's views were so distressing that defense counsel did not even object to the prosecutor's for-cause challenge, submitting it instead. (5 RT 1412.) This suggests that defense counsel concurred in the assessment that Prospective Juror 63 was excusable for cause. (See *People v. Williams, supra,* 58 Cal.4th at p. 278; *People v. McKinnon, supra*, 52 Cal.4th at p. 644; *People v. Schmeck, supra*, 37 Cal.4th at p. 262; *Wainwright v. Witt, supra*, 469 U.S. at pp. 434-435.)

In any event, the trial court did not abuse its discretion in finding that the views of Prospective Jurors 44 and 63 on capital punishment would prevent or substantially impair the performance of their duties as jurors in accordance with his instructions and his oath. (*Wainwright v. Witt, supra*, 469 U.S. at p. 424.) Unmistakable clarity of bias is not required. (*Ibid.*) "What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." (*Wainwright v. Witt, supra*, 469 U.S. at pp. 424-425.) "Despite this lack of clarity in the printed record, however, there will be situations where the

trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." (*Id.* at pp. 425-426; see also *People v. Jones, supra*, 54 Cal.4th at pp. 41-42.)

Thus, whatever ambiguity Miles may find in this record, the trial court, aided as it undoubtedly was by its assessment of the prospective jurors' demeanor, was entitled to resolve it in favor of the prosecution. (*Wainwright v. Witt, supra*, 469 U.S. at p. 434; see also *People v. Capistrano, supra*, 59 Cal.4th at p. 859.) Consequently, the Court should reject Miles's claim.

III. THE SUBSTANTIAL IMPAIRMENT STANDARD FOR DETERMINING JUROR BIAS IN CAPITAL CASES DOES NOT VIOLATE THE FEDERAL AND STATE CONSTITUTIONS

Miles spends 20 pages of his Opening Brief arguing that the substantial impairment test for deciding whether a prospective juror should be excused in a capital case violates the Sixth Amendment. (AOB 99-119.) According to him, that is not the standard the framers would have intended. (AOB 99-119.)

Suffice it to say that it is up to the Supreme Court and this Court, not Miles, to determine whether the substantial impairment standard is constitutional. And both courts have spoken, often and consistently. "Under the applicable state and federal constitutional provisions, prospective jurors may be excused for cause if their views would prevent or substantially impair the performance of their duties." (*People v. Gonzalez* (2012) 54 Cal.4th 1234, 1284-1285, citing *Wainwright v. Witt, supra*, 469 U.S. at p. 424; see also *Uttecht v. Brown, supra*, 551 U.S. at p. 9.) End of story.

IV. THE TRIAL COURT PROPERLY DENIED MILES'S MOTION TO SUPPRESS THE BLOOD AND HANDWRITING EVIDENCE

On June 16, 1992, the police arrested Miles in Torrance as he was fleeing the Bridget E./Steve H. crime scene (see Statement of Facts, section II(A)(1)(e), *supra*) in his truck. (3 RT 800-810.) After Miles's arrest, Rialto police detective Chester Lore secured a search warrant as part of his investigation of the crimes for which Miles was convicted in this case. (16 CT 4739-4753.) The ensuing searches yielded, inter alia, a sample of Miles's blood and the note with the word government misspelled from Miles's truck. (16 CT 4769, 4772.) Miles moved to traverse the warrant and suppress this evidence under Penal Code section 1538.5. (10 CT 2831-2838; 13 CT 3698-3733.)

Miles claims, then and now, that Detective Lore's affidavit contained lies and material omissions without which the warrant was insufficient to state probable cause. (AOB 120-142.) After conducting a hearing on Miles's motion, the trial court found that there were no lies or material omissions in the warrant and that, even if there were, the warrant was still sufficient. (5 RT 1233-1241.) This was not error.

A. Proceedings Below

1. Detective Lore's Affidavit in Support of the Search Warrant

In June 1992, Detective Lore was a 20-year law enforcement veteran who was investigating a string of rapes and robberies committed in the Inland Empire in early 1992, including the Willem, Christine C, Osburn/Carol D., and Andersen crimes. (16 CT 4739-4743.) These crimes bore similarities indicating that they were each perpetrated by the same person. (16 CT 4739-4743.)

In particular, the crimes were committed in the evening hours at commercial offices on Mondays, Tuesdays, and Wednesdays. (16 CT

4740-4743.) The victims described the perpetrator as a tall African-American male between 25 and 35 years old who used a small semi-automatic handgun. (16 CT 4740-4745.) The affidavit summarized: "Witnesses to the robberies described the subject as being a Black male, 25 to 35 years, 6 feet to 6'4", thin build, large dark eyes, dark hair, wearing a dark blue or black watch cap, dark blue or black Levi type pants, an[d] at times was described as having a thin moustache." (16 CT 4745.)

Moreover, there were peculiar hallmarks associated with the crimes. Most notably, the assailant bound the victims with telephone cords, was soft-spoken, and told them, "Don't look at me." (16 CT 4742-4745.)

Physical evidence found at the Willem, Christine C., and Osburn/Carol D. scenes confirmed that the same person was involved in all three. (16 CT 4741.) The evidence established that the suspect was an African-American man with ABO blood type, who was an AB secretor. (16 CT 4741.)

On June 17, 1992, Detective Lore learned of Miles's arrest in connection with the Bridget E./Steve H. crime.[22] (16 CT 4743.) The circumstances of the Bridget E./Steve H. crime fit the pattern of crimes that Detective Lore was investigating. (16 CT 4744.) Specifically, the crime occurred in the evening at an office and the assailant was a tall African-American man with a handgun who tied the victims with telephone cords and told them, "Don't look at me." (16 CT 4745.)

Not only was Miles caught fleeing from the Bridget E./Steve H. scene in which the suspect's modus operandi matched the modus operandi of the other crimes, but his physical characteristics were consistent with the

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[22] Miles was not taken without a fight. He tried to evade the police, who ultimately had to shoot him three times in order to apprehend him. (16 CT 4744.)

person that Detective Lore was looking for. Miles was a 25-year-old African-American man with virtually no body fat who was 6'5" to 6'6" tall and weighed between 200 and 210 pounds. (16 CT 4744-4745, 4747.) Miles's blood type is AB positive, which was the same blood type as the person who committed the Willem, Christine C., and Osburn/Carol D. crimes.[23] (16 CT 4744.) Finally, when shown a photographic lineup including Miles, victim Janet Heynen (see Statement of Facts, section II(A)(1)(b), *supra*) pointed to Miles and said, "It could be him." (16 CT 4745.)

2. Detective Lore's Testimony at the Suppression Hearing

Detective Lore testified twice during the hearing on Miles's motion to suppress. (3 RT 581; 5 RT 1190.) He verified that, pursuant to the search warrant, the police took blood and saliva samples from Miles and recovered the handwritten note with the word government misspelled. (3 RT 618-620; 5 RT 1194.)

Defense counsel questioned Detective Lore about his description of the person he was seeking in connection with the Inland Empire crimes. In his affidavit in support of the warrant, Detective Lore indicated that Christine C. described her assailant as "a tall Black male adult, late 20's to early 30's, with a small caliber handgun." (3 RT 636; 16 CT 4741.) The affidavit also stated that the victims' descriptions of the suspect in the Osburn/Carol D. case matched the description from the Christine C. case. (3 RT 637; 16 CT 4741.) Detective Lore clarified that, by "match," he meant that the descriptions from the victims were similar, and were within a range of a couple of inches and 30 pounds. (3 RT 637-638, 694.)

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[23] The police learned Miles's blood type from the hospital where he was treated for his gunshot wounds. (3 RT 648-649.)

Detective Lore acknowledged that his affidavit generally described the suspect as standing between 6'0" and 6'4." (3 RT 639.) He also agreed that a few of the victims said the suspect was shorter and weighed less than Miles. (3 RT 702-705.) But victim Arnold Andersen (see Statement of Facts, section II(A)(1)(d), *supra*) described his assailant as being taller than 6'4;" Andersen, who is 6'4," said he had to look up to the suspect. (3 RT 656-657, 710.) Detective Lore also extrapolated the height of the person recorded using Willem's ATM card after her murder, presumably her killer, to be about 6'5" to 6'6." (3 RT 710.)

Detective Lore further explained that, "[a]fter 25 years of law enforcement, you begin to realize that people are not very good with heights and weights." (3 RT 639.) Accordingly, Detective Lore asked Carol D., who described her attacker as around 5'10" or 6'0," whether the suspect could have been taller, but she could not remember and did not want to change her description. (3 RT 654-655.) Therefore, in his affidavit, Detective Lore concluded that Miles "displays the physical characteristics as described by the majority of victims in this case." (16 CT 4745.)

Detective Lore's affidavit also noted that a box of Kleenex from the Andersen crime scene "was collected and linked to the suspect." (16 CT 4742; 3 RT 640.) While it turned out that the box provided nothing useful, Detective Lore did not know that at the time he prepared the affidavit. (3 RT 640; 5 RT 1192-1193.) Rather, when he executed the affidavit, Detective Lore believed that the Kleenex box was going to be shipped to the crime lab for analysis. (5 RT 1192-1193.) Detective Lore conceded that any implication from the affidavit that the Kleenex box had been scientifically connected to Miles was incorrect. (3 RT 640-641; 5 RT 1196.)

Lastly, as to victim Heynen's pointing out Miles in a photo lineup and stating "[i]t could be him," she had previously made the same statement

about another individual in a different photo lineup. (3 RT 643.) Detective Lore did not include this earlier identification in the affidavit. (3 RT 643.)

3. The Trial Court's Ruling

Taking the supposedly intentional or reckless false statements and material omissions one by one, the trial court found as follows:

As to the Kleenex box from the Andersen crime scene, the trial court noted that the affidavit's statement that the box was "linked to the suspect" was susceptible to multiple interpretations. (16 CT 4742; 5 RT 1235.) It could mean that it was linked to Miles – i.e., Miles was "the suspect" – which would have been false. (5 RT 1235-1236.)

On the other hand, because the intruder in the Andersen case had cut himself and bled, "another interpretation would be that the box being linked to the suspect merely meant that the authorities collected the evidence, believed the blood on the box was that of the suspect when he forced entry into the building." (5 RT 1236.) That "is consistent with Detective Lore's testimony that he later learned that the box could not be analyzed due to it having been wiped off." (5 RT 1236.)

"So, in other words, at the time that he prepared the affidavit, [Detective Lore] believed there was a Kleenex box with blood on it, possibly the suspect's blood; and that the box was taken into evidence to be analyzed." (5 RT 1236.) "[Detective Lore] did not mean to suggest that the analysis had been done and that the blood on the box was that of Mr. Miles." (5 RT 1236.)

"Based on the Court's reading of the affidavit, and having heard the affiant testify on both occasions as to his intentions in including that information," the trial court found that Detective Lore had not knowingly, deliberately, or recklessly included false information in his affidavit. (5 RT 1236.) "At most, the Court would find a negligent mistake in drafting the affidavit in such a way that a Magistrate could mistakingly [*sic*] assume

there was a scientific link, or failing to include the information that the box was to be analyzed later." (5 RT 1236-1237.)

Finally, even if Detective Lore did intentionally or recklessly make a false statement regarding the Kleenex box, "the Court does not agree with defendant that this was the critical information that linked him to the crimes." (5 RT 1237.) The affidavit (1) indicated that there was serological evidence that the same person likely committed the Willem, Christine C., and Osburn/Carol D. crimes, (2) stated that Miles had the same blood type as that found at those scenes, and (3) contained information that Miles was arrested as a suspect in a similar robbery/rape in Torrance. (5 RT 1237.) "So, even with the Kleenex box statement omitted, the Court would find probable cause." (5 RT 1237.)

Next, the trial court addressed the purported discrepancy between the various victims' descriptions of the Inland Empire suspect and the description that Detective Lore provided in the affidavit. (5 RT 1237-1238.) The trial court explained that Detective Lore "testified that he came up with the – with an accumulation or an average of the descriptions that he had received from the various victims." (5 RT 1238.) In Detective Lore's opinion, Miles "fit within that range when taking into account his experience that crime victims are not always accurate in estimating the height and weight of their perpetrators." (5 RT 1238.) The trial court "d[id] not find this information to be misleading or false, and d[id] not find that defendant has met his initial burden of showing a knowing or intentionally false statement, or reckless disregard for the truth." (5 RT 1238.)

Finally, the trial court was unmoved by Detective Lore's inclusion of Heynen's statement that Miles "could be him" when shown a photo lineup, but omission of Heynen's similar statement regarding another person at an earlier time. (5 RT 1238.) "The identification by Miss Heynen is, at the very least, equivocal and falls short of a positive identification." (5 RT

1238.) Consequently, "I can assume that the Magistrate came to the same conclusion, and that the additional information would not have led to a different result or have added anything of substance to the affidavit." (5 RT 1238-1239.)

B. Standard of Review

A defendant has a limited right to challenge the veracity of statements contained in an affidavit of probable cause made in support of the issuance of a search warrant. (*People v. Scott* (2011) 52 Cal.4th 452, 484.) An affidavit is presumed valid, and innocent or negligent misrepresentations will not support a motion to traverse. (*Ibid.*)

Instead, the defendant must show that (1) the affidavit included a false statement made knowingly or intentionally, or with reckless disregard for the truth, *and*, (2) with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause. (*People v. Scott, supra*, 52 Cal.4th at p. 484; see *Franks v. Delaware* (1978) 438 U.S. 154, 155 [98 S.Ct. 2674, 57 L.Ed.2d 667]; 5 RT 1234.) Similarly, a defendant who challenges a search warrant based on omissions in the affidavit bears the burden of showing an intentional or reckless omission of material information that, when added to the affidavit, renders it insufficient to support a finding of probable cause. (*People v. Scott, supra*, 52 Cal.4th at p. 484.) In either scenario, the defendant must make his showing by a preponderance of the evidence. (*Ibid.*)

This Court's review of issues related to the suppression of evidence seized by the police is governed by federal constitutional standards. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1118.) In reviewing a trial court's denial of a motion to traverse, "[w]e defer to the trial court's express and implied factual findings if supported by substantial evidence, but we independently determine the legality of the search under the Fourth Amendment ." (*People v. Eubanks* (2011) 53 Cal.4th 110, 133.) "Because

courts accord a preference to searches and seizures conducted pursuant to a search warrant, in a doubtful or marginal case a search under a warrant may be sustainable where without it would fall." (*Ibid.*, internal quotation marks omitted.)

