In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CALVIN LAMONT PARKER,

Defendant and Appellant.

CAPITAL CASE

Case No. S113962

San Diego County Superior Court Case No. SCD154640
The Honorable Michael D. Wellington, Judge

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INTRODUCTION

In 2000, appellant and his Brazilian roommate, Patricia Gallego, shared an apartment on Benicia Street in San Diego, California. Gallego was a hardworking young woman who held two jobs and worked long hours. Appellant, who had recently started working for LensCrafters that summer, was sexually obsessed with Gallego. He had been stealing her photos and altering them by either cutting out the body parts of naked models from magazines or taking stolen photos of other women and pasting them on to Gallego's photos, or cutting Gallego's head from her photos and pasting it on to the naked bodies of women in magazines or other photos. Appellant, who also wanted Gallego's money, began collecting her personal information and checking her bank account balances.

In July of 2000, appellant lied to his manager at LensCrafters about needing time off from work due to his mother dying from cancer and having only a few days left to live. He worked until August 6, 2000, before taking his requested leave of absence. On or about the night of August 10, 2000, he waited for Gallego to return home from work and catch her by surprise. He then raped her and killed her. Afterwards, he tried to conceal his crimes by burning her fingertips. When the smell of burning flesh was too unpleasant, he removed her fingertips with bolt cutters. He also drained her body of blood in a bathtub, then stuffed her body inside a trash can, cleaned their apartment, discarded her fingertips and various cleaning supplies in a dumpster behind the Petsmart store in the Midway area of San Diego, dumped her bloody mattress in a residential area of Bonita, and disposed of her body in a residential area of Carlsbad. He also tried to cash her checks and obtain credit cards under her name. Following his arrest, he told another inmate in county jail that he killed Gallego for her money and even described his efforts to conceal his crime afterwards.

STATEMENT OF THE CASE

By information filed on March 27, 2001, the San Diego County District Attorney charged appellant with the murder of Patricia Gallego (Pen. Code, § 187, subd. (a)). The information alleged that appellant intentionally killed Gallego for financial gain (Pen. Code, § 190.2, subd. (a)(1)), by means of lying in wait (Pen. Code, § 190.2, subd. (a)(15)), and while he was engaged in the commission or attempted commission of rape (Pen. Code, § 190.2, subd. (a)(17)).[1] (1 CT 48-49.)

The guilt phase of appellant's trial commenced on May 22, 2002. (11 CT 2513.) On July 17, 2002, the jury found appellant guilty of first degree murder. (8 CT 1852; 11 CT 2585-2586.) The jury also returned true findings on the special circumstance allegations. (8 CT 1853-1855; 11 CT 2585-2586.)

The penalty phase began on July 24, 2002. (11 CT 2596.) On August 12, 2002, the jury returned its verdict fixing the penalty as death. (8 CT 1936; 11 CT 2615.)

On February 24, 2003, the court denied the automatic motion for modification of the penalty verdict under Penal Code section 190.4, subdivision (e), and pronounced judgment of death. (11 CT 2625.1-2625.2.)

Appeal to this Court is automatic pursuant to Penal Code section 1239, subdivision (b).

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[1] The information also alleged the murder involved the infliction of torture (Penal Code, § 190.2, subd. (a)(18)); however, the allegation was dismissed pursuant to Penal Code section 995 on January 24, 2002. (1 CT 49.)

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution evidence

a. Appellant and Gallego's living arrangement

Patricia Gallego, a Brazilian citizen, moved to the United States in 1996. She met appellant when he became roommates with her boyfriend, Charles Ijames, in 1997. (33 RT 3977; 34 RT 4269-4270.) Appellant was casually dating Marilyn Powell at the time. (34 RT 4281-4282.) Appellant did not have a car, but he had a mountain bike which he occasionally took with him on the bus. (34 RT 4279-4280.) Appellant used a pair of handcuffs to lock his bike. (34 RT 4280.)

During the summer of 1998, appellant told Ijames that Gallego asked him to marry her in exchange for $5000. Appellant told Ijames that it would have been a business transaction for money. Appellant stated he did not love Gallego and had reservations about marrying her for money. Ijames was under the impression that appellant would not marry Gallego. (35 RT 4311-4313.)

When Gallego's romantic relationship with Ijames ended in 1998, she moved back to Brazil. (34 RT 4277-4278.) When she returned to the United States in 1999, she lived with Ijames' friends, Stephanie Ortiz and Kristina Stepanof, for about a month. (34 RT 4293; 42 RT 5627-5628, 5632-5633.) Appellant continued to live with Ijames until November of 1999. (34 RT 4279.)

In April of 2000, appellant told his friend Leilani Kaloha that he was moving into an apartment with a girl named Patricia, that he knew Patricia as a friend before, that Patricia returned to San Diego, that Patricia was

going to pay him to marry her, and that they were moving in together to make their relationship look believable. (41 RT 5431.)

In late May of 2000, Kaloha asked appellant if he and Patricia were still getting married. Appellant told Kaloha that they had called off the marriage. Appellant did not seem upset. (41 RT 5432.)

Appellant also began stealing Gallego's photos and altering them by cutting out her heads from the photos and super-imposing them on models in pornographic magazines, drawing over the vaginal areas of her photos, or cutting out other women's body parts and super-imposing them on the photos. (37 RT 4801-4806, 4811; see also Exhs. 76, 77, 78, 79, and 84.)

b. Appellant's activities prior to Gallego's disappearance

In June of 2000, appellant began calling Gallego's bank, Wells Fargo Bank, to check on the balances of her accounts. He checked on her account on June 20, 2000, June 28, 2000, and July 18, 2000. (40 RT 5198-5201; Exhs. 67 and 68.)

Around July 23, 2000, appellant made arrangements to take a week off from work in August. He gave Beata Karzi, the general manager of the LensCrafters store where he worked, a letter requesting time off because his mother was dying of cancer and had a few days left to live. (35 RT 4459-4462, 4465, 4478-4479.) When Karzi talked to appellant about his request, appellant had tears in his eyes and had a difficult time talking. (35 RT 4463-4464, 4466.) Karzi granted appellant's request and told appellant that he could take more time off if he needed it. (35 RT 4466.) Karzi subsequently prepared a schedule that gave appellant the time off that he had requested, August 7, 2000, to August 12, 2000. (35 RT 4466-4468.)

When Ernesto Lozano, another LensCrafters manager, subsequently told appellant that he hoped everything would be okay and that he would

see appellant when appellant returned from his leave of absence, appellant manifested normal behavior. (35 RT 4480.)

Appellant worked at LensCrafters until August 6, 2000. (35 RT 4482-4483.)

c. Gallego's disappearance

Gallego held two jobs. She worked as a waitress, a hostess, and a bus person at the two different San Diego locations of Yakimono restaurant. (36 RT 4656- 4657.) She also worked as the supervisor of the bakery at Café Chloe in La Jolla. (36 RT 4611, 4649, 4651-4652.) Gallego always showed up on time for her shifts at the two restaurants; and, whether or not she was scheduled to work at Café Chloe, she stopped by the restaurant nearly every day to make sure that everything was all right or to prepare the employee work schedule. (36 RT 4611-4613, 4625, 4651-4652, 4657-4658.)

On August 10, 2000, Gallego worked at Yakimono restaurant from 10:45 a.m. to 2:30 p. m. (36 RT 4657-4658.) Afterwards, she worked at Café Chloe. Eudes De Crecy, the owner of Café Chloe, walked Gallego to her car after her shift that night. (36 RT 4615-4616, 4639-4640, 4652.) De Crecy noticed Gallego had been stressed, tired, and unhappy for several days. (36 RT 4623-4624.) When De Crecy asked Gallego why she was stressed or tired, Gallego told De Crecy that she wanted to change her life. Gallego said she wanted to move out of her apartment and live somewhere else. (36 RT 4624.)

Gallego was scheduled to work at Yakimono on August 11, 2000, but she did not show up for work. It was very unusual for her to not show up for work. (36 RT 4657-4658.) Anna Ching, the owner of Yakimono, called Gallego a few times but nobody answered the phone. Ching eventually left a message on Gallego's answering machine, asking Gallego

to return her call and let her know why Gallego did not show up for work. (36 RT 4659.)

Gallego was also scheduled to work at Café Chloe on August 11, 2000. Loic Vacher, the manager, found it strange that Gallego did not go to the restaurant on August 11th, 12th, or the 13th, and did not talk to anyone there. Vacher called Gallego's residence and left a message for her, but he never heard back from her. (36 RT 4652-4653.)

d. Appellant's activities following Gallego's disappearance

Around 10:19 a.m. on August 12, 2000, appellant rented a U-Haul truck from a U-Haul dealership in Mission Valley. (35 RT 4419, 4421, 4428; 40 RT 5221-5222.) He drove the truck back to his apartment and parked it at the end of the cul de sac outside of his apartment. (36 RT 4525-4527.) At 1:34 p. m., he purchased a 45-gallon Roughneck trash can with wheels and a manual hand drill at the Home Depot store in El Cajon. (36 RT 4555-4556, 4562-4563; 40 RT 5221-5222.) Around 2:10 p. m., he cashed one of Gallego's checks for $300 at an El Cajon branch of Wells Fargo Bank. (36 RT 4591-4595, 4599-4601.) The check was made payable to him. (36 RT 4592-4595.)