C. There was Substantial Evidence to Support the Trial Court's Findings and Miles Failed to Satisfy Either Prong of the *Franks* Test

Substantial evidence supported each of the trial court's factual findings. To begin with, the trial court correctly recognized the ambiguity in Detective Lore's affidavit statement that the Kleenex box from the Andersen crime scene was "linked to the suspect." (16 CT 4742.) As the trial court observed, that statement could reasonably mean that the Kleenex box, by virtue of the blood found on it, was linked generically to the suspect in the Andersen case, and not specifically to Miles. (5 RT 1236.) Therefore, there was substantial evidence to support the trial court's finding that the statement was not knowingly or recklessly false but, at most, a negligent drafting mistake. (5 RT 1236; see *People v. Scott, supra*, 52 Cal.4th at p. 486 ["An affidavit in support of a search warrant is to be interpreted in a commonsense manner"].)

Similarly, the trial court correctly found that there was nothing deliberately or recklessly false regarding Detective Lore's characterization of the victims' descriptions of their attacker and his opinion that Miles generally fit those descriptions. (5 RT 1238.) All of the victims' descriptions fit within Detective Lore's amalgamated description of "a Black male, 25 to 35 years, 6 feet to 6'4", thin build." (16 CT 4745; 3 RT 702-705.) Consequently, the trial court properly concluded that Miles had not met his initial burden of showing an intentional or reckless false statement. (5 RT 1238.)

Miles contends that Detective Lore omitted the specific victims' descriptions in order to downplay that Miles was slightly taller and heavier than the person some of the victims described. (AOB 129-130.) Likewise, he chastises Detective Lore for omitting Heynen's earlier identification of a person that "could be" her assailant. (AOB 127-128.)

When a defendant challenges an affidavit based on omissions, he must show that the omissions were material to the outcome of probable cause. (*People v. Eubanks, supra*, 53 Cal.4th at p. 136.) Materiality is evaluated by the test of *Illinois v. Gates* (1983) 462 U.S. 213 [103 S.Ct. 2317, 76 L.Ed.2d 527], which looks to the totality of the circumstances in determining whether a warrant affidavit establishes good cause for a search. (*Ibid.*)

The omissions that Miles identifies were not material. The details of the victims' descriptions were consistent with what Detective Lore generally stated in his affidavit. (16 CT 4745; 3 RT 702-705.) The victims all described a tall, thin, African-American man aged 25 to 35 and Detective Lore's affidavit said he was looking for a tall, thin, African-American man aged 25 to 35. (16 CT 4745; 3 RT 702-705.) True, and unsurprisingly, there were some minor disparities among the victims regarding just how tall and thin the Inland Empire suspect was, but Detective Lore's composite description fairly encompassed all of the victims' individual descriptions. (16 CT 4745; 3 RT 702-705.)

With respect to Heynen's omitted uncertain identification of a different suspect, as the trial court recognized, the magistrate already knew that Heynen's identification of Miles in the photo lineup was equivocal. (5 RT 1238-1239.) Thus, including a second equivocal identification would have been of no material value. (*People v. Eubanks, supra*, 53 Cal.4th at p. 136 ["We agree with the trial court that the omitted facts were not material because there is no 'substantial possibility they would have altered a

reasonable magistrate's probable cause determination,' and their omission did not 'make the affidavit[s] *substantially misleading*'" (quoting *People v. Kurland* (1980) 28 Cal.3d 376, 385)].)

In any event, even assuming that Miles's claim that Detective Lore's statement about the Kleenex box was intentionally or recklessly false and that the affidavit should have included the omitted information regarding the victims' descriptions and Heynen's second shaky identification, it would not make any difference. The question is whether there would have still been probable cause. (*People v. Scott, supra*, 52 Cal.4th at p. 484.) For the reasons that the trial court listed, which are entitled to deference, the answer is yes. (5 RT 1237; see *People v. Scott, supra*, 52 Cal.4th at p. 483 ["The magistrate's determination of probable cause is entitled to deferential review"]; *Illinois v. Gates, supra*, 462 U.S. at p. 236 [same]; *United States v. Leon* (1984) 468 U.S. 897, 914 [104 S.Ct. 3405, 82 L.Ed.2d 677] [same]; cf. *People v. Camarella* (1991) 54 Cal.3d 592, 601 [whether an affidavit provided substantial basis for concluding there was probable cause is an issue of law subject to independent review].)[24]

Namely, in connection with the Inland Empire crimes, police were looking for an African-American man in his mid-20's to mid-30's who was at least 6'0" tall and had type AB blood. Miles was a 25-year-old African-American man who was 6'6" tall and had type AB blood. Moreover, the Inland Empire suspect had a distinctive modus operandi; he struck in the evenings at commercial offices where he bound his victims with telephone

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[24] The notion that an appellate court reviews probable cause independently while still giving deference to the magistrate's determination is not inconsistent: "A reviewing court can defer to a magistrate's decision in a close case, while still retaining the ultimate authority to decide whether an affidavit provides a substantial basis for a magistrate's determination as a matter of law." (*People v. French* (2011) 201 Cal.App.4th 1307, 1315, fn. 1.)

cords and told them "don't look at me." Miles was arrested in the evening while fleeing from a crime in which the perpetrator came into a commercial office, bound the victims with telephone cords, and told them "don't look at me." All of this was ample substantial basis for probable cause independent of the alleged misstatements and omissions about which Miles complains. (See *People v. Carrington* (2009) 47 Cal.4th 145, 163 ["The showing required in order to establish probable cause is less than a preponderance of the evidence or even a prima facie case"].)

In sum, there was substantial evidence to support the trial court's finding that Detective Lore neither made false or reckless misstatements nor omitted material facts in his affidavit. Beyond that, the trial court appropriately determined that the affidavit was sufficient to state probable cause notwithstanding the supposed misstatements and omissions. Because Miles failed to meet his burden under *Franks*, there is no basis for reversing the judgment.

V. THE JURY INSTRUCTIONS ON MOTIVE AND MURDER BY TORTURE WERE PROPER

Miles contends that, "because motive was effectively an element of the state's case in connection with the first degree murder [by torture] theory," the trial court erred when it instructed the jury under CALJIC No. 2.51 that motive need not be proven. (AOB 144.) As this Court has already explained in rejecting this very argument, Miles is incorrect. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 218.) Miles is conflating intent with motive when they are not the same thing at all. (*Ibid.*)

A. Proceedings Below

The trial court instructed the jury that "[m]urder which is perpetrated by torture is murder of the first degree" and that an essential element of murder by torture is that "[t]he perpetrator committed the murder with a willful, deliberate and premeditated intent to inflict extreme and prolonged

pain upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose." (12 RT 4449; 14 CT 4083 [CALJIC No. 8.24]; Pen. Code, § 189.)

The trial court also instructed the jury that "[m]otive is not an element of the crime charged and need not be shown."[25] (12 RT 4437; 14 CT 4080; CALJIC No. 2.51.)

B. Standard of Review

The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) When reviewing a purportedly erroneous instruction, appellate courts inquire whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.) In conducting this inquiry, a reviewing court must be mindful that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. (*Ibid.*)

Additionally, the reviewing court must assume that jurors are intelligent persons, capable of understanding and correlating all jury instructions which are given. (*People v. Richardson, supra*, 43 Cal.4th at p. 1028.) The jury is presumed to have paid attention to the instructions and to have read them together. (*People v. Davis* (2005) 36 Cal.4th 510, 545.)

C. The Motive Instruction Did Not Eliminate an Element of the Murder By Torture Offense

Miles's theory is that, by instructing the jury that motive was not an element of murder by torture, the trial court effectively told the jurors they

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[25] Defense counsel objected to the torture instruction but not on the grounds Miles raises now. Rather, defense counsel argued that the instruction was unconstitutionally vague. (12 RT 4392; see *People v. Streeter* (2012) 54 Cal.4th 205, 250 [rejecting such a claim].)

could ignore the requirement that the prosecution prove that he acted "with a willful, deliberate and premeditated intent to inflict extreme and prolonged pain upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose." (12 RT 4449; 14 CT 4083 [CALJIC No. 8.24].) This argument assumes its conclusion, namely, that a motive to commit a crime and an intent to do some act during the commission of that crime are one and the same.

This Court has recognized that, contrary to Miles's assumption, motive and intent are separate and disparate mental states. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504.) The words are not synonyms. (*Ibid.*) Motive describes the reason a person chooses to commit a crime. (*Ibid.*) The reason, however, is different from a required mental state such as intent. (*Ibid.*)

Accordingly, in *People v. Whisenhunt, supra*, 44 Cal.4th at p. 218, the Court rejected the identical argument that Miles now makes. The Court concluded that *People v. Lynn* (1984) 159 Cal.App.3d 715 correctly decided this issue. (*Ibid.*) "*Lynn* stands for the proposition that motive is not an element of the crime of murder by torture, even though one of the essential elements of that crime is that the prohibited act be committed with the intent to cause pain for a specific purpose." (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1453.)

In particular, the *Lynn* court explained that the intent requirement of murder by torture "does not elevate motive to the status of an element" of the crime. (*People v. Lynn, supra*, 159 Cal.App.3d at p. 728.) "Rather, as CALJIC No. 2.51 instructs, the presence or absence of motive remains a circumstance in the case which may tend to establish guilt or innocence." (*Ibid.*) "The [murder by torture] instruction does not change the treatment of motive from that in other first degree murder cases." (*Ibid.*; see also *People v. Hamlin, supra*, 170 Cal.App.4th at pp. 1453-1454 [rejecting

argument that motive instruction vitiated intent requirement of crime of torture].)

Miles cites one case that he says supports his argument, *People v. Maurer* (2008) 32 Cal.App.4th 1121. (AOB 152-153.) *Maurer*, however, does not help him. There, the court found it was error to give CALJIC No. 2.51 where the defendant was charged with misdemeanor child annoyance under Penal Code section 647.6. The court acknowledged the general rule that motive is not an element of a criminal offense. (*Id.* at p. 1126.) "But the offense of section 647.6 is a strange beast" in which motive – specifically, being motivated by an unnatural or abnormal sexual interest – is an element. (*Id.* at pp. 1126-1127; see *People v. Hillhouse, supra*, 27 Cal.4th at p. 504 [distinguishing *Maurer*]; *People v. Wilson* (2008) 43 Cal.4th 1, 22 [same].)

Murder by torture is no such "strange beast." A murder can be committed for reasons other than torture, but still be committed by means of torture. For example, Miles's motive for killing Willem could have been so she could not testify against him, but he may have sadistically intended to inflict extreme and prolonged pain upon her while he was doing it. That is why courts have repeatedly rejected the contention that the motive instruction is incompatible with murder by torture. (*People v. Whisenhunt, supra*, 44 Cal.4th at p. 218; *People v. Lynn, supra*, 159 Cal.App.3d at p. 728.)

D. The Motive Instruction Did Not Eliminate an Element of the Penetration by Foreign Object Offense

Miles's claim that that the verdicts on counts 9 and 14 should be reversed likewise fails. (AOB 154.) On those counts, the jury found Miles guilty of violating Penal Code section 289, subdivision (a) (sexual penetration by foreign object). (14 CT 4017, 4020; 15 CT 4211, 4215.) Because motive is not a prerequisite to a section 289 violation, informing

the jurors that they need not find motive was irrelevant. (*People v. White* (1986) 179 Cal.App.3d 193, 205-206 [holding that "it is the nature of the act that renders the abuse 'sexual' and not the motivations of the perpetrator"]; *People v. Whitham* (1995) 38 Cal.App.4th 1282, 1293 [same].)

E. Miles Was Not Prejudiced by Any Error in the Instructions

Tellingly, Miles does not even attempt to show that the supposedly erroneous instructions actually prejudiced him. Instead, he argues that reversal of the first degree murder conviction is automatically required under *Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182] because the purported error was structural. (AOB 149-150.) Miles is trying to force a square peg into a round hole. *Sullivan* is inapplicable.

As this Court explained, the Supreme Court held in *Sullivan* that an instruction defining reasonable doubt in a way that effectively lowered the prosecution's burden of proof required automatic reversal. (*People v. Aranda* (2012) 55 Cal.4th 342, 364-365.) But that is not what happened here. The trial court gave CALJIC No. 2.90 (12 RT 4440; 14 CT 4088), and Miles does not, nor could he, contend that this instruction was "a misdescription of the burden of proof." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 281; see *People v. Lucas* (2014) 60 Cal.4th 153, __ [177 Cal.Rptr.3d 378, 507] [rejecting litany of challenges to adequacy of CALJIC No. 2.90 "because CALJIC No. 2.90 sufficiently defined the prosecution's burden"].)

At most, Miles's argument is that the motive instruction functionally omitted the intent element of murder by torture. An instructional error that improperly describes or omits an element of the crime from the jury's consideration is subject to the "harmless error" standard of review set forth

in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*People v. Flood* (1998) 18 Cal.4th 470, 502-503.)

Under *Chapman*, a federal constitutional error is harmless when the reviewing court determines beyond a reasonable doubt that the error complained of did not contribute to the verdict. (*People v. Aranda, supra* 55 Cal.4th at p. 367.) The reviewing court looks to the whole record to evaluate the error's effect on the jury's verdict. (*Ibid.*) This typically includes review of the strength of the prosecution's case. (*Ibid.*) "Indeed, the harmless error inquiry for the erroneous omission of instruction on one or more elements of a crime focuses *primarily* on the weight of the evidence adduced at trial." (*Ibid.*, original italics)

In this case, there are multiple reasons why the putative instructional error was harmless beyond a reasonable doubt. For starters, there was overwhelming evidence that Miles tortured Willem to death – particularly, the gruesome nature of her injuries. (10 RT 3663-3690; *People v. Morales* (1989) 48 Cal.3d 527, 559 [intent "may be inferred from the circumstances of the crime, the nature of the killing, and the condition of the victim's body"].)

What's more, the jury specifically found true the torture-murder special circumstance. (15 CT 4221.) This establishes that the jury necessarily agreed by unanimous vote that Miles intentionally murdered Willem and intended to inflict extreme cruel physical pain and suffering upon her for the purpose of revenge, extortion, persuasion, or any other sadistic purpose.[26] (14 CT 4112 [CALJIC No. 8.81.18]; *People v. Jones*

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[26] The motive instruction also has no bearing on the jury's special circumstance finding. (E.g., *People v. Crew* (2003) 31 Cal.4th 822, 852 ["We have in the past rejected defendant's argument that a trial court commits prejudicial error by instructing in the language of CALJIC No. 2.51 that motive is not an element of the crime charged. There is no

(continued...)

(2013) 57 Cal.4th 899, 966 [holding there was no error under *Chapman* where first degree murder instruction omitted element of malice but the jury sustained sodomy-murder special circumstance because "[t]his finding demonstrates the jury necessarily found beyond a reasonable doubt the facts supporting first degree murder"].)

Beyond that, murder by torture was not the prosecution's only theory for first degree murder. The jury was also instructed on premeditated deliberate murder and felony murder during the commission of rape, robbery, or burglary, and the jury specifically found true the rape/robbery/burglary special circumstances. (14 CT 4098, 4100; 15 CT 4218-4220.) Thus, the Court can conclude that the jury reached its verdict of first degree murder under at least one legally proper theory such that any instructional error would be harmless beyond a reasonable doubt. (*People v. Jones, supra*, 57 Cal.4th at p. 966; *People v. Pearson* (2012) 53 Cal.4th 306, 320; *People v. Boyd* (1985) 38 Cal.3d 762, 770.)