At 8:46 a.m. on August 13, 2000, appellant purchased bolt cutters and rented a Rug Doctor from the Home Depot store in the Midway area of San Diego. (36 RT 4537, 4541-4542, 4544, 4549, 4551-4552; 40 RT 5222-5223.)

Sometime after 5:00 p. m. on August 13, 2000, appellant drove the U-Haul truck to the dumpsters in the parking lot of the Petsmart in the Midway area of San Diego. He parked the truck in front of the dumpsters, exited the truck, walked to the back of the truck, and paused momentarily before flicking an object, later discovered to be a human thumb by the police, into the side area of the trees. (33 RT 4045-4057, 4074.) Appellant

opened the back door of the truck, took out two garbage bags, and threw them into one of the dumpsters. (33 RT 4075-4076.) Afterwards, he closed the back door of the truck, got back into the truck, and drove away. (3 RT 4079-4080.)

Later that night, for nearly an hour between 3:00 a.m. and 4:00 a.m. on August 14, 2000, Josh Dubois, who had been sleeping in the apartment underneath appellant and Gallego's apartment, heard the sound of duct tape constantly coming off a roll from inside appellant and Gallego's apartment. Dubois also heard car doors opening and closing outside the apartment. (36 RT 4519-4522, 4528-4530.)

Around 11:30 a.m., on August 14, 2000, appellant entered a Wells Fargo Bank in the Mission Valley area of San Diego to cash another one of Gallego's checks. The check was made payable to him in the amount of $350. (36 RT 4568-4570, 4572-4573, 4575; 40 RT 5184-5185, 5187-5189.) The bank teller tried to process the transaction at two different teller stations but the computers would not process the check. (36 RT 4575-4576.) Appellant ultimately left the bank. (36 RT 4577, 4581.)

Appellant returned the rented U-Haul truck to the U-Haul dealership around 12:05 p. m. on August 14, 2000. (35 RT 4435, 4438; 40 RT 5224.) When appellant subsequently returned to work, his supervisor, Ernesto Lozano, was sympathetic. Lozano offered appellant additional time off, but appellant told Lozano that things were fine and that he just needed to work. (35 RT 4480, 4482-4485.) But appellant later accepted Lozano's offer to leave work early and let someone else take over the remainder of his shift.[2] (35 RT 4484.)

[2] August 14, 2000, was the last day that appellant worked at LensCrafters. (35 RT 4480, 4482-4483.)

On August 14, 2000, appellant called Anna Ching, the owner of the Yakimono restaurants. Appellant told Ching that Gallego went home to Brazil because Gallego's mother had an accident. Appellant asked Ching not to fire Gallego because Gallego needed her job. Ching agreed not to terminate Gallego's employment.[3] (36 RT 4659.)

On August 15, 2000, appellant called Loic Vacher, the manager of Café Chloe. Appellant told Vacher that Gallego returned to Brazil because one of her parents was in the hospital. Appellant further stated that Gallego would be back in San Diego and that Gallego did not quit her job. (36 RT 4653-4654.)

On August 15, 2000, appellant made a telephonic transfer of the entire balance of $4,670.02 in Gallego's savings account to her checking account.[4] (40 RT 5196-5197; 40 RT 5197, 5252 .)

e. Discovery of Appellant's "to-do" list, Gallego's fingertips, bolt cutters, cleaning supplies and containers, incense sticks, and lit but not smoked cigarettes in a dumpster in the Midway area of San Diego

Around 6:30 a.m. to 7:00 a.m. on August 14, 2000, Steve Gomez, a landscaper for the Petsmart shopping center in the Midway area of San

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[3] A few days later, a detective called Ching and asked her if she knew that Gallego had been murdered. (36 RT 4660.)

[4] Jeri Wilkinson, a senior investigator in the Wells Fargo Bank's Fraud Investigations Department, testified at trial that a person who had Gallego's password could make a telephonic transfer of funds from one of Gallego's bank accounts to another one of her bank accounts by calling the telephone number that is listed at the top of her bank statement. (40 RT 5174, 5196.) Wilkinson also testified that if someone other than Gallego called Wells Fargo Bank and had her password, the caller could access Gallego's account balances. (40 RT 5200.)

Diego, looked inside one of the dumpsters that were behind the Petsmart. (33 RT 4004, 4018-4019.) Gomez looked inside the dumpster out of habit because Petsmart often discarded dog food and toys. In the past, Gomez found discarded items that he brought home for his dog. (33 RT 4008-4010.)

That morning, inside the dumpster, Gomez saw lighters and a pack of cigarettes. He also saw a black plastic trash bag containing four fingertips which appeared to belong to a woman and were blackened, as if they had been burnt. (33 RT 4010-4012, 4022.) Gomez called his supervisor and informed his supervisor of his findings. (33 RT 4012, 4018.) Gomez's supervisor contacted the police while Gomez made sure nobody took anything out of the dumpster. (33 RT 4013, 4023.)

The police arrived at the Petsmart shopping center around 8:15 a.m. (33 RT 4036; see also 37 RT 4693.) San Diego Police Detective James Hergenroeather climbed into the dumpster that had the fingertips and sifted through its garbage for human body parts. (37 RT 4693-4696, 4705-4706.) He found seven fingertips inside the dumpster. He also found one fingertip on the ground east of the other dumpster. (37 RT 4709, 4711-4712, 4717-4718.) He gave the fingertips to criminalists for identification. (37 RT 4698.)

Detective Hergenroeather and evidence technician Tom Washington subsequently went through the remaining garbage in the dumpsters and inventoried other items of evidentiary value. (37 RT 4708-4709.) Inside one dumpster, they collected a Ralph's plastic bag containing: two yellow rubber gloves with red stains; two empty packages labeled "BIC Sure Start"; 1 blue bar of soap with a penny attached to it; five pennies; a plastic top of a spray bottle; pieces of duct tape wrapper; three wet paper towels;

four fingertips that had been burned;[5] and two Marlboro cigarettes with brown stains that appeared to have been lit but not smoked. (37 RT 4697, 4704-4705, 4710.) They also collected the following items:

- an empty white plastic bottle labeled "Tile Action" (37 RT 4711);
- a Home Depot plastic bag containing a clear plastic shower cap, a plastic package labeled "Dust and Protective Nuisance Masks," a white plastic cap with a brown plastic spout, an apparent plastic top to a bottom, a Marlboro cigarette with brown stains that had apparently been lit but not smoked, and an empty Hershey's Chocolate Malt Syrup bottle (37 RT 4712-4713);
- a plastic bag containing a used roll of duct tape, 18-inch bolt cutters with an attached "Home Depot" sticker (37 RT 4714-4715); and,
- a plastic bag containing two pieces of a banana peel, a piece of green wood incense that was burned on one end, a blue shirt, an empty three fluid ounce clear plastic bottle, a pair of tweezers, two empty plastic containers, a plastic file, two pieces of redwood incense that were both burned on one end, another plastic bag with a partial paper towel, a wet washcloth, a glass labeled "Dazzling Gold Estee Lauder," an eight ounce empty plastic bottle labeled "Bath and Body Works Body Splash" in the Freesia scent, a green toilet seat cover, a piece of label from the plastic labeled "Aphrodisia Ten Sticks," a pair of blue Levi's denim pants, a metal hand drill, a piece of note paper that read "Please do not disturb. Sleeping. Thanx [*sic*]," a piece of note paper that appeared to be a handwritten to-do list, and cologne.

(37 RT 4717-4722, 4725-4726; Exhs. 58, 59, and 60.)

The handwritten note that was found inside a plastic bag in the Petsmart dumpster and appeared to be a to-do list, included the following:

[5] The fingertips were the same ones found earlier by Gomez.

- 2-4am [¶] M-Th
- shaver cord
- dish wash gloves
- Adidas jacket
- knit cap inside-out
- long black nylon (Nike sweats)
- digi cam (scanner)
- cucumber
- get info → software for moving, altering, or enlarging photos
- burn palms + face thoroughly
- (small hand truck & drawer for extraction from apt.)
- 2 S.A.S.E. letters re: 11 day hiatus to
  visit w/ grieveng [*sic*] relatives
  need these checks
- 5-day hiatus for me
  Su → Th
  & slave screams
- Ads in Reader + Internet Baby!!
- on Avg. 2nd/ 10th/ & 15th
  ensure 7,200.00 avail …
- close <u>all</u> windows + kitchen
- lock doors
- on her stomach
- (shave + plug a virgin
  pussy & clenching
  ass cheeks
  pound ‘em)
- (rub your nuts
  . . .
  lubed-up tits & lubed-up
  asshole!!!)
- (your nuts . . .)

- (30 & afraid to take a dick – what a fuckin' joke)

(Exhs. 59 and 60.)