In sum, any instructional error here was not automatically reversible, but subject to *Chapman* harmless error analysis. Under the *Chapman* standard, the error was harmless.

(...continued)
reasonable likelihood that the jury would have applied the motive instruction to the special circumstance allegation"]; *People v. Riggs* (2008) 44 Cal.4th 248, 314 [CALJIC No. 2.51, "which states that motive is not an element of the 'crime charged,' does not conflict with the special circumstance instruction in such a manner that there is any reasonable likelihood that the jury would have been confused, and would have improperly decided the truth of the special circumstance allegation"].)

VI. THE INSTRUCTION ON THE TORTURE-MURDER SPECIAL CIRCUMSTANCE WAS PROPER

Intent to kill is an element of the torture-murder special circumstance. (*People v. Jennings* (2010) 50 Cal.4th 616, 647.) Miles contends that *People v. Pearson, supra*, 53 Cal.4th 306 compels the reversal of the jury's torture-murder special circumstance finding on the ground that the jury was not adequately instructed regarding the intent-to-kill element. (AOB 155-162.) *Pearson*, however, is inapposite because it involved multiple defendants and aiding and abetting liability, which rendered the form instruction on torture-murder ambiguous.

In this case, Miles was the only defendant and the only actual perpetrator. Therefore, the torture-murder instruction was unambiguous and the jury necessarily found the requisite intent to kill when it determined that the special circumstance was true.

A. Proceedings Below

The trial court used CALJIC No. 8.81.18 to instruct the jury regarding the torture-murder special circumstance as follows:

> To find that the special circumstance, referred to in these instructions as murder involving infliction of torture is true, each of the following facts must be proved:
>
> 1. The murder was intentional; and;
>
> 2. The defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose.
>
> Awareness of pain by the deceased is not a necessary element of torture.

(14 CT 4112; 12 RT 4453-4454.)

B. The Jury Was Properly Instructed Regarding Intent to Kill

Per CALJIC No. 8.81.18, the trial court instructed the jurors that, to find the special circumstance true, they had to find that "[t]he murder was *intentional*." (14 CT 4112, italics added.) Miles "concedes that in some cases, telling the jury that it must find the 'murder was intentional' may be the functional equivalent of requiring an intent to kill." (AOB 160.) But he says that this case is like *Pearson*, where the Court found that the jury was not properly instructed on intent to kill. (AOB 160; *People v. Pearson, supra*, 53 Cal.4th at p. 322.)

This case and *Pearson* are nothing alike. In *Pearson*, the defendant *and two other men* brutally killed the victim during a robbery and sexual assault. (*People v. Pearson, supra*, 53 Cal.4th at p. 310.) The trial court instructed the jury that it could find that the torture-murder special circumstance applied to the defendant as an aider and abettor if the jury found that he *either* had the intent to kill *or* was a major participant and acted with reckless indifference to human life. (*People v. Pearson, supra*, 53 Cal.4th at p. 322.) This instruction was wrong because the torture-murder special circumstance applies *only* if the defendant personally harbors an intent to kill. (*Id.* at pp. 322-323.)

The jury found the special circumstance true based on the aider and abettor theory, but made no specific finding as to whether the defendant acted with the intent to kill or merely with reckless indifference to the victim's life. (*People v. Pearson, supra*, 53 Cal.4th at p. 323.) Therefore, it was impossible to conclude beyond a reasonable doubt that the jury determined the defendant had an intent to kill. (*Id.* at pp. 322-323.) CALJIC No. 8.81.18's requirement that the jury find the "murder was intentional" did not solve the problem because the murder could

simultaneously be intentional for one accomplice but not intentional for the defendant. (*Id.* at p. 323.)

Here, there is no such ambiguity. Miles acted alone. There was no aiding and abetting theory. Consequently, when the jurors found true that the "murder was intentional," they necessarily found that Miles harbored an intent to kill.[27]

Finally, even assuming error in the instructions, the Court should find the error harmless beyond a reasonable doubt. Unlike in *Pearson*, where the defendant was one of three perpetrators whose personal involvement was in substantial factual dispute, here Miles was the sole perpetrator. (*People v. Pearson, supra*, 53 Cal.4th at p. 323.) There was ample evidence that Miles intended to kill Willem when he personally bludgeoned, beat, stomped, and strangled her to death. (10 RT 3663-3690.)

In sum, because there was no error in the torture-murder special circumstance instruction, and because the putative error was harmless anyway, there is no reason for the Court to reverse the jury's finding that the torture-murder special allegation was true.

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[27] The prosecutor correctly told the jurors that they could find first degree murder by torture without finding an intent to kill. (12 RT 4484; *People v. Pearson, supra*, 53 Cal.4th at p. 319, fn. 3; *People v. Jennings, supra*, 50 Cal.4th at p. 647.) Later, when discussing the torture-murder special circumstance, the prosecutor accurately explained that, while the jurors could find Miles guilty of murder without finding an intent to kill, "[t]o get to the special circumstance *first you have to find that there was an intentional murder*, and again we've established, through the method of death, the method of attack, the repetitive nature, again the strangulation, we know the murder was intentional." (12 RT 4490, italics added.)

VII. CALIFORNIA'S FELONY MURDER SPECIAL CIRCUMSTANCE IS CONSTITUTIONAL

Miles argues at length that California's death penalty scheme allowing a jury to sentence a defendant to death where it has found true the rape, robbery, or burglary special circumstance under Penal Code section 190.2, subdivision (a)(17), is unconstitutional. (AOB 163-177.) This is so, he claims, because, in cases where the defendant is the actual killer, there is no concomitant requirement that the jury find that the defendant acted with intent to kill or reckless indifference to human life. (AOB 167; 14 CT 4110.) Miles notes that there is such a requirement for aiders and abettors and, therefore, contends that the requirement must also apply to actual killers. (AOB 167.) He relies principally on *Tison v. Arizona* (1987) 481 U.S. 137 [107 S.Ct. 1676, 95 L.Ed.2d 127] and *Enmund v. Florida* (1982) 458 U.S. 782 [102 S.Ct. 3368, 73 L.Ed.2d 1140]. (AOB 167-168.)

This Court has repeatedly and resoundingly rejected identical arguments. (E.g., *People v. Letner* (2010) 50 Cal.4th 99, 192 [holding that there is no requirement of reckless indifference to human life where defendant is the actual killer]; *People v. Stanley* (2006) 39 Cal.4th 913, 958 [holding that "intent to kill is *not* an element of the felony-murder special circumstance if the defendant is the actual killer"]; *People v. Kennedy* (2005) 36 Cal.4th 595, 640 [same]; *People v. Smithey* (1999) 20 Cal.4th 936, 1016 [same]; *People v. Visciotti* (1992) 2 Cal.4th 1, 62 [same]; *People v. Belmontes* (1988) 45 Cal.3d 744, 794-795 [same]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [same].)

The Court most recently addressed this issue in *People v. Contreras* (2013) 58 Cal.4th 123, 163. There, the Court explained that the limits that the Supreme Court imposed on death eligibility and sentencing in *Enmund* – which involved an aider and abettor – were categorical. (*Ibid.*) "When such rules are stated in terms of the circumstances under which capital

punishment is allowed, no constitutional violation occurs where the defendant '*in fact killed*, attempted to kill, or intended to kill.'" (*Ibid.*, quoting *Cabana v. Bullock* (1986) 474 U.S. 376, 386 [106 S.Ct. 689, 88 L.Ed.2d 704], italics added by the Court.)

"Accordingly, in the context of first degree felony murder, we have not conditioned capital punishment upon an intent to kill for actual killers" and "[t]he felony-murder special circumstance in section 190.2(a)(17) is valid absent any requirement that a defendant who actually killed during an enumerated felony acted with the intent to kill." (*People v. Contreras, supra*, 58 Cal.4th at p. 163.) "We reject defendant's contrary claim." (*Ibid.*)

Contreras likewise disagreed with the defendant's assertion that *Tison* requires at least a finding of "reckless indifference to human life" before imposing the death penalty. (*People v. Contreras, supra*, 58 Cal.4th at p. 164.) As the Court explained, *Tison* dealt with a *non-killer accomplice's* eligibility for the death penalty. (*Ibid.*) "[T]he principles and authorities that allow the death penalty for nonkiller accomplices to felony murder have no direct bearing on what is minimally required to impose death on someone who actually kills during a felony and who possesses no lethal mental state." (*Ibid.*)

Unlike with accomplices, proof that a defendant who is guilty of felony murder was the actual killer of the victim – *by itself*–establishes the degree of culpability required to impose the death penalty. (*People v. Contreras, supra*, 58 Cal.4th at p. 165, citing *People v. Letner, supra*, 50 Cal.4th at p. 193.) *Tison* and *Enmund*, which addressed different concerns, do not alter that established principle. (*Ibid.*, citing *People v. Letner, supra*, 50 Cal.4th at p. 193.)

Miles's reliance on *Hopkins v. Reeves* (1998) 524 U.S. 88 [118 S.Ct. 1895, 141 L.Ed.2d 76] for the proposition that the Supreme Court applied the intent-to-kill requirement to actual killers is equally unavailing. (AOB

168.) Miles "view[s] that case out of context, extracting from it a rule the court did not adopt." (*People v. Letner, supra*, 50 Cal.4th at p. 194.)

In *Reeves*, the Supreme Court simply held that the prosecution must satisfy the requirements of *Tison* and *Enmund* at some point in the proceedings. (*People v. Letner, supra*, 50 Cal.4th at p. 194.) But "*Tison* and *Enmund* do not require that there be proof that an actual killer had any culpable mental state regarding the murder – and the court's subsequent decision in *Reeves* said nothing that changes that principle." (*Ibid.*)

Furthermore, *Kennedy v. Louisiana* (2008) 554 U.S. 407 [128 S.Ct. 2641, 171 L.Ed.2d 525], which Miles also cites, does not "undermine[] any decision of the United States Supreme Court or this court concerning the circumstances under which a death sentence is allowed for felony murderers who actually kill their victims." (*People v. Contreras, supra*, 58 Cal.4th at p. 165.) Moreover, "because [Miles's] death sentence complied with federal and state constitutional and statutory requirements ... his related international law claim fails." (*Id.* at pp. 165-166; AOB 173-175.)

Lastly, even assuming error in not instructing the jury that intent to kill was required for the rape/robbery/burglary special circumstance, that error was harmless beyond a reasonable doubt. The jury also found true the torture-murder special circumstance, which requires an *intentional* murder. (14 CT 4112; 15 CT 4221.) Thus, the jury necessarily concluded that Miles intended to kill Willem, rendering any error in the rape/robbery/burglary special circumstance instructions harmless under any standard. (See *People v. Jones, supra*, 57 Cal.4th at p. 966.)

In sum, California's felony murder special circumstance comports with the Constitution. Regardless, the jury found true that appellant intentionally murdered Willem, which satisfies any intent to kill requirement in this case.

VIII. THE TRIAL COURT PROPERLY PERMITTED CROSS-EXAMINATION OF DEFENSE COUNSEL DURING THE COMPETENCY TRIAL

Miles's defense counsel, Joseph Canty, testified at the competency trial. The trial court allowed the prosecutor to cross-examine Canty regarding the effect an incompetence finding would have on the guilt-phase jury and whether seeking a new penalty-phase jury is a common tactic in capital cases.

Miles contends that this evidence was irrelevant. (AOB 178-194.) But, as the trial court found, the evidence was patently relevant regarding both Canty's credibility and the prosecutor's argument that Miles was malingering.

Miles also asserts that the evidence was attorney-client privileged or work product. (AOB 194-199.) That argument is a red herring. None of the disputed testimony was protected from disclosure under the privilege or work product doctrines.

A. Proceedings Below

The competency trial hinged on Miles's ability to cooperate with his attorney in presenting his defense at the penalty phase. (14 RT 5004-5005.) Canty testified at the competency trial because he "was in a prime position to explain how Mr. Miles was cooperating in his own defense." (AOB 181.) Obviously, once Canty testified, he was subject to cross-examination. (Evid. Code, §§ 711, 773.)

Miles wanted to have his cake and eat it too by (1) offering Canty's testimony with only a selective privilege waiver and (2) dictating what the prosecutor could ask Canty about on cross-examination. So he filed a motion seeking to do just that. (16 CT 4518-4526.)

The trial court and counsel addressed the issues before Canty testified. (15 RT 5119-5132.) The trial court agreed with Miles that Canty could

testify without a general privilege waiver. (15 RT 5126.) As to what restrictions, if any, were to be placed on the prosecutor's cross-examination, the trial court decided to play it by ear: "I think we're just going to have to take it as it comes. ... [I]f it's getting into an area we call strategy, motive, trial tactics, then let's address it before out of the presence of the jury so I can make a ruling on it." (15 RT 5132.)

Canty took the stand and presented himself as something of an expert on defending capital cases. (15 RT 5136-5140.) He touted his years-long special assignment handling death penalty cases in the capital defense unit of the public defender's office. (15 RT 5136-5137.) He reassured the jury about the effect of an incompetence finding, explaining that it would not necessarily preclude a defendant from eventually facing trial. (15 RT 5140.) Then, after telling the jury that he would divulge privileged information only with great reluctance, Canty testified to his conversations with Miles that made him believe that Miles was incompetent. (15 RT 5141-5193.)

On cross-examination, Canty conceded that his "obligation in representing Mr. Miles is to basically exhaust every legal remedy so that he avoids the death penalty." (15 RT 5193.) The prosecutor asked Canty what happens to the guilt-phase jury if there is a finding of incompetence between the guilt and penalty phases of a capital trial. Notwithstanding his extensive experience handling capital cases, Canty pled ignorance:

Q: And the effect of a finding of incompetency in this particular trial would mean that [the guilt-phase] jury would be discharged, would it not?

A: That would be up to the Judge.

Q: Well, doesn't 1368, Section 1368 state right in the section that if there's a finding of incompetency the jury shall be discharged.

A: You got me on that one. Without looking at the section, I don't know that.

(15 RT 5201.)

Following up, the prosecutor asked, "Frequently there's a, there's a tactical advantage in death penalty cases to have a second, separate jury impaneled for the penalty phase that did not hear the guilt phase; is that correct?" (15 RT 5202.) The prosecutor did not seek a sidebar prior to posing this question because "I think it was a fair question, and I don't think was in any way beyond the scope[,] [i]t was certainly in line with the topics that he opened the door to." (15 RT 5257.) Nevertheless, defense counsel objected and the trial court let the jury go for the day without an answer from Canty. (15 RT 5202.)