The handwritten list also included a drawing of two people lying on top of each other, next to the following words: "um you got daddy all big n wet, now let's spank that tight lil asshole." (Exhs. 59 and 60.)

f. Discovery of Gallego's bloodstained mattress in Bonita

On August 14, 2000, two young girls who were trying to set up a lemonade stand in their Bonita neighborhood, Devon C. and Jillian C., found a mattress lying on the street near their homes. (33 RT 3986-3987, 3990, 3996, 4001.) When they lifted the mattress, they noticed bloodstains on it. (33 RT 3990, 3998, 4001-4002.) Devon also noticed 10 tiny blood spots on the body pillow accompanying the mattress. (33 RT 3998, 4002.) They told Jillian's mother about the mattress. (33 RT 3990, 3998-3999, 4002.) Their fathers looked at the mattress that evening and reported it to the Sheriff's department. (33 RT 3990, 3992.)

On August 17, 2000, Devon's father called the San Diego police regarding the mattress. (33 RT 3992-3993.) Detective Hergenroeather recovered the mattress. (33 RT 3992-3993; 37 RT 4812.)

g. Discovery of Gallego's body in a trash can in Carlsbad

Around 6:00 p. m. on August 14, 2000, Debra Desrosiers and her neighbor were walking in Calvera Hills, a residential neighborhood in Carlsbad, when Desrosiers saw a trash can that had duct tape wrapped all around it. (33 RT 4024-4025, 4028.) The trash can, which was sitting in a ditch on the side of the road, looked out of place because the neighborhood

was well manicured by the homeowners' association. (33 RT 4024-4025.) The trash can was in an isolated area of the neighborhood. (33 RT 4028.)

Desrosiers kicked the trash can with her feet to see if it really contained trash. It was very heavy. (33 RT 4026-4027.) When Desrosiers' neighbor lifted the slightly open lid of the trash can, Desrosiers saw plastic and something that appeared to be the color of flesh. Desrosiers also saw something dark resembling hair. (33 RT 4027, 4030.) Desrosiers went home and called 911. (33 RT 4027.)

Carlsbad Police Sergeant Gary Spencer responded to the call. (34 RT 4102.) When Sergeant Spencer lifted the trash can lid a little higher to look inside it, he saw semi-clear plastic wrapped around a head of hair and skin. He pulled the lid up even further, reached inside the trash can, and confirmed a body was inside the trash can. (34 RT 4104.)

h. The arrest of Appellant and search of his apartment

On August 15, 2000, the police arrested appellant at the apartment that he shared with Gallego. (34 RT 4112-4115.) On August 17, 2000, Detective Hergenroeather and evidence technician Tom Washington searched the apartment. (33 RT 3992-3993; 37 RT 4812.)

Appellant's bathroom, Gallego's bedroom, and Gallego's bathroom looked like they had been cleaned. (37 RT 4762.) Consistent with the handwritten to-do list that was recovered from the Petsmart dumpster, the windows of the apartment were closed. (37 RT 4717-4722, 4725-4726, 4762-4763, 4819.) The majority of the items on the handwritten to-do list were also found inside the apartment: a shaver and cord; dishwashing gloves; an Adidas jacket; a knit cap; Nike sweats; camera film; a "small-medium dark car with a decent trunk" (Gallego's car); a small hand truck; and, a letter regarding an 11-day hiatus. (37 RT 4818-4820.) The only items on the handwritten to-do list that Detective Hergenroeather did not

encounter in the apartment, were: a digi cam or scanner; a cucumber; software for moving, altering, or enlarging photos; and, a self-addressed stamped envelope.[6] (37 RT 4820-4821.)

In the living room area, Detective Hergenroeather found a laundry basket containing a towel and a wet washcloth. (37 RT 4767-4768.) On the floor, he found a manila envelope that was labeled "CAL P.R.G"[7] and which contained Gallego's passport photos and international documents. (37 R 4768-4770.) On the back of one of the international documents were handwritten notes reading "Eudes, 715 Pearl Street, La Jolla, California 92037" and "2200." (37 RT 4770.) One photo had large breasts drawn over it. (37 RT 4770.) Inside the closet, Detective Hergenroeather found: plastic bags matching the plastic bag with the red pull tab containing the burnt fingertips in the Petsmart dumpster; and, a Nash brand scarf. (37 RT 4771.)

In the dining room area, Detective Hergenroeather found: Gallego's car keys; a notebook and a note setting forth instructions on how to drive a manual car; and, a used mop. (37 RT 4772-4774.)

In the kitchen area, Detective Hergenroeather found numerous cleaning supplies in a cabinet. (37 RT 4774.) Inside a trash bin, he found one of Gallego's checks, check number 201. The check was torn and made payable to "Cal." (37 RT 4775.) On the kitchen counter, Detective Hergenroeather found: a credit card with appellant's name on it; a Togos' receipt for a purchase made at 11:40 a.m. on August 15, 2000 at the 2508 El Camino Real location in Carlsbad; a Sav-On receipt for a purchase made

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[6] Detective Hergenroeather did not specifically look for a self-addressed stamped envelope because he did not know what an "SASE" meant until he conducted the investigation. (37 RT 4820-4821.)

[7] Gallego's full name was Patricia Ramos Gallego. (37 RT 4769-4770.)

at 11:38 p. m. on August 14, 2000 at the 2510 El Camino Real location in Carlsbad; a completed J.C. Penney credit card application made under the name "Pat R. Gallego"; a Nordstrom FSB credit application made under the name of "Pat Ramos Gallego"; a Mervyn's application made under the name of "Pat R. Gallego"; a Robinson's May application made under the name of "Pat R. Gallego"; and a Wells Fargo credit card application made under Gallego's name; a Plaza Camino Chevron Service Center receipt under the name of "Erik Smith"; a sheet of paper with California Driver's License number B7982524, social security numbers, names, and phone numbers written on it; appellant's driver's license; $194.30 in United States currency; the August 13, 2000, receipt for a Rug Doctor rental; the August 14, 2000, receipt for the return of the U-Haul truck; and, Gallego's check (check number 202) that appellant tried to cash at the Wells Fargo bank in Mission Valley. (37 RT 4776-4781, 4786-4788; see 35 RT 4442-4443 [U-Haul rental], 36 RT 4551-4553 [Rug Doctor rental], 4570-4573 [appellant's attempted transaction at Wells Fargo].)

Gallego's bedroom appeared to Detective Hergenroeather as if it had been cleaned and her belongings had been moved out of it. (37 RT 4782.) Detective Hergenroeather noticed a red stain on the carpet. (37 RT 4783.) The police collected a computer and a computer hard drive from Gallego's bedroom. The computer was last accessed at 12:42 a.m. on August 10, 2000. (43 RT 5994-5995.)

Detective Hergenroeather found both Gallego's bathroom and appellant's bathroom to be clean. (37 RT 4788, 4790.) Underneath appellant's bathroom sink were cleaning supplies and a shaver and cord. (37 RT 4790.)

Inside appellant's bedroom, Detective Hergenroeather found miscellaneous books and papers. (37 RT 4793.) Specifically, he found: a Ralphs receipt for a purchase made at 11:41 p. m. on August 13, 2000, for

garbage bags and a couple of food items (37 RT 4796-4797); an envelope that had "Patricia G" and numbers and names of places written on it (37 RT 4797); a handwritten note stating, "I am sorry that I'm not able to finish my shifts" (37 RT 4797-4798); a sheet of paper which began with "The loudest clap of thunder" (37 RT 4798); a letter which began with "I didn't feel much like talking last night" (37 RT 4798); and, a letter that read as follows:

> "I underline 'true self,' because if that's your thinking.
>
> "I didn't feel much like talking last night, because all my life long, I've been lousy with any . . . of verbal confrontation. So much so that you'd be left with the impression that I'm the fuckin' foreigner.
>
> "Plus, I was pissed-off about your agenda – just like a God damn Nazi!! Are you the only men you'll show your true self to, have to fit some fuckin' media mind controlling criteria of T.V. actor looks or money or blond hair and blue eyes. You're such a fucking puppeted piece of shit at a whimsical society's mercy.
>
> "With all that you've ever said I do you do your best and succeed at making me feel completely insignificant – about half the time – while in the early weeks of our cohabitation, I just wanted to confront you. I call it feeling and acting like a human being, by yielding, caring, respect, attention and notes and flowers to perpetuate said intentions."
>
> "Your brain can only hope to aspire to be my liquid excrement!!"

(37 RT 4799-4800.)

In appellant's bedroom, Detective Hergenroeather also found pornographic videocassette tapes, as well as hundreds of pornographic magazine pages and photographs of nude women and body parts. (37 RT 4794, 4801-4802, 4806-4807, 4810.) These materials included: cut-outs of large breasts or a penis from magazines that were pasted on models in other

magazines; cut-outs of Gallego's head from photos of her super-imposed on models in pornographic magazines; hand drawings over Gallego's vaginal area in pictures; photographs of Gallego with her chest area cut out; and, cut-outs of other female acquaintances' heads from photos of them super-imposed on other photos with hand drawings over the vaginal area and waist. (37 RT 4801-4806, 4811.)

In addition, Detective Hergenroeather found a knit cap on appellant's bed. (37 RT 4795-4796.) He also found a glass pipe, condoms, and a camera and film. (37 RT 4793.)

Inside appellant's bedroom closet, Detective Hergenroeather found: a pair of Nike black nylon pants; miscellaneous papers and drawings; a videocassette tape; and, an Adidas jacket with two passport photographs of Gallego and her Wells Fargo check number 250 inside a pocket. (37 RT 4808-4810).

Detective Hergenroeather found two mops, one in the apartment and one on the patio. (37 RT 4812.)