After the jury was gone, counsel and the trial court discussed the matter. The prosecutor told the court that one of his arguments was going to be that there is a tactical advantage to having a new jury decide the penalty. (15 RT 5203.) The trial court indicated that, "at this point in time I don't think [the prosecutor's] getting to, well, work product ... [h]e's talking about it in the abstract." (15 RT 5203.) Defense counsel responded that he thought this information was irrelevant in the abstract and unduly prejudicial in the concrete. (15 RT 5203.) The trial court wanted time to think about it. (15 RT 5203.)

The next day, before the resumption of Canty's cross-examination, there was further discussion. (15 RT 5252-5255.) Again, the prosecutor confirmed that he intended to argue that a motive for the competency trial in this case was to obtain a new jury for the penalty phase. (15 RT 5254.) The trial court ruled that "it certainly would be relevant for [the prosecutor] to argue that if he chooses to do that[] [a]nd so I think that there is some, certainly some relevance more than just a minimum amount of relevance to that position." (15 RT 5254.) Moreover, "while it does deal with the subject of the strategy that we were concerned about before, it's basically strategy or motive for this proceeding, as opposed to overall strategy in the

penalty phase, and I think directly would be relevant on this, on this issue." (15 RT 5254-5255.)

The prosecutor and Canty then had the following colloquy:

> Q: Frequently it's a defense tactic in capital cases to seek a new jury for the penalty phase, a separate jury that hasn't heard the guilt phase evidence; is that right?
>
> A: I can't answer that yes or no. I would think that depending upon the status of the case and a given case, I could conceive that counsel might wish to have another jury handle the penalty phase, and there could be a variety of reasons for that.

(15 RT 5260.)

Next, the prosecutor asked Canty whether he had ever made a motion for a new penalty-phase jury in any of his other capital cases. (15 RT 5260.) Canty averred that he could not remember but, after being shown a motion for a separate penalty-phase jury that had his name on it, he admitted that he had. (15 RT 5260-5262.) Similarly, in a stuttering response, Canty did not deny (because he claimed not to remember) that, before the issue of competency arose, he told the prosecutor he was thinking of making a motion for a new penalty-phase jury in this case. (15 RT 5362.)

Later, upon seeing a copy of Penal Code section 1368, Canty conceded that section 1368 mandated discharge of the guilt-phase jury if Miles were found incompetent. (15 RT 5292-5293.) Canty's story was that he did not recall this when he previously testified that the discharge of the jury was within the judge's discretion. (15 RT 5293.)

B. Standard of Review

A trial court has considerable discretion in determining the relevance of evidence. (*People v. Merriman, supra*, 60 Cal.4th at p. 74.) Similarly, the court has broad discretion under Evidence Code section 352 to exclude

even relevant evidence if it determines the probative value of the evidence is substantially outweighed by its possible prejudicial effects. (*Ibid.*)

An appellate court reviews a court's rulings regarding relevancy and admissibility under Evidence Code section 352 for abuse of discretion. (*People v. Merriman, supra*, 60 Cal.4th at p. 74.) This Court will not reverse a trial court's ruling on such matters unless it is shown that the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*Ibid.*)

C. The Trial Court Did Not Abuse Its Discretion in Allowing the Prosecutor to Cross-examine Canty About the Potential Benefits of an Incompetency Finding

1. The Evidence Was Relevant

Miles asserts that evidence regarding the potential benefits of a new jury for the penalty phase was not relevant to the competency trial. He is mistaken.

To begin with, the benefits of an incompetency finding – namely, a new penalty-phase jury – were relevant to Canty's credibility. They gave Canty – who had already testified he was obligated to exhaust every legal remedy so that Miles could avoid the death penalty – a reason for saying that Miles was incompetent, regardless of Miles's actual mental state. Thus, even if, as Miles contends, Canty's belief that an incompetence finding would help his client said nothing about Miles's competence, it *did* say something about Canty's credibility. And evidence bearing on a witness's credibility is always relevant. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9; *People v. Hillhouse, supra*, 27 Cal.4th at p. 494; *People v. Contreras, supra*, 58 Cal.4th at p. 152.)[28]

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[28] Miles suggests that Canty, as a sworn officer of the court testifying under penalty of perjury, was somehow immune from cross-

(continued...)

Beyond that, Miles's assertion that the benefits of a new jury for the penalty phase were not relevant to the ultimate question of Miles's competence likewise misses the mark. (AOB 190-191.) Miles's competence was the very issue that was in dispute. The prosecutor's argument was that Miles was faking incompetence for an ulterior purpose. Therefore, as the trial court put it, the potential benefits of faking incompetence "certainly would be relevant." (15 RT 5254; *People v. Contreras, supra*, 58 Cal.4th at p. 152 [relevant evidence is evidence that has some tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action]; Evid. Code, § 210.)

2. The Evidence Was Not Unduly Prejudicial

Alternatively, Miles contends that the trial court erred in not excluding this evidence as unduly prejudicial under Evidence Code section 352. (AOB 191-194.) The supposed prejudice is that the evidence supported the prosecutor's argument to the jury that "the entire competency hearing was a ruse" to prevent the guilt-phase jury from deciding the penalty phase. (AOB 194.)

In other words, Miles thinks that the evidence was prejudicial because it helped the prosecutor's case and damaged Miles's. That is precisely what is not "undue prejudice."

"Prejudice," as used in Evidence Code section 352, is not synonymous with damaging and is not so sweeping as to include any evidence the opponent finds inconvenient. (*People v. McCurdy* (2014) 59

(...continued)
examination relating to his credibility. (AOB 190-191.) Conspicuously, he cites no authority for that proposition. (Cf. *People v. Stanley* (1995) 10 Cal.4th 764, 793 [explaining that every brief should contain a legal argument with citation of authorities on the points made such that, if none is furnished on a particular point, the court may treat it as waived, and pass it without consideration].)

Cal.4th 1063, 1095) Nor is evidence "prejudicial" merely because it undermines the opponent's position or shores up that of the proponent; the ability to do so is what makes evidence relevant. (*People v. Scott, supra*, 52 Cal.4th at p. 490.) Rather, "prejudice" refers to evidence that uniquely tends to evoke an emotional bias against the defendant as an individual, and has little to do with the issues raised in the trial. (*People v. McCurdy, supra*, 59 Cal.4th at p. 1095.)

Here, the evidence regarding the benefits to Miles of an incompetence finding were highly relevant to the issues raised in the competency trial. Those benefits were (1) Miles's very motive for faking and (2) a reason to question the credibility of Canty's testimony that Miles was incompetent.

D. The Evidence Was Not Privileged

Miles argues that even if the testimony elicited from Canty was relevant and admissible it was, nonetheless, a privileged attorney-client communication or attorney work product. (AOB 194-199; Evid Code, § 954; Pen. Code, § 1054.6) It was neither.

First, the attorney-client privilege applies to "a confidential *communication* between client and lawyer." (Evid. Code, § 954, italics added.) With respect to the benefits of an incompetence finding, Miles does not identify a single communication between himself and Canty about which Canty was asked or forced to testify. (AOB 185.)

Second, "through its reference to Code of Civil Procedure section 2018.030, subdivision (a), Penal Code section 1054.6 '"expressly limits the definition of 'work product' *in criminal cases* to 'core' work product, that is, any *writing* reflecting 'an attorney's impressions, conclusions, opinions, or legal research or theories.'"'" (*People v. Zamudio* (2008) 43 Cal.4th 327, 355, quoting *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 68, fn. 2, italics added by the Court; *People v. Bennett* (2009) 45 Cal.4th 577, 595.) The prosecutor's questions to Canty did not relate to any *writing* reflecting

his impressions, conclusions, opinions, legal research or theories and thus could not have impinged any valid work product privilege. (*People v. Bennett, supra*, 45 Cal.4th at p. 595 ["[T]he prosecutor's questions did not elicit or attempt to elicit evidence of a 'writing' reflecting defense counsel's 'impressions, conclusions, opinions, or legal research or theories' and therefore did not violate the work product privilege"].)[29]

Moreover, Canty was not asked to, and did not, divulge any otherwise privileged or confidential information. For example, the only question and answer relating to strategy that Miles identifies was when the prosecutor asked whether it is frequently a defense tactic to seek a new penalty-phase jury in capital cases. (15 RT 5260; AOB 185.) Canty gave an evasive response: "I can't answer that yes or no. I would think that depending upon the status of the case and a given case, I could conceive that counsel might wish to have another jury handle the penalty phase, and there could be a variety of reasons for that." (15 RT 5260.)

Canty's observation that there might be reasons why, depending on the case, some hypothetical defense counsel might want a new penalty-phase jury did not disclose any unique impressions, conclusions, opinions, or theories. Indeed, the prosecutor did *not* ask Canty to actually list the reasons that he or any other defense counsel might have for seeking a new penalty-phase jury in a given case.

Furthermore, Canty did not deny telling the prosecutor that he was thinking of seeking a new penalty-phase jury in this case. (15 RT 5363.) The mere fact that Canty was pondering a motion for a new penalty-phase jury could not have been privileged or confidential since he told the

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[29] The Court of Appeal opinion upon which Miles relies, *Fireman's Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263, is a *civil* case that no criminal case has ever cited. (AOB 197-199.)

prosecutor about it. During Canty's testimony, the prosecutor did not ask, and Canty did not say, *why* he was contemplating that move. (15 RT 5363.)

The other two portions of Canty's testimony that Miles identifies are even further removed from any arguable privilege claim. (AOB 185.) First, after initially claiming that he could not remember, Canty admitted that he had previously moved for a new penalty-phase jury in a capital case. (15 RT 5260-5262.) That is not privileged or confidential information; it is a matter of public record. (*People v. Combs* (2004) 34 Cal.4th 821, 865-866 [holding that where prosecutor questioned defense counsel about prior court proceedings, "[defense counsel] did *not* testify about any confidential communications between him and defendant" and that "[b]ecause this information was of public record no confidential information was elicited by the prosecution which violated the attorney-client privilege" (internal quotation marks omitted)].)

Second, although he originally testified that he was not aware of what would happen to the guilt-phase jury if Miles were found incompetent, Canty later recalled that section 1368 required the jury's discharge. (15 RT 5292-5293.) Again, what the law says is a matter of public record and is not privileged or confidential. (*People v. Combs, supra*, 34 Cal.4th at pp. 865-866.)

Finally, assuming that Canty's testimony could somehow be shoehorned into the protective boot of privilege, the trial court still did not err in allowing it. Having selectively waived the privilege so that Canty could give helpful testimony, it would have been patently unfair for Miles to turn around and use the privilege to bar the prosecutor from eliciting information that was relevant to his argument. (See *People ex rel. Herrera v. Stender* (2012) 212 Cal.App.4th 614, 647 [recognizing that the "privilege which protects attorney-client communications may not be used both as a sword and a shield" (internal quotation marks omitted)].)

E. Miles Was Not Harmed by Any Error

Even if it was error for the trial court to permit the testimony at issue, reversal is not required. Error in admitting or excluding evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. (*People v. Watson* (2008) 43 Cal.4th 652, 686, referring to *People v. Watson* (1956) 46 Cal.2d 818, 836.) Thus, appellate review under *Watson* focuses on what a jury is *likely* to have done in the absence of the error under consideration. (*People v. Breverman* (1998) 19 Cal.4th 142, 177.)

"In making [the *Watson*] evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so relatively strong, and the evidence supporting a different outcome is so comparatively weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*People v. Breverman, supra*, 19 Cal.4th at p. 177.) Accordingly, "[a]pplication of the *Watson* standard of appellate review may disclose that, though error occurred, it was harmless." (*Id.* at p. 178.)

In this case, it is not reasonably probable that Miles would have obtained a better result had the alleged error not occurred. The competency trial was fundamentally a battle of experts. Miles called five doctors who testified regarding his purported mental illness and his supposed inability to cooperate in presenting his defense at the penalty phase. (14 RT 5031; 15 RT 5208, 5276, 5307, 5364.) The prosecutor called two doctors who testified that appellant was malingering. (16 RT 5429, 1542, 5557, 5573-5575.) Also, the prosecutor showed the jury a videotape of Miles acting normally after the guilt phase. (16 RT 5737-5743.) Having heard and seen this evidence, the jury manifestly agreed with the prosecutor's experts that Miles was malingering.

Miles's assertion that, notwithstanding the testimony from multiple doctors and video of his actual behavior, it was Canty's testimony that really turned the tide against him is nothing but speculation. And speculation does not establish prejudice. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1254 [holding that "speculative" claim of prejudice was insufficient to meet *Watson* standard]; *People v. Blakeley* (2000) 23 Cal.4th 82, 94 [explaining that *Watson* "requires a *reasonable* probability, not a mere *theoretical* possibility, that the ... error affected the outcome of the trial"].)

IX. THE EIGHTH AMENDMENT DOES NOT BAR EVIDENCE OF JUVENILE CRIMES AT THE PENALTY PHASE

During the penalty phase, the trial court informed the jury that Miles had 14 prior felony convictions. (18 RT 6100-6101.) Eight of those convictions were for residential burglaries that Miles committed just before he turned 18.[30] (9 RT 3632; 18 RT 6100-6101.) Miles does not, nor could he, dispute that felony convictions for crimes committed when he was a juvenile are admissible aggravating circumstances under Penal Code section 190.3, factor (c). (AOB 203; *People v. Williams* (2010) 49 Cal.4th 405, 462; *People v. Pride* (1992) 3 Cal.4th 195, 256-257.)

Nevertheless, Miles contends that admission of these convictions violated the Eighth Amendment. (AOB 203-215.) He relies on three Supreme Court cases decided after he was sentenced: *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1]; *Graham v. Florida* (2010) 560 U.S. 48 [130 S.Ct. 2011, 176 L.Ed.2d 825]; and *Miller v.*

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[30] Miles committed these crimes between October 17, 1984, and December 11, 1984. (18 RT 6100-6101.) Miles turned 18 on December 12, 1984. (9 RT 3632.) He was an adult when he was convicted on June 4, 1985. (18 RT 6100.)

Alabama (2012) __ U.S. __ [132 S.Ct. 2455, 183 L.Ed.2d 407]. These cases do not support Miles's argument.

In *Roper*, the Supreme Court held that the Eighth Amendment barred execution of a defendant who was under 18 when he committed the capital crime. (*Roper v. Simmons, supra*, 543 U.S. at pp. 555-556, 578.) *Graham* held that the Eighth Amendment prohibits a sentence of life without parole (LWOP) for a juvenile offender's non-homicide crime. (*Graham v. Florida, supra*, 560 U.S. at pp. 52-53, 82.) Finally, *Miller* held that the Eighth Amendment precludes a mandatory LWOP sentence for a defendant convicted of a murder committed before he turned 18. (*Miller v. Alabama, supra*, 132 S.Ct. at p. 2460.)

Roper, *Graham*, and *Miller* were concerned with the *penalty* imposed on an offender for a *juvenile* crime. This case, however, involves Miles's penalty for a murder he committed as an *adult*. Enhancing an adult defendant's sentence based on his juvenile crimes is not an additional penalty for his juvenile crimes, it is a stiffened penalty for his adult crime. (*People v. Pride, supra*, 3 Cal.4th at p. 257.)

Thus, Miles's reliance on *Roper*, *Graham*, and *Miller* is "badly misplaced" because they say nothing about the propriety of permitting a capital jury, trying an adult, to consider evidence of offenses committed when the defendant was a juvenile. (*People v. Bramit* (2009) 46 Cal.4th 1221, 1239.) An Eighth Amendment analysis hinges upon whether there is a national consensus in this country against a particular *punishment*. (*Ibid.*) Miles's challenge here is to the admissibility of evidence, not the imposition of punishment. (*Ibid.*; *People v. Bivert* (2011) 52 Cal.4th 96, 123 [rejecting defendant's argument that *Roper* articulated a "rule in which no prior juvenile conduct is admissible in the penalty phase of a capital trial"]; *People v. Lee* (2011) 51 Cal.4th 620, 648-649 [holding that *Roper*

does not compel exclusion of juvenile criminal activity]; *People v. Taylor* (2010) 48 Cal.4th 574, 653-654 [same].)

In sum, both before and after the cases that Miles cites, this Court has held that juvenile criminal activity is admissible as an aggravating circumstance in capital cases. There is no support anywhere for Miles's contention that *Roper*, *Graham*, and *Miller* created a bar on the consideration of juvenile crimes when deciding the appropriate penalty for an adult murderer.

Moreover, when evidence has been improperly admitted under section 190.3, subdivision (c), "the error may be harmless when the evidence is trivial in comparison with the other properly admitted evidence in aggravation." (*People v. Williams, supra*, 49 Cal.4th at p. 461.) The question is whether, in light of the properly admitted evidence of Miles's criminal history and the circumstances of the crimes in this case, there is a reasonable possibility that the jury's penalty verdict was affected by the inadmissible evidence. (*People v. Burton* (1989) 48 Cal.3d 843, 864.) This standard is "essentially the same as the harmless beyond a reasonable doubt standard of *Chapman v. California*." (*People v. Lewis, supra*, 43 Cal.4th at p. 527, internal quotation marks omitted.)

Here, Miles's old juvenile burglary convictions were not the most significant aggravation evidence. They paled in comparison to the appalling nature of Willem's murder and the evidence of Miles's other 1992 crimes, which included a horrific binge of rapes and armed robberies. "On this record, given the properly admitted evidence of defendant's substantial criminal history and the circumstances of the instant offenses, there simply is no reasonable possibility the jury's penalty verdict was affected by the inadmissible evidence." (*People v. Burton, supra*, 48 Cal.3d at p. 864.)

X. ADMISSION OF EYEWITNESS TESTIMONY REGARDING UNCHARGED CRIMES UNDER PENAL CODE SECTION 190.3, FACTOR (B), DID NOT VIOLATE MILES'S CONSTITUTIONAL RIGHTS

Miles argues that, because identification evidence had been lost, the trial court erred in permitting Paula Yenerall, Janet Heynen, John Kendrick, and Arnold Andersen to testify that Miles robbed them at gunpoint. (AOB 216-241.) There was no error, as the "lost" evidence was minimal and ameliorated. Moreover, there was so much other evidence in aggravation that the exclusion of this testimony would not have made a difference anyway.

A. Proceedings Below

During the penalty phase, the prosecutor presented evidence under Penal Code section 190.3, factor (b), that Miles committed armed robberies on January 6, January 21, February 19, and February 21, 1992. (Statement of Facts, section II(A)(1)(a)-(d), *supra*.) This evidence was introduced through the eyewitness testimony of Yenerall, Heynen, Kendrick, and Andersen. (Statement of Facts, section II(A)(1)(a)-(d), *supra*.) These crimes were originally part of the information in this case but were later severed. (5 CT 1312-1338; 13 CT 3619-3620; 2 RT 514-515.)

1. The Missing Photo Lineups

a. Paula Yenerall

Paula Yenerall was the January 6, 1992, robbery victim. (Statement of Facts, section II(A)(1)(a), *supra*.) In March 1992, Yenerall identified a man named Orlando Boone from a photo lineup, although she did not choose him out of a subsequent live lineup. (5 CT 1497-1498; 10 CT 2999; 12 CT 3406.) The Orlando Boone photo lineup was available to the defense. (12 CT 3407.)

Later, in July 1992, Yenerall picked Miles from a live lineup. (5 CT 1476-1482; 10 CT 2999.) She again identified Miles on March 18, 1996, when she testified at the preliminary hearing. (5 CT 1472; 10 CT 2999.)

Yenerall further testified at the preliminary hearing that, a few weeks prior to her July 1992 identification of Miles, she was shown a photo lineup in which she picked Miles. (5 CT 1494-1495, 1498-1499; 6 CT 1500; 11 CT 3000.) The police and prosecution had no record of the second photo lineup. (5 CT 1272-1273.) Their belief was that Yenerall was simply confused and was likely talking about a picture of the live lineup that she was shown during her 1994 grand jury testimony. (12 CT 3406-3407.) Significantly, Miles was number 5 in the live lineup and number 5 in the picture of the live lineup, and Yenerall said that he was number 5 in the photo lineup that she believed she had seen in 1992. (5 CT 1480-1482, 1499; 12 CT 3406-3407.)

Yenerall also testified that the police showed her a sketch of a possible suspect and asked what changes she would make for it to look more like the person who robbed her. (6 CT 1509-1510.) The sketch was provided to the defense. (5 CT 1274; 12 CT 3407.)

b. Janet Heynen

Janet Heynen was the January 21, 1992, robbery victim. (Statement of Facts, section II(A)(1)(b), *supra.*) She identified Miles at the July 1992 live lineup and again at the 1996 preliminary hearing. (6 CT 1533-1534, 1538-1539.)

Heynen testified that the police had asked her to look at photo lineups at least four times before the live lineup. (6 CT 1543, 1548.) The first two times, she may have said that one person was close, but not definite. (6 CT 1544-1545.) She did not remember if she selected anyone the third time. (6 CT 1547.) The fourth time, she remembered again saying that one person looked close, but she could not say for sure. (6 CT 1547-1548.)

Upon reflection after her preliminary hearing testimony, Heynen told Detective Lore that she was not sure she had seen that many photo lineups. (6 CT 1720.) Detective Lore testified that, on March 12, 1992, he showed Heynen a photo lineup including a suspect named Steven Dyer. (7 CT 1986-1987.) Heynen did not identify Dyer from that lineup, and the lineup was disassembled a few days later. (5 CT 1274; 7 CT 1987-1988.) A photo of Dyer was made available to the defense. (12 CT 3407; 2 RT 473.)

Also on March 12, 1992, Detective Lore showed Heynen a book of sex offender parolee photos. (7 CT 1986.) She said a parolee named Damon Cooper looked familiar. (7 CT 1987-1988.) His photo was available. (7 CT 1987; 12 CT 3407.)

On March 23, 1992, Detective Lore showed Heynen a photo lineup that included Orlando Boone. (7 CT 1989.) Heynen identified photo number 5 (not Boone). (7 CT 1989.) That photo lineup, including photo number 5, still existed and was available to the defense. (5 CT 1274; 7 CT 1991; 12 CT 3407.)

In June 1992, a third photo lineup that included Miles was shown to Heynen. (7 CT 1993.) No issues were raised regarding this lineup. (10 CT 2710.) Detective Lore was not aware of any other times where Heynen viewed a photo lineup. (7 CT 1994.)

Heynen also assisted in preparing a sketch of the person who robbed her. (7 CT 1994.) The sketch was not destroyed and was available to the defense. (5 CT 1274; 7 CT 1995; 12 CT 3407.)

c. John Kendrick

Kendrick was one of the February 19, 1992, robbery victims. (Statement of Facts, section II(A)(1)(c), *supra*.) He identified Miles both at the July 1992 live lineup and at the 1996 preliminary hearing. (8 CT 2321, 2324-2326.)

Kendrick recalled that the police showed him photo lineups on two occasions. (8 CT 2326.) He did not remember making an identification either time. (8 CT 2327-2328.) According to Detective Lore, however, when shown the second photo lineup, Kendrick identified a man named Randy Winters. (7 CT 2021.) Since the photo lineup with Winters's picture was disassembled and unavailable, the prosecutor provided the defense with Winters's DMV photo. (7 CT 2021-2022; 2 RT 494.)

d. Arnold Andersen

Arnold Andersen and his wife, Sharyn, were the victims of the February 21, 1992, robbery. (Statement of Facts, section II(A)(1)(c), *supra*.) In June 1992, Andersen saw a newspaper article with Miles's picture, which he recognized as the person who robbed him. (6 CT 1582.) Andersen subsequently identified Miles at the July 1992 live lineup and the 1996 preliminary hearing. (6 CT 1574, 1584-1585.)

Andersen recalled that, on several occasions, the police had shown him photos of potential suspects. (6 CT 1589.) He did not remember making a positive identification from these photos. (6 CT 1593.)

Detective Lore testified that, on March 26, 1992, he showed Andersen a photo lineup. (7 CT 2011.) Andersen said person number 5 in the lineup "was the closest, but it's *not* him." (7 CT 2011, italics added.) That photo lineup was unavailable. (12 CT 3410.)

Detective Howard Woods testified that he prepared a photo lineup with a suspect named Roger Egan, which he showed to Andersen on May 22, 1996. (7 CT 2044-2047.) Andersen did *not* positively identify Egan, but Andersen did say that Egan looked closest to the person who robbed him and that he was about eighty percent sure. (7 CT 2011, 2046.) Because this photo lineup was disassembled, the prosecutor provided the defense with Egan's DMV photo. (5 CT 1274; 7 CT 2052; 2 RT 475.)

2. The Trial Court's Rulings

Miles filed a pre-trial motion to dismiss the information under Penal Code section 995 based in part on the missing photo lineups. (9 CT 2656-10 CT 2734.) The trial court (Judge McCarville) denied the motion as "too draconian." (Pre-trial RT 185; 10 CT 2830.)

In particular, the trial court explained that, while "[i]n a perfect world, everything should be saved[,] [p]erfection in certainly not required in the law." (Pre-trial RT 184.) The court noted that the magistrate who previously addressed the issue "did not find any willful or intentional misconduct" and, "from the record the Court finds no nefarious conduct either by the investigators or the district attorney." (Pre-Trial RT 184-185.) Although there may have been some "lax conduct," "I can't find that there was anything willful or malicious." (Pre-Trial RT 185.)

Miles later filed a motion to sever the counts involving eyewitness testimony from the counts involving serological evidence arguing, inter alia, that severance was an appropriate sanction for the loss of evidence relating to some of the witnesses' identifications. (10 CT 2946-2974.) Simultaneously, based on the lost or destroyed evidence, Miles filed a motion under *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] and *California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528, 81 L.Ed.2d 413] to preclude any pre-trial or in-court identification testimony by Yenerall, Heynen, Kendrick, and Andersen. (10 CT 2989-11 CT 3074.)

Again, the trial court (Judge Edwards) denied the motion to entirely exclude the eyewitness testimony as that would be tantamount to a dismissal. (2 RT 514.) The court found, however, that severance of the

eyewitness counts from the serological counts was an appropriate sanction and granted that relief.[31] (2 RT 515.)

Following the guilt phase, Miles moved to preclude Yenerall, Heynen, Kendrick, and Andersen from testifying at the penalty phase on the same lost evidence ground. (15 CT 4344-4353.) Once more, the trial court denied the motion as follows:

> Ruling on this motion, of course, involves several factors that the Court has to consider. And I suppose the first one would have to do with the motion that you made under *Brady versus Maryland*, and whether or not the Court should, as a sanction for not preserving the photo line-ups, strike evidence of the eyewitness identifications. And in considering the prejudice to the defendant's case, the Court is not convinced that the defendant's case is sufficiently prejudiced to warrant exclusion of the identifications, which, in essence, would be basically exclusion of the – or dismissal of the cases altogether, since without the eyewitness identifications there is really no case against, against Mr. Miles.
>
> I can appreciate the fact that you would prefer to have the line-ups there to show the jury, but the issues of greatest concern, in other words, that several of the victims picked out other people as the perpetrator, people who were not Mr. Miles, that fact can be easily brought to the jury without those line-ups being present.
>
> Secondarily, the person or persons picked out were so dissimilar from Mr. Miles in appearance that this is important, specifically you recited as an example Mr. Boone, who apparently we do have pictures of Mr. Boone. The jury should be able to view that and certainly decide for itself if there is such a dissimilarity, and what weight to be given to that.
>
> The confusion that underlies all of these, or a lot of these identifications, and various line-ups, photo line-ups, live line-ups, show-ups, whatever, that certainly can be brought out.

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[31] The missing evidence issues implicated witnesses in addition to Yenerall, Heynen, Kendrick, and Andersen. (10 CT 2989-11 CT 3074.)

> And finally, as far as the actions of the police in failing to preserve these photo line-ups, it's my understanding that these were line-ups that were put together early in the investigation, substantially prior to Mr. Miles being a suspect, when there was some sort of a task force in place. And they were pulling pictures, I guess, that matched these general descriptions given by the victims to see if any of them could be identified. And I guess in those cases they followed up on it and found that the person could not have been the perpetrator, and I guess probably felt that there was no longer a need to keep those photo line-ups intact.
>
> It was only when Mr. Miles became a suspect in the case that they then focused on him, and I would assume preserved any photo line-ups that involved him. So I don't see any willful, purposeful, malicious intent on the part of the police in destroying evidence that could have been helpful to Mr. Miles. And as I've indicated, I think that the same arguments and the same points can be made even without those, those line-ups. And so I would deny the motion, the *Brady* motion.

(13 RT 4666-4668.)

3. Cross-examination of the Witnesses Regarding Their Identifications at the Penalty Phase

At the penalty phase, defense counsel had the opportunity to cross-examine the witnesses regarding their initial identifications of someone other than Miles as the possible perpetrator. For example, Yenerall admitted that she identified Orlando Boone from a photo lineup and stated that she might have picked Miles from another photo lineup. (17 RT 5989.) Likewise, Heynen testified that on two occasions she identified someone from a photo lineup that "could be him," but had no idea if that person was Miles. (17 RT 6003-6004.) Defense counsel elected not to cross-examine Kendrick or Andersen. (18 RT 6043, 6080.)

B. Standard of Review

Due process does not impose upon law enforcement an undifferentiated and absolute duty to retain and to preserve all material that

might be of conceivable evidentiary significance in a particular prosecution. (*People v. Duff* (2014) 58 Cal.4th 527, 549.) Nevertheless, the constitutional due process rights of a defendant may be implicated when he or she is denied access to favorable evidence in the prosecution's possession. (*People v. Lucas, supra*, 173 Cal.Rptr.3d at p. 448, citing *Brady v. Maryland, supra*, 373 U.S. 83.) "In *Trombetta*, the high court limited the state's affirmative duty to preserve evidence to that which 'might be expected to play a significant role in the suspect's defense.'" (*Ibid*, quoting *California v. Trombetta, supra*, 467 U.S. at p. 488.)