Detective Hergenroeather never found the bedding for Gallego's mattress, the bathroom mat from Gallego's bathroom, the clothing that Gallego was wearing, or handcuffs. (37 RT 4822-4823.)

Shawn Montpetit, a criminalist with the San Diego Police Department, applied Luminol to different areas of Gallego's bedroom and bathroom. (37 RT 4821, 5004-5005; 39 RT 5065.) In the southeast and northeast corners of Gallego's bedroom, Luminol indicated there was more blood on the carpet in those areas than the small drops that were visible to the naked eye. (39 RT 5093-5095, 5103.) Montpetit cut two pieces of the carpet from those areas for DNA testing. (39 RT 5097-5098, 5103.) The DNA profiles of the blood in those samples were consistent with Gallego's blood. (39 RT 5098.) Luminol also indicated blood on the threshold of

Gallego's bathroom door and along the door frame.[8] (39 RT 5095-5096, 5098-5099, 5105.) The bed frame that was leaning against a wall also tested positive for blood. (39 RT 5098-5099, 5103.)

In Gallego's bathroom, Montpetit noticed a rectangular area of the floor that appeared to be cleaner than the rest of the floor. Given the rectangular shape, Montpetit surmised a bath mat might have been missing from the bathroom. (39 RT 5097.) Montpetit applied Luminol to the bathroom, and the police swabbed an area that appeared to luminesce, specifically the area underneath the towel rack and near the shower door. (39 RT 5107.) Montpetit tested the swab for blood but could not confirm the presence of blood. At trial, Montpetit testified that either no blood was present or it was at a level below which the test could detect. (39 RT 5108.) He further testified that cleaning the bathroom could have completely removed all of the blood. (39 RT 5108-5109.)

i. The search of Gallego's car

In Gallego's car, Detective Hergenroeather found a dust mask, a pair of white shoe laces, and a "Chanel" bottle containing approximately one and one-half inches of a yellow-colored liquid. (37 RT 4815-4816.) He also found a Plaza Camino Chevron Service Station invoice under the name of "Erik Smith" on the floorboard of the car. (37 RT 4814-4815.)

The police later took custody of the truck. When they returned it to the dealership one month later, the truck had the smell of a butcher shop garbage can. (35 RT 4444.)

[8] Montpetit found the blood stain on the metal strip used to tack down the carpet. (39 RT 5105.) The bathroom flooring was linoleum.

j. Appellant's admissions to Edward Lee in county jail

Following his arrest, appellant shared the same cell at the San Diego County Jail with Edward Lee. (40 RT 5330-5331.) Appellant told Lee that he was in custody for killing a girl. (40 RT 5332.) Lee did not want to talk to appellant, but appellant wanted to talk. (40 RT 5333.) Appellant told Lee that a girl from Brazil wanted him to marry her for $2,000 so that she could obtain United States citizenship. (40 RT 5334.) Appellant further stated that the girl had about $12,000 to $15,000 in the bank and so he figured why marry her for $2,000 when he could get rid of her and obtain all of her money. (40 RT 5334-5335.) Based on what appellant told him, Lee understood that appellant and the girl were roommates and that she was going to put the money in a joint account so that their marriage would look legitimate. (40 RT 5335.)

Appellant also told Lee that after he killed the girl, he tried to hide her identity by using bolt cutters to cut the girl's fingers off but her skin was tough and he had to jerk the bolt cutters around to get her fingers to pop off. (40 RT 5335-5336.) Appellant said he figured that nobody would know anything about the girl since she came from another country and he could dispose of her body and nobody would know the difference. (40 RT 5337.) Appellant said he bagged up the girl's fingers after he cut them off. (40 RT 5341.) Appellant added that he tried to get rid of the girl's body by putting her body in a truck and driving it up to Carlsbad, but a bright light startled him when he tried to dump her body and he drove away. (40 RT 5341-5342.) Appellant did not say where he ultimately dumped the girl's body. (40 RT 5342-5343.) Appellant disclosed only that he got a truck to put stuff in a dumpster and that an old lady was watching him while he was at the dumpster but he put the stuff in the dumpster anyway. (40 RT 5342-

5343.) Appellant also stated that he drained the girl's blood in the bathroom. (40 RT 5343.)

Appellant told Lee the details of the murder like the murder was nothing or it was an "everyday thing." (40 RT 5345-5346.)

On August 21, 2000, Lee told Detective Ott what appellant shared with him. (40 RT 5337-5338.)

k. The autopsy of Gallego

Deputy Medical Examiner Christopher Swalwell conducted the autopsy of Gallego on August 15, 2000.[9] (34 RT 4116-4117.) Gallego arrived at the Medical Examiner's Office inside a plastic trash can. (34 RT 4120; 37 RT 4726.) The trash can emitted a foul odor that smelled like death but also had a sweet-smelling scent. Detective Hergenroeather, who was present for the autopsy, believed the sweet-smelling scent came from the Bath and Body Works Freesia body splash or the Estee Lauder Dazzling Gold perfume that he found in the Petsmart dumpsters earlier. Detective Hergenroeather believed the body splash or perfume was used to mask the foul odor. (37 RT 4727-4728.)

Swalwell removed a plastic bag containing Gallego's body and gave it to the police as evidence. (34 RT 4120; 37 RT 4728.) He then removed Gallego, whose body was contorted to fit inside the trash can, from the trash can. The plastic bag had moisture in it, and Gallego's body was wet. (34 RT 4120.) The small amount of fluid inside the trash can was a clear-type of tan-colored watery fluid. Swalwell did not find any blood inside the trash can. He also did not see any blood on Gallego's body. (34 RT 4120-4121, 4168-4169.)

[9] At the time of the autopsy, the body had not been identified as Gallego. The body was identified simply as "Jane Doe." (37 RT 4729.)

Gallego was naked, and the only thing that was on her body was a wet rayon-type, silk Nash brand scarf that was loosely looped three times around her neck and had a hastily-made knot in it. (34 RT 4121, 4189; 37 RT 4729, 4731, 4753; see also 37 RT 4771.) The scarf covered a cut on Gallego's neck. (37 RT 4731.) Based on his observations, Detective Hergenroeather believed the scarf could have been used as a gag on Gallego. (37 RT 4731.)

After removing the scarf, Swalwell performed an external examination and collected sexual assault evidence. (34 RT 4122-4124.) Gallego's body had several discolorations; some of them were injuries and some were postmortem changes resulting from the beginning of the decomposition process. (34 RT 4125.) Based on the degree of the decomposition, Swalwell estimated Gallego's death probably occurred between two and three days before that morning of that autopsy. (34 RT 4127-4128.)

Gallego's hands did not have any fingertips and her vaginal area appeared to have been freshly shaven. (34 RT 4128-4129.) The palmar surface of her hands and some of her fingertips appeared to have been burned as they were black, slightly wrinkled, and dried. (34 RT 4129.) Swalwell physically matched the fingertips that were brought to the Medical Examiner's Office with the ends of Gallego's hands where they had been cut. (34 RT 4129-4131.) Gallego's fingers were all cut between the first and second joints of the fingers, and her thumbs were cut between the joints and knuckles. (34 RT 4130.)

Gallego's external injuries also included: a laceration on the right frontal area of her head; a few small scrapes on her face, three of which she sustained before her death; an imprint mark further back along her jawline; a cut on the left side of her neck that she sustained before her death, and an abrasion on the front of her neck; several scrapes and a couple of

contusions on her back; three marks in the middle of her back; a bruise on the back of her right arm; small cuts and scrapes on her left wrist; a faint mark on her right wrist; several abraded marks around her left elbow; a contusion on her right inner ankle; and, discolorations behind her knees. (34 RT 4135-4139, 4143-4144.)

Gallego's head injury was caused by a blunt object with a point and three edges stemming from the point, such as the corner of a desk or a rock. The object was relatively heavy because it indented and fractured Gallego's skull. (34 RT 4155-4157.) Assuming Gallego was not already unconscious, the object would likely have caused unconsciousness upon contact. The bleeding in the scalp around the head injury indicated the injury occurred before Gallego was killed. (34 RT 4158.)

Gallego's neck injury was a horizontal cut wound across the left side of her neck, measuring two inches in length. (34 RT 4157, 4159-4160, 4162-4164.) The cut went all the way down to her cervical spine, cutting her internal jugular vein. (34 RT 4159-4161.) The cut was caused by a sharp-edged object that went across her neck three times in the same proximity within the depth of the same wound. (34 RT 4157, 4162-4164.) Gallego's spine on the left side of her neck had three parallel horizontal cuts: two cuts were superficial, just scraping the spine; and, one was about a quarter of an inch deep. (34 RT 4162-4164.) Gallego's neck injury occurred before her death. (34 RT 4164.)

In addition to her skull fracture, Gallego suffered a fracture of the superior horn of her thyroid cartilage, which was part of her windpipe. (34 RT 4177-4178.) Swalwell testified at trial that this type of injury was common in asphyxia cases, where there was hanging or strangulation, and motor vehicle accidents resulting in multiple trauma. (34 RT 4177-4178.) A fair amount of pressure was needed to break the thyroid bone. The broken part in Gallego was small, between an eighth of an inch and a

quarter of an inch in diameter. (34 RT 4178.) Holding down a person's neck, leaning on it, and cutting it was a reasonable scenario for breaking the thyroid bone. (34 RT 4178-4179.)