Trombetta's "constitutional materiality" standard imposes two requirements that a defendant must meet in order to show a due process violation. (*People v. Lucas, supra*, 173 Cal.Rptr.3d at p. 448.) First, the evidence must possess an exculpatory value that was apparent before it was destroyed. (*Ibid.*) Second, it must be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. (*Ibid.*)

Destroyed evidence with only potential, rather than apparent, exculpatory value is without remedy under *Trombetta*, but *Arizona v. Youngblood* (1988) 488 U.S. 51 [109 S.Ct. 333, 102 L.Ed.2d 281] provides a limited remedy when the state has acted in bad faith in failing to preserve the evidence. (*People v. Lucas, supra*, 173 Cal.Rptr.3d at p. 448.) In *Younglood*, the Supreme Court held that "'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.'" (*Ibid.*, quoting *Arizona v. Youngblood, supra*, 488 U.S. at p. 58.)

A trial court's ruling on a *Trombetta* motion is upheld on appeal if a reviewing court finds substantial evidence supporting the ruling, including the existence of the availability of comparable evidence and the absence of

bad faith. (*People v. Montes, supra*, 58 Cal.4th at p. 837; *People v. Roybal* (1998) 19 Cal.4th 481, 510.)

C. The Trial Court's Ruling Was Proper

Miles does not challenge the trial court's finding that there was no bad faith regarding the lost evidence. So the question under *Trombetta* is whether the evidence had an exculpatory value that was apparent before it was destroyed and was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. (*People v. Lucas, supra*, 173 Cal.Rptr.3d at p. 448.)

Starting with Yenerall, the only evidence supposedly lost was a photo lineup that she thought she had seen and out of which she identified Miles before picking him from a live lineup.[32] (5 CT 1494-1495, 1498-1499; 6 CT 1500; 11 CT 3000.) The police had no record of this and believed Yenerall was confused at the preliminary hearing because she was shown photos of the live lineup during her grand jury testimony two years earlier. (5 CT 1272-1273;12 CT 3406-3407.)

In any event, a putative photo lineup from which Yenerall picked Miles had no apparent *exculpatory* value. (*People v. Schmeck, supra*, 37 Cal.4th at p. 283 [*Trombetta* test was not satisfied where the lost evidence "was inculpatory rather than exculpatory"]; *People v. Freeman* (1994) 8 Cal.4th 450, 492 ["It is hard to imagine how the bag [into which defendant placed stolen loot and which the police later lost] could have had an *exculpatory* value or how that value could have been apparent to the police"].)

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[32] Miles asserts that the composite sketch that Yenerall was shown was not "preserved or disclosed to defense counsel." (AOB 222.) He is wrong. (5 CT 1274; 12 CT 3407.) Since all of the composites were available, defense counsel could have shown any or all of them to Yenerall.

That Miles can contrive an argument for why the phantom photo lineup might have been useful does not assist him. "'The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.'" (*People v. Lucas, supra*, 173 Cal.Rptr.3d at p. 459, quoting *United States v. Agurs* (1976) 427 U.S. 97, 109-110 [96 S.Ct. 2392, 49 L.Ed.2d 342]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1162 ["We are not persuaded by defendant's claim that without the lost photographs, the defense could not show how suggestive they may have been, or demonstrate how the photo lineup procedure may have impermissibly affected [the victim's] subsequent identifications of defendant both at his 1976 preliminary hearing and at trial below"]; *People v. Frye* (1998) 18 Cal.4th 894, 943 [holding that "suppositions as to the value of this piece of evidence do not establish materiality in the constitutional sense"].)

As to Heynen, the only evidence actually missing was a photo lineup that included then-suspect Dyer *from which Heynen made no identification whatsoever*.[33] (7 CT 1986-1988.) A photo of Dyer was made available to the defense. (12 CT 3407; 2 RT 473.) Heynen's *failure* to identify a suspect who was not Miles had no apparent exculpatory value and, beyond that, Miles had the opportunity to cross-examine Heynen regarding her identification of someone other than him. (*People v. Lucas, supra*, 173 Cal.Rptr.3d at p. 459 ["Even assuming without deciding that *Trombetta* applies in the context of a photo lineup identification ... defendant has not

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[33] Miles contends that the photo of the person Heynen identified in the Orlando Boone lineup was destroyed and that the sketch she helped prepare was not disclosed. (AOB 224.) He is wrong again. (5 CT 1274; 7 CT 1991, 1995; 12 CT 3407.)

shown how any alleged deficiency deprived him of material evidence"]; *People v. Walker* (1988) 47 Cal.3d 605, 638 [holding that neither prong of the *Trombetta* test was met where defendant made no showing that negligently destroyed evidence had any exculpatory value and did not show why his opportunity to cross-examine witness with knowledge of the evidence was inadequate to protect his rights].)

As to Kendrick, there is no indication that the photo lineup with Randy Winters had an apparent exculpatory value to defendant when it was disassembled. The Winters photo lineup was shown to Kendrick in March 1992, several months *before* Miles became a suspect. (7 CT 2021.)

The same is true regarding Andersen. The police showed Andersen the Egan photo lineup –from which Andersen did not positively identify Egan (but said that Egan looked close) – in May 1992, several weeks *before* Miles was a suspect.[34] (7 CT 2044-2047.)

The Winters and Egan photo lineups could not have had apparent exculpatory value to Miles *before* Miles was even a suspect. (*People v. Webb* (1993) 6 Cal.4th 494, 520 [finding no constitutional violation where evidence was lost at a time when "officials were not aware of defendant's possible involvement in the murders"].) The possibility at the time that the lineups might be exculpatory to some unknown suspect in the future is insufficient. (*Arizona v. Youngblood, supra*, 488 U.S. at p. 56, fn.* [noting that "we made clear in *Trombetta* that the exculpatory value of the evidence must be apparent *before* the evidence was destroyed," internal quotation marks omitted]; *People v. Thomas* (2012) 54 Cal.4th 908, 929 [observing that exculpatory value of evidence must be "apparent on its face" at the

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[34] Miles's argument regarding Andersen is based solely on the unavailability of the Egan lineup and not the other unavailable lineup from which Andersen failed to identify anyone. (7 CT 2011; 12 CT 3410; AOB 226.)

time it was destroyed]; *People v. DePriest* (2007) 42 Cal.4th 1, 42 ["[T]he trial court properly concluded that the [evidence] had no discernible value favoring the defense before it disappeared"]; *People v. Arias* (1996) 13 Cal.4th 92, 165, fn. 28 ["If the records of defendant's 1981 juvenile revocation proceeding were destroyed three years thereafter (i.e., in 1984), the authorities could not then have known they would be helpful at the penalty trial for capital crimes committed in 1987"]; *People v. McPeters* (1992) 2 Cal.4th 1148, 1180 ["But assuming the envelope did have some exculpatory value, defendant failed to establish that value was 'apparent before the evidence was destroyed'"].)

Moreover, even if the Winters and Egan photo lineups did have apparent exculpatory value when they were disassembled, the prosecution provided defense counsel with pictures of Winters and Egan. (2 RT 475, 494.) Therefore, defense counsel had comparable evidence with which to cross-examine Kendrick and Andersen. (*People v. Cook* (2007) 40 Cal.4th 1334, 1350-1351 [trial court did not err in denying defense motion for sanctions where police failed to preserve photo book from which victim identified defendant's picture]; *People v. Yeoman* (2003) 31 Cal.4th 93, 126 [trial court did not err in denying motion to exclude victim's identification testimony where original photo from photo lineup was lost]; *People v. Rodrigues, supra*, 8 Cal.4th at p. 1162 [holding that "defendant was not denied a fair trial by the loss of the photos shown to [a victim] for identification purposes"].)

Miles apparently agrees that he cannot meet the *Trombetta* standard because he does not even mention it, let alone argue that he has cleared *Trombetta*'s two-pronged hurdle. Instead, Miles claims that *Gardner v. Florida* (1977) 430 U.S. 349 [97 S.Ct. 1197, 51 L.Ed.2d 393] compels reversal of the death verdict because "[t]his case is just like *Gardner*." (AOB 235.)

This case is nothing like *Gardner*. In *Gardner*, the trial judge imposed the death sentence on a defendant (over the jury's recommendation of life) by relying in part on a confidential presentence investigation report that was not disclosed to the defendant. (*Gardner v. Florida, supra*, 430 U.S. at pp. 351-353.) The Supreme Court "conclude[d] that [the defendant] was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." (*Id.* at p. 362.)

In this case, unlike *Gardner*, Miles was not sentenced to death based on undisclosed information that he had no opportunity to deny or explain. Indeed, this Court has previously rejected an argument nearly identical to Miles's.

Specifically, in *Rodrigues*, the prosecutor introduced evidence that the defendant had raped Jill M. as an aggravating circumstance during the penalty phase of a capital case. (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1162.) Relying on *Gardner*, the defendant claimed that he did not have a fair opportunity to confront and rebut the evidence against him on this incident due, in part, to the loss of photos shown to Jill M. for identification purposes. (*Id.* at pp. 1161-1162.)

The Court disagreed, holding that the "defendant was not denied a fair trial by the loss of the photos shown to Jill M. for identification purposes." (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1162.) "[A]dmission of an in-court identification is considered fair when the defendant is given the opportunity to cross-examine the pertinent witnesses in order to expose the potential for error in the lineup method [citations], and when it appears that the in-court identification is based on the personal observation of the defendant at the time of the alleged crime, rather than on the previous lineup." (*Ibid.*) Because the defense was able to confront and cross-examine Jill M., "defendant fails to establish any unfairness." (*Ibid.*; see

also *People v. Wharton* (1991) 53 Cal.3d 522, 601 [rejecting *Gardner* argument and explaining that "although defendant complains of his inability to effectively confront the witnesses because of the passage of time, we note he had notice of this evidence (§ 190.3, par. 4) and cross-examined those witnesses that were available"].)

So it is here. Miles had every opportunity to confront and cross-examine Yenerall, Heynen, Kendrick, and Andersen regarding their identifications of him. The missing photo lineups did not prevent Miles from eliciting from these witnesses whether they had ever identified someone besides Miles and, to the extent they had, Miles had pictures of each of the other people so identified.

D. Any Error Was Harmless

Even assuming error in the denial of Miles's motion to exclude the identification testimony of Yenerall, Heynen, Kendrick, and Andersen, reversal of the death verdict is not required. Again, "error in the admission of evidence under section 190.3, factor (b) is reversible only if there is a reasonable possibility it affected the verdict, a standard that is essentially the same as the harmless beyond a reasonable doubt standard of *Chapman*." (*People v. Lewis, supra*, 43 Cal.4th at p. 527, internal quotation marks omitted.)

Had the trial court granted Miles's motion, it would have effectively precluded the jury from hearing about the Yenerall, Heynen, and Kendrick/Crawford robberies. Excluding Arnold Andersen's testimony would not have foreclosed evidence of the Andersen robbery because Sharyn Andersen also testified and identified Miles. (18 RT 6082-6083.) Moreover, while the prosecutor briefly alluded to the Yenerall, Heynen, and Kendrick/Crawford robberies in the "other crimes" portion of his closing, he focused mostly on the Bridget E./Steve H. incident. (20 RT 6779-6781.)

Thus, aside from the Yenerall, Heynen, and Kendrick/Crawford robberies, the jury had before it the abominable circumstances of Miles's crimes in this case (particularly Willem's murder), Miles's rape and sexual humiliation of Bridget E. and Steve H., the Andersen robbery, Miles's 14 prior felony convictions, and the victim impact statements. In light of the overwhelming evidence, any effect of the Yenerall, Heynen, and Kendrick/Crawford robberies was negligible, at most. Once more, "[o]n this record, given the properly admitted evidence of defendant's substantial criminal history and the circumstances of the instant offenses, there simply is no reasonable possibility the jury's penalty verdict was affected by the [allegedly] inadmissible evidence." (*People v. Burton, supra*, 48 Cal.3d at p. 864.)

XI. NEITHER STATE LAW NOR THE FEDERAL CONSTITUTION BARS IMPACT TESTIMONY FROM "OTHER CRIMES" VICTIMS

Bridget E. testified under Penal Code section 190.3, factor (b), that Miles had raped and robbed her on June 16, 1992. (Statement of Facts, section II(A)(1)(e), *supra*.) Over Miles's objection, she also testified briefly about the impact this had on her. (Statement of Facts, section II(A)(3)(b), *supra* ;17 RT 5940, 5943, 5947; 18 RT 6065.)

Miles contends that permitting an "other crime" victim to give impact testimony violated both state law and the federal Constitution. (AOB 243.) He is wrong. This Court has so held time and time again.

The Court could not have made itself more clear that Penal Code section 190.3, factor (b), expressly permits "other crimes" victim impact evidence: "The circumstances of uncharged violent crimes, *including the impact on victims of those crimes*, are made expressly admissible by section 190.3, factor (b)." (*People v. Virgil* (2011) 51 Cal.4th 1210, 1276, italics added; see also *People v. Brady* (2010) 50 Cal.4th 547, 581; *People v. Bramit* (2009) 46 Cal.4th 1221, 1241; *People v. Davis* (2009) 46 Cal.4th

439, 617; *People v. Demetrulias* (2006) 39 Cal.4th 1, 39; *People v. Holloway* (2004) 33 Cal.4th 96, 143-144; *People v. Mendoza* (2000) 24 Cal.4th 130, 185-186; *People v. Price* (1991) 1 Cal.4th 324, 479; *People v. Mickle* (1991) 54 Cal.3d 140, 187.)

Miles claims that the Court reached the opposite conclusion in *People v. Boyde* (1988) 46 Cal.3d 212. (AOB 243.) Not quite. In *Boyde*, "we held irrelevant to the aggravating factors in section 190.3 unspecified 'testimony by victims of other offenses about the impact that the event had on their lives.'" (*People v. Holloway, supra*, 33 Cal.4th at p. 143, quoting *People v. Boyde, supra*, 46 Cal.3d at p. 249.) Thus, at most, *Boyde* held that "evidence of indirect or idiosyncratic effects of prior criminal violence is irrelevant under factor (b)"and *not* that "other crimes" victim impact evidence is per se inadmissible under the statute. (*Id.* at p. 144.)

Here, Bridget E.'s victim impact testimony was about how Miles's rape and robbery at her workplace directly affected her, her pregnancy, and her ability to work. (18 RT 6065.) Accordingly, "the link between the attack and the emotions and actions to which [Bridget E.] testified was direct and foreseeable, not causally remote or unforeseeable." (*People v. Holloway, supra*, 33 Cal.4th at p. 144.)