Swalwell testified that after Gallego's jugular vein was severed, she would have gone into shock and then died in a matter of minutes. (34 RT 4166-4168.) Swalwell concluded Gallego died as a result of the blood loss from her injuries. (34 RT 4164.)

At trial, Swalwell explained that submersion of a wounded person in water tends to keep the wound open and moist so the blood will not clot. Submerging the person in a tub of water and holding that person there allows the blood to continue flowing out of the person's body. (34 RT 4169.) The fact that all of Gallego's blood was lost as she had no blood in or on her, indicated to Swalwell that her loss of blood took place somewhere other than in the trash can. (34 RT 4169-4170.) Submersion in a tub of water could have been a factor of Gallego's complete blood loss. Running water into her neck injury also could have been a factor of the blood loss. (34 T 4255-4256.)

When shown a photograph of Gallego's mattress at trial, Swalwell identified five major bloodstained areas on the mattress. Swalwell testified Gallego had two major body parts that would have bled on to the mattress: her neck as a result of the cut; and, her scalp as a result of the laceration. (34 RT 4171.)

l. A tool marks examination of Gallego's body

Dr. Norman Sperber, a dentist, was one of the top leaders in the field of tool mark identification. Tool mark identification is the identification of a mark left by any object on a soft or hard material. (35 RT 4329-4330, 4323-4324.) Marks that are left by teeth are considered tool marks. (35 RT 4323-4324.)

At Sergeant Holmes' request, Dr. Sperber looked at photographs of Gallego's injuries. (35 RT 4329-4330.) On August 24, 2000, after Detective Hergenroeather obtained a pair of handcuffs from the police department's property room, Dr. Sperber and Detective Hergenroeather examined Gallego's body at the Medical Examiner's Office. (35 RT 4330-4331; 37 RT 4755.) The purpose of Dr. Sperber's examination was to determine if a horizontal mark on Gallego's lower back might have been caused by a pair of handcuffs as a result of her being handcuffed from behind. (35 RT 4332, 4337, 4389.)

When Dr. Sperber first saw the mark in photographs, he thought it could have been caused by handcuffs that were between Gallego's back and the surface that she had been lying on when she was handcuffed. (35 RT 4332.) In examining the mark on Gallego's body, Dr. Sperber and Detective Hergenroeather turned Gallego on to her stomach, brought her hands behind her back into a handcuffing position, and put the handcuffs on her wrists. (35 RT 4333; 37 RT 4759-4760.) The chain or the bar which connected the two handcuff rings appeared to be sitting directly over the horizontal mark on Gallego's back. (35 RT 4336; 37 RT 4760, 4762.)

Dr. Sperber also observed faint circumferential marks on Gallego's right wrist which were consistent with handcuffs. (35 RT 4338.) Detective Hergenroeather similarly noticed Gallego had bruising on her left wrist that appeared to be handcuff marks, akin to those which he had seen on suspects who were handcuffed improperly or for too long. (37 RT 4756-4757.)

m. DNA analyses

Criminalist Shawn Montpetit of the San Diego Police Department tested the bolt cutters for the presence of blood. Results of chemical tests performed on the blades of the cutters and pieces of human tissue that were on the cutting surfaces were negative for blood. (37 RT 5065.) Montpetit's

DNA testing of the pieces of human tissue indicated Gallego was likely the source of that tissue. (37 RT 5065-5066; 40 RT 5124-5125.)

Montpetit also performed DNA testing on Gallego's mattress to determine whether the blood on it was linked to the charged crimes. (37 RT 5061, 5066-5067.) Montpetit first used an alternate light source to find areas on the mattress that did not appear to have any biological fluid other than blood (e.g., semen, saliva, urine) so that he could test only the blood. (37 RT 5067.) He selected two areas that he thought would be the least likely to have other DNA sources on them, but both had other DNA sources on them. He then extracted the DNA and separated the sperm cells from other cell types, resulting in DNA from a sperm fraction and DNA from a non-sperm fraction for each sample. (37 RT 5067-5068.)

Testing of one sample indicated Gallego could be the source of both the non-sperm DNA and the sperm DNA.[10] (37 RT 5071-5072.) (37 RT 5071-5072.)

For the second sample, Montpetit performed two different DNA tests. First, he tested five DNA markers. The results showed the DNA types from the non-sperm fraction were consistent with Gallego's and the DNA types from the sperm fraction matched appellant's. (37 RT 5072; 40 RT 5123-5124.) As the sample was taken from a blood-stained area, the source of the blood was likely Gallego. (40 RT 5123.)

Montpetit then performed a second test on another nine DNA markers. The results of the second test also showed the DNA from the non-sperm fraction likely came from Gallego and the DNA from the sperm

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[10] Montpetit explained that a possible reason why Gallego could have been the source of both the sperm *and* non-sperm cells was because the low levels of sperm in the tested area, combined with high levels of other cell types, tended "to swamp out whatever DNA [was] from the sperm cells." (37 RT 5072.)

fraction likely came from appellant. (37 RT 5072-5073.) The likelihood that a randomly selected person would match the DNA profile of the non-sperm fraction was one in 1 trillion for the Caucasian population, one in 3.1 trillion for the African-American population, and one in 1 trillion for the Hispanic population. (37 RT 5073-5074.) The probability that a randomly selected person would match the DNA profile of the sperm fraction was one in 320 billion for the Caucasian population, one in 75 billion for the African-American population, and one in 1.8 trillion for the Hispanic population. (37 RT 5074.)

Montpetit also performed DNA testing on two cuttings of the carpet where he observed blood. He took those carpet samples from the entrance to Gallego's bedroom and from Gallego's bedroom. (39 RT 5097-5098.) DNA testing of the blood in those samples were consistent with Gallego's blood. (39 RT 5098.)

On June 27, 2001, Montpetit tested three separate areas of the scarf that was looped around Gallego's neck for the presence of saliva and blood. (39 RT 5075.) Two of the areas tested negative for saliva, and the third area produced an inconclusive test result. (39 RT 5075-5076.) All three areas tested positive for blood. (39 RT 5078.) Montpetit testified water on the scarf would have diluted any saliva that was on it. (39 RT 5078-5079.)

Montpetit tested red stains on a pair of rubber gloves for the presence of blood. The test results were negative. (39 RT 5081.)

Montpetit identified one sperm cell on a banana peel but he could not test it for DNA due to an insufficient number of sperm cells.[11] (39 RT 5081.)

[11] Montpetit needed at least 100 sperm cells in order to obtain a DNA type. (39 RT 5081.)

In the non-sperm fraction of two vaginal swabs taken from Gallego, Montpetit found DNA that was consistent with Gallego's. While he was unable to make conclusions from the sperm fraction of one swab due to low levels of DNA, he concluded that Gallego and appellant could have contributed all of the DNA for the sperm fraction of the second swab. (39 RT 5083-5084; 40 RT 5125-5128.) Using only five of the DNA markers, Montpetit determined the chance that somebody randomly selected from the population being included as a possible contributor to the mixture of DNA in that second swab was 1 in 1200 for the Caucasian population, 1 in 2400 for the African-American population, and 1 in 1800 for the Hispanic population. (39 RT 5084; 40 RT 5128.)

Montpetit also tested the U-Haul truck for blood. Five areas tested positive: four were on the floor of the cargo area; and, one was on the passenger side wall of the cargo area. (39 RT 5099-5101.) Most of the blood stains were drops of blood, except for one large rectangular- or square-shaped area in the back corner near the passenger side. (39 RT 5101-5102.) DNA testing of the blood found in that large area indicated Gallego was the most likely source of that blood. (39 RT 5102.)

n. Handwriting analyses

At the request of the prosecutors and defense attorneys, forensic document examiner David Oleksow compared questioned documents (documents that were in dispute or of questionable authenticity) with exemplars (known handwritings) of appellant.[12] (40 RT 5257, 5267-5268,

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[12] The exemplars of appellant's handwriting included: his signature on his California driver's license; handwriting exemplars that Oleksow personally collected from appellant on July 31, 2001; handwriting exemplars that an investigator collected from appellant upon appellant's arrest; and, a multi-page LensCrafters document that appellant prepared

5319-5321.) At trial, Oleksow explained that a forensic document examiner is an individual who has specialized training, experience, and education in matters including, but not limited to: the identification of handwriting, hand printing, and numbers; the identification of forgeries and forged signatures; the identification of manufactured or altered business records and documents; the identification and restoration of documents which have been altered intentionally or by the environment; the identification of products used in the printing process; and, identification of rubber-stamped impressions or other types of cancellations devices. (40 RT 5259-5260.)

Oleksow determined appellant was responsible for the hand printing and numbers (i.e., everything that was handwritten) on the following documents: a Macy's credit card application, dated August 6, 2000, under the name of "Pat Gallego" (40 RT 5282-5283); a J.C. Penney application under the name of "Pat Gallego" (40 RT 5284-5285); a Mervyn's credit card application under the name of "Pat Gallego" (40 RT 5285); a Robinson's-May credit card application under the name of "Pat Gallego" (40 RT 5286-5287); a Nordstrom credit card application (40 RT 5287-5288); and, a Wells Fargo credit card application (40 RT 5289).

Oleksow determined appellant was responsible for the hand printing and numbers on the Rug Doctor receipt, with the exception of the information written in portions of the invoice that were completed by Home Depot employees. Oleksow was unable to identify the signature on the document as appellant's because it was nondescript and easy for someone to duplicate. (40 RT 5290-5291.)

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during the course of his employment with that company. (40 RT 5272-5274.)

Oleksow also concluded that appellant was responsible for writing the date, payee's name of "Calvin L. Parker," and written and numerical amounts on check number 202 from Gallego's bank account. Oleksow gave an inconclusive finding on the check maker's signature because the signature was scribbled and nondescript. (40 RT 5292.)

Oleksow was reasonably certain that appellant was the person who wrote his name as the payee on check number 200 from Gallego's bank account, as well as the written and numerical amounts on the check.[13] (40 RT 5311-5312.) Oleksow concluded that Gallego did not sign the check. (40 RT 5312.)

Oleksow concluded the handwriting on check number 201 from Gallego's bank account was similar to and consistent with appellant's handwriting, but he could not give a strong opinion as to whether it was appellant's. Oleksow examined check number 201 in parts because the check consisted of three pieces. Even after connecting the three pieces together, the check was still missing portions. (40 RT 5293.)

Oleksow concluded that appellant was responsible for the handwriting on the "to-do" list. (40 RT 5294-5295.) The top of the document had the overwritings of "2-4 A.M." and "August" and scribbling following it.[14] (40 RT 5295-5296.) Using an electrostatic detection apparatus ("EDSA") to read the indented impressions on a different document that was underneath the "to-do" list in a three-ring lined notepad, Oleksow determined the scribbling following the "August" overwriting on the "to-do" list was

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[13] Oleksow could testify only that he was "reasonably sure" that appellant was the person who wrote check number 200 because the poor quality of the microfiche copy of the check. (40 RT 5312.)

[14] Overwritings are writings where the writers made a mistake or a correction and wrote over the preexisting letter or number formation. (40 RT 5295-5296.)

August 2nd; the scribbling indicated there had been multiple corrections to the August 2nd date. (40 RT 5296-5301.) Underneath the "2-4 A.M." overwriting were the numbers "3" and "4." (40 RT 5300-5301.)

Oleksow concluded that appellant was the person who wrote on a sheet of paper "Please do not disturb. Sleeping. Thanx." (40 RT 5301-5302.) On the back of that sheet of paper, appellant wrote, "I didn't feel much like talking last night." (40 RT 5302-5303.)

Oleksow also concluded that appellant was the person who wrote "Neut, clutch, gas, gear. Clutch, gear, gas" on a different document. (40 RT 5303.)

Oleksow concluded that appellant was the person who wrote the following list at the bottom of an envelope postmarked July 11, 2000: "Banks/malls, Pier 1, Wards, J.C. Penney, Macy's, Sears, and Mervyn's." (40 RT 5303-5304.) At the top, appellant wrote "Patricia G." and "VISA." (40 RT 5304-5305.)

Oleksow concluded that appellant wrote a note which began, "I'm sorry I'm not able to finish my shifts to end this week, but I had to go home to help my mother." (40 RT 5305-5306.)

Oleksow concluded that appellant was the person who wrote a note which began, "I didn't feel much like talking last night." (40 RT 5306-5307.) Appellant also wrote at the top of that same note, "Your brain could only hope to aspire to be my liquefied excrement." (40 RT 5307.)

Oleksow also examined a stack of Wells Fargo checks that were in appellant's name and numbered 463 through 499. Check number 463 had a handwritten telephone number and "Providian Credit" at the upper left-hand corner and two signatures on it. (40 RT 5308, 5311.) Oleksow concluded the signatures were an unknown person's attempts to forge Gallego's signature. (40 RT 5308-5310.) Oleksow concluded appellant

was the person who wrote the telephone number and "Providian Credit" on the check. (40 RT 5311.)

Oleksow concluded that appellant was the person who wrote "CAL P.R.G." and "Target, Wards, Best Buy, Sears, Pier 1, VISA, and Master Card" on a manila envelope containing Gallego's identification and passport photos. (37 RT 4769; 40 RT 5313-5314.)

2. Defense evidence

Stephanie Ortiz, one of the two women with whom Gallego lived for about a month in 1999, testified that Gallego had considered marrying a United States citizen to obtain United States citizenship. (42 RT 5628.)

Kristina Stepanof, the other woman with whom Gallego lived in 1999, testified that Gallego visited her workplace in early July of 2000. Gallego told Stepanof that she was in love. (42 RT 5637-5638.) Gallego never told Stepanof the name of the person with whom she was in love. (42 RT 5639.) Gallego also told Stepanof about her new roommate situation. Gallego explained that she was living with her friend Calvin, that she would be paying Calvin money to marry her, and that they were living together only to make it look like they were in love. (42 RT 5638-5639.)

Detective Mark Keyser, who assisted in the investigation of Gallego's murder, interviewed the residents of the apartment complex where appellant and Gallego lived. (43 RT 5847-5849.) He interviewed Laura Balza, who lived in the apartment next to appellant and Gallego's apartment, a few days after appellant's arrest. (41 RT 5500.) Balza told Detective Keyser that she heard a man arguing with a woman around 3:00 a.m. on Tuesday, August 8, 2000. (41 RT 5495-5497, 5499-5500, 5514; 43 RT 5875.) Balza thought the argument came from the apartment that was above her because of the way the sound travelled. (41 RT 5498-5500, 5515-5516; 43 RT 5875-5876.)

Detective Keyser also interviewed Stepanof on August 16, 2000. (43 RT 5865.) Stepanof said her single contact with Gallego after Gallego moved out of her apartment took place in mid-July. (43 RT 5866-5868.) Stepanof told Detective Keyser that Gallego said she was excited about moving in with a new man whom she met, that she was in love with that man, and that she and this man were going to get married but it was strictly a business situation. (43 RT 5868-5870.) Stepanof told Detective Keyser that Gallego did not tell her the name of the person with whom she was in love or the person who she was going to marry. (43 RT 5881.) Stepanof never told Detective Keyser that she thought Gallego's statement about being in love was a joke. (43 RT 5870-5871.)

Marilyn Powell, the woman whom appellant was dating while he was Charles Ijames' roommate, testified that she observed Gallego and Ijames arguing on three occasions. (43 RT 5919-5920.) Gallego used swear words, angry words, and insulting words towards Ijames. (43 RT 5922.) Powell characterized Gallego's actions as temper tantrums. (43 RT 5918-5920.)

San Diego Police Officer James Tomsovic, who also assisted in the investigation of Gallego's murder, interviewed Eudes De Crecy, the owner of Café Chloe, on August 29, 2000. (43 RT 5925.) De Crecy told Officer Tomsovic that Gallego said she planned to get married on August 27, 2000, and that Gallego appeared to be normal and upbeat on the night of August 10, 2000. (43 RT 5926.)

Annie Lee, the mother of Edward Lee, appellant's cell mate in county jail, testified that her son Edward Lee threatened to kill her and her tenant, Urie Hyder, in March of 2000. (43 RT 5936.) Annie Lee testified she requested a restraining order against her son because he was on drugs and she tried to get him out of her house so he could get help for his drug

addiction and not because she was afraid her son would kill her. (43 RT 5938, 5942.)

Jack Goldberg, the president of Metrionix, a business that did engineering work in acoustics research and development, testified as an acoustics expert. (42 RT 5645-5646, 5648.) He was asked to determine whether someone in the neighborhood would have woken up had someone been screaming inside a bedroom at appellant and Gallego's apartment. (42 RT 5651.) After conducting sound measurements at the apartment complex where appellant and Gallego lived, Goldberg opined that a person in Balza's apartment would likely wake up to the sound of a woman screaming. (42 RT 5650, 5661-5662, 5667.)

Presented with a hypothetical, Goldberg was asked to assume that a person inside the apartment directly above appellant and Gallego's apartment (Bausch's apartment) heard the sound of duct tape coming off a roll from appellant and Gallego's apartment and that the windows in the apartment above were closed. (42 RT 5669-5670.) Goldberg testified his sound measurements indicated that: (1) someone in the apartment above with the windows closed could have heard the duct tape being pulled; and, (2) a person who woke up to that sound meant the person was a fairly light sleeper. (42 RT 5670.)

William Brady, a physician who specialized in forensic pathology and testified as an expert witness, opined the deep cut in Gallego's neck was the injury that killed her because the extent of the bleeding resulting from that injury was enough to have produced death. (41 RT 5518, 5524, 5546-5547, 5562-5563.) Brady opined Gallego's head injury was serious but not necessarily fatal. (41 RT 5563.) Brady also opined that Gallego was not gagged. (41 RT 5564-5565.) Brady did not find any injury of Gallego's genitalia or evidence of forcible sexual contact. (41 RT 5568-5569.) Brady

disagreed with Dr. Sperber's opinion that handcuffs were placed on Gallego when she was alive. (41 RT 5582.)

Giacomo Behar, an immigration and naturalization attorney, purchased pastries at Café Chloe. (42 RT 5713.) He gave his business card to at least one, if not more, of the Brazilian female employees of that establishment. (42 RT 5715.)