Miles's alternative theory that "other crimes" victim impact evidence violates the Eighth Amendment fares no better. Again, the Court has routinely rejected this very argument: "[W]e have repeatedly held that the admission of evidence about the impacts of a capital defendant's other violent criminal activity does not violate the state or federal Constitutions." (*People v. Virgil, supra*, 51 Cal.4th at p. 1276; see also *People v. Garceau* (1993) 6 Cal.4th 140, 201-202; *People v. Benson* (1990) 52 Cal.3d 754, 797; *People v. Karis* (1988) 46 Cal.3d 612, 640-641.)

Moreover, Miles's reliance on out-of-state cases for a contrary conclusion is not persuasive. (AOB 255-256.) "Those cases, although not

free from ambiguity, do not appear to state that the federal Constitution prohibits admission of such evidence; rather, each holds that such evidence is irrelevant or inadmissible by applying the laws of the state in which the case was decided." (*People v. Davis, supra*, 46 Cal.4th at p. 618 [rejecting argument based on same out-of-state cases that Miles cites].) "Thus, they do not appear to support defendant's claim that the admission of such evidence violated the Eighth Amendment." (*Ibid.*) "At any rate, they are not binding on this court, which has repeatedly held that the Eighth Amendment does not prohibit the admission of testimony by a defendant's prior victims concerning the impact of his violent crimes against them." (*Ibid.*; see also *People v. Virgil, supra*, 51 Cal.4th at p. 1276.)

Beyond that, there was no reasonable possibility that any error in admitting Bridget E.'s victim impact testimony affected the jury's decision to impose the death penalty. (*People v. Davis, supra*, 46 Cal.4th at p. 618.) Even without that testimony – which consisted of less than one transcript page (18 RT 6065) – the evidence of the crime itself left little doubt about the impact it had on her. (*Ibid.*) What's more, there was the other overwhelming evidence in aggravation, including the nature of the crimes in this case, Miles's other violent crimes, Miles's prior felonies, and the victim impact testimony of Willem's family.

Again, "[o]n this record, given the properly admitted evidence of defendant's substantial criminal history and the circumstances of the instant offenses, it was not reasonably possible that the jury would have rendered a different verdict had it not heard the evidence" of how Bridget E. was impacted by the rape. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1173.) "Accordingly, the claim fails for want of prejudice." (*Id.* at pp. 1173-1174.)

In sum, the admission of Bridget E.'s victim impact evidence was expressly permitted by Penal Code section 190.3, factor (b), and consistent with the Eighth Amendment. In any event, there was so much evidence in

aggravation that there is no reasonable possibility that excluding Bridget E.'s victim impact testimony would have affected the jury's decision.

XII. ADMISSION OF THE WILLEM FAMILY'S VICTIM IMPACT TESTIMONY DID NOT VIOLATE STATE OR FEDERAL LAW

Over Miles's objection, Willem's family members gave victim impact testimony under Penal Code section 190.3, factor (a). (17 RT 5947; Statement of Facts, section II(A)(3)(a), *supra.*) Just as with Bridget E.'s victim impact testimony, Miles contends that the admission of the Willem victim impact testimony violated state law and federal law. (AOB 259-271.) And, just as with his Bridget E. argument, Miles is wrong in both respects.

This Court has repeatedly held: (1) unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a), and (2) the United States Constitution bars victim impact evidence only if it is so unduly prejudicial as to render the trial fundamentally unfair. (*People v. Abel* (2012) 53 Cal.4th 891, 938; see also *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720]; *People v. Trinh* (2014) 59 Cal.4th 216, 245; *People v. Vines, supra*, 51 Cal.4th at p. 889; *People v. Brady, supra*, 50 Cal.4th at p. 574; *People v. Hamilton* (2009) 45 Cal.4th 863, 927; *People v. Lewis* (2006) 39 Cal.4th 970, 1056-1057; *People v. Robinson* (2005) 37 Cal.4th 592, 650; *People v. Panah* (2005) 35 Cal.4th 395, 494-495; *People v. Roldan* (2005) 35 Cal.4th 646, 731; *People v. Benavides* (2005) 35 Cal.4th 69, 107; *People v. Brown* (2004) 33 Cal.4th 382, 396-398; *People v. Pollock* (2004) 32 Cal.4th 1153, 1181; *People v. Boyette* (2002) 29 Cal.4th 381, 443-444; *People v. Stanley* (1995) 10 Cal.4th 764, 832; *People v. Edwards* (1991) 54 Cal.3d 787, 835-836.)

Miles claims that the seminal case on this issue, *People v. Edwards*, "was simply wrong" because it did not adhere to fundamental principles of

statutory construction when it concluded section 190.3, factor (a)'s reference to "circumstances of the crime" included the impact on victims. (AOB 260.) The *Edwards* opinion plainly belies Miles's contention.

Specifically, the Court explained that "[i]n construing statutes, we apply the usual, ordinary import of the language used." (*People v. Edwards, supra*, 54 Cal.3d at p. 833.) "The word 'circumstances' as used in factor (a) of section 190.3 does not mean merely the immediate temporal and spatial circumstances of the crime" but rather extends to that which surrounds the crime materially, morally, or logically, which includes the specific harm caused by the defendant. (*Ibid.*)

People v. Love (1960) 53 Cal.2d 843 does not help Miles either. (AOB 263-264.) In *Love*, the Court reversed a death verdict where, during the penalty phase, the jury saw a photo of the dead victim with a pained look on her face and heard a recording of the victim groaning as she died. (*Id.* at pp. 854-855.) The Court held that this evidence was unduly inflammatory, as it tended only to prove facts already known to the jury and was of limited probative value in determining the defendant's sentence (*Id.* at p. 856.)

To the extent that Miles reads *Love* as recognizing a codified wholesale rule against admission of victim impact evidence – something that *Love* does not even come close to holding – it has since been abrogated. As the Court observed, "*Love* predates the high court's ruling in *Payne v. Tennessee* ... and the enactment of section 190.3, both of which expressly allow the jury to consider the circumstances of the crime – including its immediate injurious impact – as an aggravating factor." (*People v. Brady, supra*, 50 Cal.4th at p. 575.)[35]

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[35] *People v. Floyd* (1970) 1 Cal.3d 694 is so inapposite that Miles might have cited it by mistake. (AOB 264.) The issue there was whether (continued...)

Beyond that, Miles's contention that, when the current death penalty law was adopted in 1978, the phrase "circumstances of the crime" must have had the same meaning as it did in the 1977 law is self-defeating. (AOB 263.) As the Court recognized in *Edwards*, the 1977 law *did* permit "'assessment of the offense from the victim's viewpoint.'" (*People v. Edwards, supra*, 54 Cal.3d at p. 834 and fn. 10, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864.)

Apart from his off-base statutory construction argument, Miles does not, nor could he, claim that the Willem family's victim impact testimony is different from the kinds of testimony that the Court has routinely upheld. Therefore, the trial court did not err in allowing this evidence. (E.g., *People v. Abel, supra*, 53 Cal.4th at p. 938 ["The testimony of Miller's parents about their own emotions following their son's death and the effect it had on their lives did not exceed acceptable limits"]; *People v. Lewis, supra*, 39 Cal.4th at p. 1057 [holding that family members speaking of how they missed their loved ones "concerned the kinds of loss that loved ones commonly express in capital cases"].)

Finally, even assuming error, reversal is not required. Again, as discussed above, "in light of the nature of the crime and the other aggravating factors, including defendant's criminal history, there is no reasonable possibility" that the Willem family's testimony affected the verdict. (*People v. Abel, supra*, 53 Cal.4th at p. 939.)

(...continued)
the prosecutor committed misconduct when he argued that the jury should sentence the defendant to death for reasons of retribution. (*Id.* at pp. 721-722.)

XIII. THE TRIAL COURT PROPERLY DENIED MILES'S MOTION TO DISCHARGE JUROR 12

When the guilt-phase jurors returned following the competency trial to begin the penalty phase, Juror 12 indicated that he had seen newspaper headlines regarding the competency trial. After questioning Juror 12, Miles asked the trial court to excuse him and the trial court declined. Miles claims this was error. (AOB 272-280.) It was not, as there was no indication that the newspaper headlines would affect Juror 12's ability to be fair.

A. Proceedings Below

Upon determining that a competency trial was necessary, the trial court met individually with each of the guilt-phase jurors to discuss their future availability in the event that the penalty phase went forward. The trial court told Juror 12 that, during the break, "if there's anything in the newspaper about this case, please don't read that." (13 RT 4785.)

When the jurors were called back a few months later for the penalty phase, they each filled out a supplemental questionnaire. In response to a question asking whether he had read anything in the newspaper, Juror 12 wrote, "I have read the headlines, but not the article itself." (25 JQ 7130.)

The trial court conducted further voir dire of Juror 12. Juror 12 said he had seen two or three headlines about the case but did not read anything further. (17 RT 5960.) He gathered from the headlines that there was a competency trial and what the result of the trial was. (17 RT 5961.) Juror 12 had not discussed this with the other jurors and said there was nothing about what he had seen that caused him to come to any conclusions or form any opinions about the case. (17 RT 5961-5962.)

Miles moved to excuse Juror 12. (17 RT 5965-5966.) The trial court denied the motion as follows:

I don't remember what I told the jurors when we had them come back in May. I realize we didn't get into detail about what was going on, but without looking at the transcript, it seems to me I might have suggested that something's going to be happening which will require them to come back in August or not.

But be that as it may, I don't want to guess as to what I said, I don't see where he expressed any opinions adverse to either side based on what he read in the headlines. I don't think he violated the Court's admonition. The Court's admonition was not to read anything about the case.

The impression I get was that in going through the newspaper, naturally in skimming the headlines you can see that this is something about the case, and at that point he stopped reading and did not read the content. I don't, I don't know. I didn't tell them not to read the papers. I just told them not to read anything about the case. I don't think he violated the Court's order.

I didn't get the impression from anything that he said that he had formed any opinions or conclusions. In fact, he said he didn't, and that it wouldn't affect his decision in this case. So I just don't think there's enough there to excuse him, and so I'll deny the motion.

(17 RT 5966-5967.)

B. Standard of Review

A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) Juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias. (*People v. Nesler, supra*, 16 Cal.4th at p. 578.)

Even inadvertent receipt of extraneous information qualifies as misconduct. Although inadvertent exposure to out-of-court information is not blameworthy conduct, as might be suggested by the term "misconduct,"

it nevertheless gives rise to a presumption of prejudice because it poses the risk that one or more jurors may be influenced by material that the defendant has had no opportunity to confront, cross-examine, or rebut. (*People v. Nesler, supra*, 16 Cal.4th at p. 579; see also *People v. Stanley, supra*, 39 Cal.4th at p. 950 ["Juror C.'s reading of the newspaper article, and 'his inadvertent receipt of information outside the court proceedings,' was misconduct giving rise to a rebuttable presumption of prejudice"]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1331 ["Even if inadvertent, it is misconduct for a sitting juror to read a newspaper article relating to the trial"].)

However, "[a]ny presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant." (*In re Hamilton* (1999) 20 Cal.4th 273, 296, original italics.)

A substantial likelihood of bias can appear in two different ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not inherently prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was actually biased against the defendant. (*In re Carpenter* (1995) 9 Cal.4th 634, 653.) "[B]efore a unanimous verdict is set aside, the likelihood of bias under either test must be *substantial*." (*Id.* at p. 654, original italics.)

When analyzing a juror misconduct claim, a reviewing court accepts the trial court's credibility determinations and findings on questions of historical fact, if supported by substantial evidence. (*People v. Nesler,*

supra, 16 Cal.4th at p. 582.) But whether prejudice arose from juror misconduct is a mixed question of law and fact that is reviewed independently. (*Ibid.*) "Because it is impossible to shield jurors from every contact that may influence their vote, courts tolerate some imperfection short of actual bias." (*People v. Ramos* (2004) 34 Cal.4th 494, 519.)

C. Miles Was Not Prejudiced

1. The Newspaper Headlines Were Not Inherently Likely to Have Caused Bias in Juror 12

A finding of inherently likely bias is required when, but only when, the extraneous information is so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment. (*In re Carpenter, supra*, 9 Cal.4th at p. 653.) Application of this "inherent prejudice" test depends upon a review of the trial record to determine the prejudicial effect of the extraneous information. (*Ibid.*)

Here, the extraneous information was a couple of newspaper headlines from which it could be inferred that Miles had a competency trial and was found competent. (17 RT 5960-5961.) Since Juror 12 did not actually read the articles, he knew nothing more. (17 RT 5960.) For example, he could have had no idea what the "competency" issue was or what evidence was presented in the competency trial and, thus, certainly could not have known that some of the doctors who testified in the competency trial would also testify in the penalty phase.

Simply knowing that there was a question as to Miles's competence that was resolved against him was not so inherently prejudicial that reversal of the death penalty judgment would have been required if it were introduced during the trial itself. Indeed, the fact that there was a past issue regarding Miles's mental competence came out anyway during the penalty phase through Dr. Lantz. (18 RT 6257.) Consequently, all of the jurors could infer that, whatever the competence issue was, Miles was deemed

competent. (*People v. Ramos, supra*, 34 Cal.4th at p. 521 ["The articles contained nothing significant that the jury did not hear themselves. They contained no extraneous information. We conclude the trial court correctly found that the information they disclosed was not prejudicial"].)

In re Carpenter is instructive. There, a sitting juror in a capital murder trial that resulted in a death sentence had learned through a newspaper article that the defendant was previously convicted and sentenced to death in connection with a similar murder. (*In re Carpenter, supra*, 9 Cal.4th at pp. 640-642.) The Court held that this information was *not* inherently prejudicial in the context of the whole record. (*Id.* at p. 655.) In so holding, the Court rejected an analysis based on *Caldwell v. Mississippi* (1985) 472 U.S. 320 [105 S.Ct. 2633, 86 L.Ed.2d 231] – upon which Miles relies here – because the Supreme Court had since limited *Caldwell* in *Romano v. Oklahoma* (1994) 512 U.S. 1 [114 S.Ct. 2004, 129 L.Ed.2d 1]. (*Id.* at pp. 649, 655.)

In sum, this Court has repeatedly "held that reading a newspaper account of the trial is not sufficient to create a substantial likelihood of prejudice." (*People v. Ramos, supra*, 34 Cal.4th at p. 521.) There is no reason for the Court to depart from that principle in this case, where Juror 12 did not even read any newspaper articles but only skimmed the headlines. (*People v. Stanley, supra*, 39 Cal.4th at pp. 950-951 [finding no error where trial court did not disqualify sitting juror who read newspaper article about the case]; *People v. Riggs* (2008) 44 Cal.4th 248, 281 ["We have long held that juror exposure to pretrial publicity regarding a case does not presumptively disqualify the juror"]; *People v. Hillhouse, supra*, 27 Cal.4th at pp. 488-489 [no error in not excusing potential juror who had read newspaper accounts and even formed preconceived notions about the case]; *People v. Ayala* (2000) 24 Cal.4th 243-272 [no error in keeping potential juror who read newspaper account relating to the case].)

2. Juror 12 Was Not Actually Biased

Even if the extraneous information was not so prejudicial, in and of itself, as to cause inherent bias, the totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose. (*In re Carpenter, supra*, 9 Cal.4th at p. 654.) What constitutes actual bias of a juror varies according to the circumstances of the case. (*People v. Nesler, supra*, 16 Cal.4th at p. 580.)

In any event, actual bias supporting an attack on the verdict is similar to actual bias warranting a juror's disqualification. (*People v. Nesler, supra*, 16 Cal.4th at p. 581.) "'Actual bias' in this context is defined as 'the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.'" (*Ibid.*, quoting Code Civ. Proc., § 225, subd. (b)(1)(C).)

Here, there is no substantial likelihood that Juror 12 was actually biased against Miles. To begin with, he said he had not formed any opinions or conclusions that would affect his decision, and the trial court believed him. (17 RT 5961, 5967; *In re Carpenter, supra*, 9 Cal.4th at p. 656 [no substantial likelihood of actual bias where trial court did not find that juror was biased]; *People v. Stanley, supra*, 39 Cal.4th at p. 951 ["We may not substitute our reading of the 'cold transcript' in this case for the credibility determinations reached by the trial court after making its inquiry, observing the juror, and listening to his responses. ... We find those credibility determinations supported by substantial evidence and conclude the presumption of prejudice from the juror misconduct has been rebutted in this case"].)

Moreover, "[t]he juror did not suggest that []he would consider the extraneous information in reaching h[is] verdict, or that the verdict would

be based on anything other than ... [the] evidence." (*In re Carpenter, supra*, 9 Cal.4th at p. 656.) Nor did Juror 12 tell the other jurors about the newspaper headlines. (*Id.* at p. 657 [noting that "a biased juror would likely have told other jurors what she had learned"].)

"In addition, the evidence supporting the death verdict was overwhelming." (*People v. Ramos, supra*, 34 Cal.4th at p. 521.) The jury had already found Miles guilty of the horrendous murder of Willem and the attendant special circumstances. Beyond that, "[t]he proof of his prior violent acts was extensive, and there was no evidence that any offending juror discussed the newspaper articles with any innocent juror." (*Ibid.*)

In sum, under all of the circumstances, there simply is no evidence that Miles suffered any prejudice just because Juror 12 saw some headlines regarding the competency trial.[36] The headlines were not inherently likely to cause bias and there was no evidence that Juror 12 actually was biased. Thus, the trial court properly denied Miles's motion to discharge Juror 12.

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[36] Miles accuses the trial court of failing to admonish juror 12 not to consider the newspaper headlines and not to discuss the headlines with other jurors. (AOB 278, fn. 39.) Contrary to Miles's accusation, the trial court instructed the jurors that "[y]ou must decide all questions of fact in this case from the evidence received in this trial and not from any other source," "you must not discuss the case with a fellow juror until the case is submitted to you for your decision and only when all jurors are present in the jury room," and "[y]ou must not be influenced by bias or prejudice against the defendant." (12 RT 4431; 20 RT 6758-6759.) "Absent some showing to the contrary, we presume the jury followed the court's instructions." (*People v. Merriman, supra*, 60 Cal.4th at pp. 48-49.)

XIV. THE TRIAL COURT'S INSTRUCTIONS TO THE TWO ALTERNATE JURORS DID NOT VIOLATE MILES'S CONSTITUTIONAL RIGHTS

Before the penalty phase began, the trial court excused two of the guilt-phase jurors and replaced them with alternates. (17 RT 5968-5971; 16 CT 4599-4600.) When later instructing the jury, the trial court gave CALJIC No. 17.51.1, which provides that, "[f]or the purposes of this penalty phase of the trial, the alternate jurors must accept as having been proved beyond a reasonable doubt those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial." (20 RT 6766; 16 CT 4665.)

Although he did not object below, Miles now says that this instruction violates the state and federal constitutions. (AOB 281-286.) But the Court has repeatedly held that, where "[t]he guilt phase jury determined defendant's guilt and the truth of the special circumstance allegation beyond a reasonable doubt[,] [a]s a matter of law, the penalty phase jury must conclusively accept these findings." (*People v. Harrison* (2005) 35 Cal.4th 208, 256; see also *People v. Maciel* (2013) 57 Cal.4th 482, 548; *People v. Streeter* (2012) 54 Cal.4th 205, 265; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1238.)

More specifically, the Court has squarely rejected the argument that it is unconstitutional to instruct alternate jurors who are seated at the guilt phase that they are required to accept the defendant's guilt beyond a reasonable doubt. In *People v. Cain* (1995) 10 Cal.4th 1, 65-66, the defendant challenged the very same language as to an alternate juror that Miles now challenges. The Court held that "[w]e perceive no constitutional defect" in the instruction, which "did no more than inform the jury of the[] limitations on its penalty phase duties." (*Id.* at p. 66.)

What's more, the trial court instructed the jurors in accordance with Penal Code section 190.3, factors (a) and (k), which encompass the jurors' potential consideration of lingering doubt. (20 RT 6759-6761; 16 CT 4652-4653 [CALJIC No. 8.85]; *People v. Enraca* (2012) 53 Cal.4th 735, 767; *People v. Thompson* (2010) 49 Cal.4th 79, 138-139.) And defense counsel argued that the jurors should consider lingering doubt. (20 RT 6824.) Accordingly, there was nothing preventing the jurors from factoring any lingering doubt into their penalty decision just as defense counsel urged them to do. (*People v. Enraca, supra*, 53 Cal.4th at pp. 767-768.)

XV. CALIFORNIA'S DEATH PENALTY STATUTE ADEQUATELY NARROWS THE CLASS OF DEATH-ELIGIBLE DEFENDANTS

Citing *Furman v. Georgia* (1972) 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346], Miles contends that California's death penalty law is unconstitutional because it does not sufficiently narrow the class of death-eligible defendants. (AOB 287-297.) This Court "previously ha[s] considered and rejected this precise contention." (*People v. Jones* (1997) 15 Cal.4th 119, 196; see also *People v. Ray* (1996) 13 Cal.4th 313, 356-35; *People v. Arias* (1996) 13 Cal.4th 92, 186-187; *People v. Crittenden* (1994) 9 Cal.4th 83, 154-155; *People v. Wader* (1993) 5 Cal.4th 610, 669.)

Nevertheless, Miles says he has empirical evidence that supports his argument. He trumpets research from Professor Steven Shatz. (AOB 288.) The gist of Shatz's conclusions is that California's death penalty statute is unconstitutional because too many people are death eligible and too few of those who are death eligible are actually sentenced to death. (AOB 287-297; 13 CT 3753-3770.) But the Shatz study is flawed and useless.

For starters, Shatz artificially inflated the proportion of death-eligible murderers by looking solely at published decisions of this Court and the Courts of Appeal, and unpublished decisions from the First District Court of Appeal. (AOB 288; 13 CT 3757-3758.) "[T]his is obviously a skewed

sample." (*People v. Jones* (2003) 30 Cal.4th 1084, 1128 [rejecting a similar statistical argument].) It omits all unpublished decisions from five of the six districts and all cases in which the defendant did not appeal, "groups likely to include a higher proportion of cases without special circumstances." (*Ibid.*) Indeed, Shatz himself acknowledged that "the mix of cases within this group is *not* representative." (13 CT 3757, italics added.) "Thus [Miles's] figures fail to show the extent to which the California statute narrows the proportion of death-eligible murderers." (*People v. Jones, supra*, 30 Cal.4th at p. 1128.)

Moreover, Miles's "attempts to frame his narrowing claim as involving only the special circumstances identified by the California death penalty scheme is not well taken." (*Webster v. Chappell* (E.D. Cal., June 4, 2014) 2014 WL 2526857, at pp. *56, *65 [rejecting narrowing argument based on same Shatz study].) "His failure to address the import of California's division of murder into degrees is fatal to his attempts to show California's statutory scheme violates the Eighth Amendment." (*Id.* at p. *65.)

Putting aside the defects in the narrowing methodology, Shatz's "death sentence ratio" results – i.e., the percentage of people eligible for the death penalty who are actually sentenced to death – do not stand up to scrutiny either. (*People v. Jones, supra*, 30 Cal.4th at p. 1127; *Webster v. Chappell, supra*, 2014 WL 2526857, at pp. *64-66.) Miles's (and Shatz's) premise is that there is a 15-20% floor death sentence ratio that supposedly drove the *Furman* decision. (AOB 291-292, 297; 13 CT 3754.) That is false. (*Webster v. Chappell, supra*, 2014 WL 2526857, at p. *64, fn. 69.)

But even assuming that a 15-20% death sentence ratio is a relevant benchmark, the Shatz study does not compel the conclusion that Miles wants. (*Webster v. Chappell, supra*, 2014 WL 2526857, at pp. *64-66.) This is so because, in order to make California's death sentence ratio appear

to fall below that benchmark, Shatz used a technique that "results in a falsely low death sentencing rate" – namely, he manufactured an expanded universe of death-eligible murderers, which necessarily drove down the percentage of those actually sentenced to death. (*Id.* at p. *64.)

In sum, the Shatz study effectively cooked the data to ensure that the desired results appeared empirically sound. Nothing in the study establishes that California's death penalty law is unconstitutional.

XVI. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Miles summarily raises nine routine challenges to the constitutionality of California's death penalty statute that this Court has repeatedly rejected. (AOB 298-301.) Miles has not presented sufficient reasoning to revisit these issues. Therefore, extended discussion is unnecessary.

Consistent with its previous rulings, the Court should reject Miles's claims as follows:

First, Penal Code section 190.3, factor (i), permitting the jury to consider a defendant's age in deciding whether to impose the death sentences is not unconstitutionally vague. (*People v. Thomas* (2012) 53 Cal.4th 771, 883; *People v. Anderson* (2001) 25 Cal.4th 543, 601; *People v. Ray* (1996) 13 Cal.4th 313, 358.)

Second, as construed and applied by this Court, California's death penalty statute is constitutional. (*People v. Carrasco* (2014) 59 Cal.4th 924, 970; *People v. Schmeck, supra*, 37 Cal.4th at p. 304.)

Third, Penal Code section 190.3, factor (a), does not fail to sufficiently minimize the risk of arbitrary and capricious imposition of the death penalty. (*People v. Carrasco, supra*, 59 Cal.4th at p. 970; *People v. Schmeck, supra*, 37 Cal.4th at p. 304.)

Fourth, the trial court was not required to instruct the jury that it must unanimously agree that Miles committed the prior felonies introduced

under Penal Code section 190.3, factor (c). (*People v. Carrasco, supra*, 59 Cal.4th at pp. 970-971; *People v. Schmeck, supra*, 37 Cal.4th at p. 304.)

Fifth, the trial court was not required to instruct the jury that it must unanimously agree that Miles committed the crimes of force or violence introduced under Penal Code section 190.3, factor (b). (*People v. Carrasco, supra*, 59 Cal.4th at pp. 970-971; *People v. Lewis, supra*, 39 Cal.4th at p. 1068.)

Sixth, the trial court was not required to instruct the jury that it must find that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt. (*People v. Carrasco, supra*, 59 Cal.4th at pp. 970-971; *People v. Schmeck, supra*, 37 Cal.4th at p. 304.)

Seventh, CALJIC No. 8.85 is constitutional. (*People v. Contreras, supra*, 58 Cal.4th at p. 173; *People v. Williams* (2013) 56 Cal.4th 630, 698; *People v. Lightsey* (2012) 54 Cal.4th 668, 731; *People v. Schmeck, supra*, 37 Cal.4th at pp. 304-305; *People v. Ray, supra*, 13 Cal.4th at pp. 358-359.)

Eighth, California's death penalty scheme does not violate international law. (*People v. Carrasco, supra*, 59 Cal.4th at p. 970-971.)

Ninth, it was constitutional to allow the same jury that found Miles guilty of the charged crimes to also determine whether Miles committed other uncharged crimes. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 77; *People v. Medina* (1990) 51 Cal.3d 870, 907.)

XVII. THERE WAS NO CUMULATIVE ERROR

Miles contends reversal is required based on cumulative error. (AOB 302-303.) The Court has recognized that multiple trial errors may have a cumulative effect. (*People v. Hill* (1998) 17 Cal.4th 800, 844-848; *People v. Holt* (1984) 37 Cal.3d 436, 458-459.) In a "closely balanced" case, this cumulative effect may warrant reversal of the judgment "where it is reasonably probable" that it affected the verdict. (*People v. Wagner* (1975) 13 Cal.3d 612, 621.)

On the other hand, if the reviewing court rejects all of a defendant's claims of error, it should also reject the contention of cumulative error. (*People v. Anderson, supra*, 25 Cal.4th at p. 606; *People v. Bolin* (1998) 18 Cal.4th 297, 335.) Similarly, where "nearly all of [a] defendant's assignments of error" are rejected, this Court has declined to reverse based on cumulative error. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057; see also *People v. Jablonski* (2006) 37 Cal.4th 774, 837 [finding no cumulative error where effect of few demonstrated was harmless]; *People v. Cooper* (1991) 53 Cal.3d 771, 839 [rejecting cumulative error argument where there was "little error to accumulate"]; .)

Here, as discussed above, there was no error at all, much less cumulative error. Miles was entitled to a fair trial – not a perfect trial – and a fair trial is exactly what he received. (*People v. Stewart* (2004) 33 Cal.4th 425, 522; *People v. Bradford, supra*, 14 Cal.4th at p. 1057.)

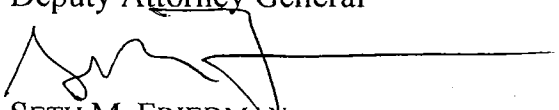
CONCLUSION

For the foregoing reasons, the Court should affirm the judgment and death sentence.

Dated: October 24, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
JULIE L. GARLAND
Senior Assistant Attorney General
RONALD A. JAKOB
Deputy Attorney General



SETH M. FRIEDMAN
Deputy Attorney General
Attorneys for Respondent

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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 34,205 words.

Dated: October 24, 2014

KAMALA D. HARRIS
Attorney General of California

SETH M. FRIEDMAN
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Miles**
No.: **S086234**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On October 24, 2014, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Cliff Gardner
Attorney at Law
1448 San Pablo Avenue
Berkeley, CA 94702

Attorney for Johnny Duane Miles
(2 Copies)

San Bernardino County Superior Court
Clerk of the Court
247 W. Third Street, 2nd Floor
San Bernardino, CA 92415-0063

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105-3647

San Bernardino County District
Attorney's Office
316 North Mountain View Avenue
San Bernardino, CA 92415-0004

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 October 24, 2014, at San Diego, California.

B. Romero
Declarant

B Romero
Signature

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