On cross-examination, Behar was shown a piece of notebook paper with appellant's handwriting on it. (42 RT 5722; 43 RT 5995.) The piece of paper had Behar's name and phone number written on it, as well as the following notes: "Interview 45 to 2 hours."; "F-1 Status"; "A-D-J to Status."; "Work Permit Same Day! Usually 3 months."; "Interview cost is $900 or more"; and, "hour-and-a-half interview prep, then three years". (42 RT 5722-5723, 5726-5727.) Behar presumed "A-D-J to Status" referred to the adjustment of an applicant's status to permanent resident. (42 RT 5723.) Behar opined the notes about the cost and length of the interview were from a conversation with another attorney because Behar did not charge $900 for an interview in the year 2000. (42 RT 5726-5727.) Behar never represented anyone whose name was Patricia Gallego or Calvin Parker. (42 RT 5730.) Behar testified appellant could have called him and that he might have talked to appellant but very few people who called him became actual clients. (42 RT 5731.)

John Edwards, the Deputy Public Administrator for San Diego County, tried to help locate Gallego's next of kin and deal with the disposition of her body and her property. (43 RT 5883-5884.) Edwards did not know who owned the bicycle and the bicycle lock that were inside the living room of appellant and Gallego's apartment. (43 RT 5885-5891.)

B. Penalty Phase

1. Prosecution evidence

Terezhina Da Silva, Gallego's mother, described Gallego. Gallego was a happy child who had a lot of friends, smiled a lot, studied a lot, and learned to speak English on her own by listening to music by the band KISS and translating the lyrics. (51 RT 7016-7017.) Gallego began working at 15 or 16 years of age, worked a lot, and always supported herself instead of relying financially on her parents. (51 RT 7017.) Before Gallego moved to the United States, she worked as a flight attendant in the aviation industry. Her dream was to return to that industry. (51 RT 7020, 7022-7023.)

The last time that Da Silva spoke with Gallego was at the end of July of 2000. (51 RT 7023.) Da Silva learned about Gallego's death when she called Gallego's apartment and spoke with a woman named "Maria." (51 RT 7024.) Maria told Da Silva only that Gallego was dead; Maria did not disclose the circumstances of her death to Da Silva. (51 RT 7024.) Da Silva screamed and cried when she heard the news. (51 RT 7025.)

Da Silva showed photos of Gallego and her friends and co-workers to the jury. (51 RT 7018-7023.) Da Silva testified that Gallego was "everything to her." (51 RT 7025.) Da Silva testified that she and Gallego were friends and supported each other and described Gallego as an honest and upstanding woman with character. (51 RT 7025.)

Rubens Gallego similarly described his daughter as an enchanting girl who was always happy and pleased everyone. As a child, Gallego's intentions were to play. As a teenager, Gallego never gave her parents any problems or concerns. (51 RT 7027.) Gallego's half siblings were extremely distressed by the news of her murder. (51 RT 7027-7028.)

Rubens Gallego was planning to be in Los Angeles with his daughter on her thirtieth birthday, August 27, 2000. (51 RT 7028.) He and his daughter's half siblings were in contact with his daughter every month, either by phone or electronic mail. (51 RT 7028.) The last time that he spoke with Gallego was in July of 2000, when they discussed his plans to visit her for her birthday. (51 RT 7028-7029.) He and his family were really upset when the Consulate informed him about his daughter's death. (51 RT 7030.) Ever since his daughter's murder, he has not been able to process what happened. He could not understand her murder. (51 RT 7031.)

Kristina Stepanof described Gallego as a wonderful person with whom she became friends after Gallego temporarily moved into her and Stephanie Ortiz's apartment in 1998. (51 RT 7032.) Gallego was an energetic, lively, and ambitious person. Gallego stayed with Stepanof and Ortiz for a month before she found her own apartment nearby. Gallego continued to go to church with them, and Stepanof spent time with Gallego every Saturday. Gallego cooked for Stepanof and went shopping with her. (51 RT 7033-7034.)

Stepanof further described Gallego as a loving, caring, and hospitable person who always wanted to give hugs, said "thank you," and made sure she had food for others to eat. (51 RT 7034-7035.) In a letter that Gallego wrote to Stepanof, Gallego referred to Stepanof as her guardian angel and thanked Stepanof for introducing her to Jesus. (51 RT 7035.)

Stepanof learned about Gallego's death when Detective Keyser called her at work. Losing her friend Gallego was hard on Stepanof. (51 RT 7036.)

2. Defense evidence

Lawrence Parker, appellant's father, testified he did not see Brenda Graves, appellant's mother, using heroin while she was pregnant with

appellant. However, Parker noticed a change in Graves' behavior and that she was moving slower than normal during the pregnancy. (51 RT 7043-7045.) One day while Graves was pregnant with their daughter, Parker arrived home to find appellant unconscious. Appellant had swallowed some of Graves' pills. His lips were blue, and he looked pale. (51 RT 7045-7047.) Appellant had to stay in the hospital for a couple of days after his stomach was pumped. (51 RT 7048.) About a year later, Graves hurt appellant when she hit his head against a dresser. (51 RT 7048-7049.) Appellant had a gash on his head and was bleeding profusely. (51 RT 7049.) Parker pulled Graves away from appellant and called the police. (51 RT 7049-7050.) The authorities took appellant to the hospital, where he stayed for about two days. (51 RT 7051-7052, 7055.) Not liking the way that Graves was cussing at him and showing negativity in their relationship, Parker left Graves and moved to Los Angeles for about 90 days. (51 RT 7050-7051, 7053.) While Parker was in Los Angeles, appellant became sick and county administrators took appellant and his siblings away from Graves. (51 RT 7051-7053.) Parker returned to San Diego and stayed with Graves for three weeks, during which Graves had a nervous breakdown and spent a couple of weeks in the hospital. (51 RT 7053-7054.)

Parker next saw appellant about four months after appellant's hospital stay. At that time, appellant was living in a foster home in Logan Heights. (51 RT 7054, 7056.) The next time that Parker saw appellant, appellant was 13 or 14 years old. (51 RT 7055, 7057.) Parker did not see appellant again until 1987. (51 RT 7055.) Parker did not stay in touch with appellant or see him again. (51 RT 7056-7057.)

Frances Gesiakowski, the county social worker who supervised the placement of appellant and his siblings after they became dependent children of the court, testified that appellant and his sister, Javonica, were

placed with their mother, Brenda Graves, from August 15, 1973, through May 15, 1974.[15] (51 RT 7059-7063, 7066, 7069, 7086.) During those nine months, the children were closely supervised by a social worker. Graves had difficulty attending to their basic needs and left them with Graves' mother for extended periods of time. (51 RT 7086.)

Gesiakowski's notes in appellant's file indicated appellant's mother was "out of it" when Gesiakowski talked to her on the phone on August 24, 1976. (51 RT 7068.) In September of 1976, Ollie Lee, Graves' sister, acted as the primary caretaker for appellant and his sister Javonica. (51 RT 7070-7071.) In October of 1976, Lee informed Gesiakowski that she wanted to be her niece and nephew's guardian. (51 RT 7071-7072.) Gesiakowski began to notice that appellant became physically sick with an upset stomach every time that Graves told him that she planned to have him and his sister live with her. (51 RT 7073.) In June of 1977, Lee was caring for 11 children. (51 RT 7077-7078.)

By June of 1977, Gesiakowski was not under the impression that appellant and his three siblings could return home to their mother since their mother was in county jail and had schizophrenia. Gesiakowski planned to refer their case to the Adoptions Department for an evaluation of their adoptability with the intent of a long range permanent placement and the termination of parental rights. (51 RT 7076-7078.)

In July of 1977, every time that Brenda Graves mentioned her plans to return appellant back to her care, appellant became physically sick for two to three days afterwards, becoming very nervous and experiencing an upset stomach. (51 RT 7085.) A recommendation was made to place appellant and Javonica in their maternal aunt Ollie Lee's home. (51 RT 7086.)

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[15] Appellant and his sister Javonica stayed with their maternal grandmother Katherine Graves. His sister Gigi and brother Lawrence stayed with a foster family, the Boltons. (51 RT 7078-7079.)

Gesiakowski did not have a plan for immediate reunification of Graves and her children because Graves was having difficulty maintaining herself in the community due to emotional problems, necessitating in-patient care at community mental health in December of 1976, and her continued involvement with law enforcement officers due to numerous law violations and incarceration in county jail at the time. (51 RT 7085-7086.)

By September of 1977, the Adoptions Department had evaluated the children for adoptability. The Adoptions Department did not feel Gigi had the potential for a successful adoptive placement and was reluctant to remove Lawrence from his foster home because it could not place Gigi. The Adoptions Department found appellant and Javonica to be adoptable but their home situation to be deprived of "stimulation." (51 RT 7082.) The Adoptions Department wanted Gesiakowski to change appellant and Javonica's home placement to facilitate an adoption. (51 RT 7082-7083.) The Adoptions Department worker was also concerned because she found appellant and Javonica's living conditions at their grandmother's house to be deplorable. Lee had requested financial assistance to buy more beds for the children. (51 RT 7083-7084.)

Ollie Lee, appellant's maternal aunt, last spoke with appellant when he was seven years old. (51 RT 7097-7098.) Lee testified that appellant's father, Lawrence Parker, was physically abusive with appellant's mother, Brenda Graves. (51 RT 7099.) Lee further testified that Brenda Graves hit appellant and busted his lip when appellant was a one-year old. (51 RT 7101.) Lee testified that when appellant was one and one-half years old, he overdosed on his mother's medications, stopped breathing and turned bluish green, and had to be taken to the hospital. (51 RT 7101-7102.) Lee testified that at one point, her mother, Katherine Graves, cared for appellant and Javonica and their 11 cousins altogether. Two of their cousins were mentally retarded. Graves' only source of income at the time was AFDC.

(51 RT 7104-7105.) Lee and two of her brothers were living with Graves and the children at the time. Her two brothers had problems with the law and with drugs. (51 RT 7106.) When appellant was six or seven years old, he was diagnosed with gonorrhea. Appellant told Lee that her brother's 17-year old girlfriend "had been messing with him." (51 RT 7106-7107.) When Lee confronted her brother about appellant's sexually transmitted disease, her brother said he was proud of his nephew. (51 RT 7107.) Lee testified that appellant and Javonica's mother talked to an imaginary ape in front of them and told them that they were White, which confused them. (51 RT 7109-7110.)

John Breen, appellant's foster brother, testified that he mentally and physically abused appellant when they lived in the same foster home. For years, Breen hit and pushed appellant, bullied appellant, and did not let appellant play with his toys. (52 RT 7160-7161.) Breen once slammed a ceramic piggy bank against appellant's head. (52 RT 7161-7162.) Breen also used butcher knives to threaten, torture, and scare appellant. (52 RT 7162.) For crimes he later committed against others, Breen was convicted of two armed robberies and incarcerated in state prison. (52 RT 7172-7173.)

Eva Nunn and her husband became foster parents for eight-year old Breen in April of 1978 and appellant and Javonica one month later.[16] (52 RT 7203-7204.) Appellant and Javonica arrived at Nunn's house with matted hair and a trash bag full of adult clothing that smelled like urine. (52 RT 7205-7206.) Appellant was a quiet child who liked to draw. (52 RT 7212.) When Brenda Graves called Nunn to say that she wanted to visit her children, Nunn would pick her up from a local bus stop and bring her

[16] Appellant and Javonica lived with the Nunns while their older siblings lived with another foster family, Dorothy Smith and her mother. (52 RT 7240.)

home to see them. (52 RT 7213, 7215.) Other times, Nunn took the children to see Graves at Graves' apartment. Graves' apartment was dirty and smelled like urine. (52 RT 7215.) Graves never had much to say. She mumbled to herself a lot and acted like a child, and appellant and Javonica would just sit there and look at her. (52 RT 7213-7214, 7217.) In letters that Graves sent to appellant and Javonica, she wrote she was marrying Michael Jackson. (52 RT 72 14.)

Javonica Gonzales, appellant's younger half-sister,[17] testified that Brenda Graves usually talked to herself when Graves visited her and appellant at the Nunns' house. (52 RT 7263-7264.) Javonica thought Graves was crazy. (52 RT 7265, 7292.)

Javonica testified that she and appellant lived with her grandmother until she was about six years old, when a social worker and the police picked them up and moved them to a receiving home. Javonica testified she and appellant began living with the Nunns when she was seven years old and he was nine years old. (52 RT 7265, 7279-7281, 7299.) When Javonica lived with her grandmother, she was subjected to physical and sexual abuse by her cousins and uncles. (52 RT 7266, 7270, 7273-7275.) She did not always have enough food to eat at her grandmother's house. (52 RT 7278.)

Javonica felt the Nunns treated her well. (52 RT 7292.) Javonica never felt Eva Nunn loved her until she had her own daughter and realized how much effort was required in raising a child. (52 RT 7283, 7292-7293.)

Javonica testified John Breen was a horrible brother and a bad kid. She only began to like Breen in the two years before her testimony. (52 RT 7285.) Breen beat up her and appellant. (52 RT 7286.) Javonica testified

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[17] Javonica testified she and appellant had different biological fathers. (52 RT 7293.)

she saw Breen hold a butcher knife against appellant's neck during one of their fights. (52 RT 7287.) Javonica testified appellant liked to listen to music and draw, not fight. (52 RT 7287-7288.)

Marilyn Kaufhold, a pediatrician and the assistant medical director for the forensic and medical part of the Chadwick Center at Children's Hospital, testified as an expert on child abuse and neglect. (53 RT 7385-7386, 7392-7393.) Dr. Kaufhold testified that child neglect, in comparison to child abuse and sexual abuse, had the overall greatest impact on a child. (53 RT 7392-7393.) Dr. Kaufhold testified the long-term impact of child abuse on a victim was its affect on the neurodevelopment of the brain such that the victim is often hyper-aroused. Neglect of that victim would also have difficulty in forming meaningful relationships. (53 RT 7396-7397.)

Dr. Kaufhold reviewed a large portion of Department of Social Services and Child Protective Services documents relating to appellant and his siblings. She characterized a situation where a mother backhanded a 12-month-old child to stop the child from crying, splitting the child's lip in the process, as child physical abuse. (53 T 7397-7398.) She added that the mother's failure to provide the child with medical treatment or evaluation constituted medical neglect. (53 RT 7399.)

Dr. Kaufhold testified that, in March of 1971, appellant's consumption of 118 prenatal iron tablets belonging to his mother was an example of child neglect. (53 RT 7400-7402.) Dr. Kaufhold testified appellant was in critical condition (i.e., he could have died) for at least the first five days of his hospitalization. (53 RT 7402.) Dr. Kaufhold added the notation in appellant's hospital discharge summary that he had no immunizations further reflected child neglect. (53 RT 7403-7404, 7408-7409.)

Dr. Kaufhold testified that, on July 27, 1971, the police brought appellant to the hospital for treatment of a two-inch laceration to his

forehead. His medical records reflected that his mother tried to settle him down from crying by picking him up and swinging him into a dresser such that his forehead hit the dresser. (53 RT 7407-7408.) Dr. Kaufhold characterized the incident as child abuse. (53 RT 7408-7409.) Dr. Kaufhold testified the incidents in March and July of 1971 would have given her concern that there might have been more incidents of child abuse and neglect. (53 RT 7409.)

Dr. Kaufhold testified that, in August of 1971, two-year-old appellant was admitted to the hospital for abdominal pain. (53 RT 7411-7412, 7418-7419.) He was in a reduced level of consciousness and had a distended abdomen. (53 RT 7411-7412.) Abdominal surgery revealed he had an abscess in his abdomen and obstruction of his small intestine due to the corrosive effect of iron. (53 RT 7412.) After spending 19 days in the hospital, he was discharged to the Hillcrest Receiving Home.[18] (53 RT 7418, 7420-7421.)

Dr. Kaufhold opined that a parent with a serious mental illness might not be able to provide a safe environment for a child. Dr. Kaufhold questioned the parent's judgment about what things were dangerous for a child and the parent's ability to interact with the child in a predicable manner. Dr. Kaufhold testified that what are nurturing to children and make their environment safe are predictability and reliability. (53 RT 7418.)

Dr. Kaufhold suspected sexual abuse was involved when appellant contracted gonorrhea at six years of age, in September 1975. (53 RT 7426-7428.) Dr. Kaufhold, whose review of the Child Protective Services records indicated appellant and his sister had a history of bed-wetting,

[18] The Hillcrest Receiving Home was the precursor to the Polinsky Center. (53 RT 7411.)

testified that a caretaker requiring a child to sleep in urine-soaked sheets on a urine-soaked mattress every night from 1978 to 1985 constituted emotional abuse. (53 RT 7432-7434.) Dr. Kaufhold testified the records did not specify that appellant's foster parents made him sleep in wet bedsheets, but she opined that the foster parents were making appellant do so because the enuresis was reported year after year. (53 RT 7436.)

Based on the reports that Dr. Kaufhold reviewed, she opined that appellant was a victim of child abuse, child neglect, and sexual abuse. (53 RT 7437.)

Brenda Graves, appellant's mother, testified she last saw appellant in his foster home. (53 RT 7525-7526.) She testified she also visited appellant and Javonica when they lived with her mother. (53 RT 7527.) She testified she came into trouble with the law for her drug use, was incarcerated at two California prisons, and was committed to Patton Sate Hospital and Camarillo State Hospital. (53 RT 7527-7528.) She denied she hit her children. (53 RT 7528.)

3. Prosecution rebuttal evidence

Brenda Chamberlain testified she began dating appellant in November of 1992 and moved into his apartment about three months later. (53 RT 7555-7556.) They had a normal loving and intimate relationship for three years. (53 RT 7556-7557.) They broke up a couple of times, and the last year of their dating relationship was "on and off quite a bit." (53 RT 7557.) Appellant did not have any trouble verbally expressing his love for Chamberlain. (53 RT 7556.) Chamberlain and appellant went out with a core group of his friends. Appellant was not a "loner." (53 RT 7558.) Chamberlain did not maintain contact with appellant after their separation. Six months after they ended their dating relationship, appellant called Chamberlain. (53 RT 7559.) Appellant asked for Chamberlain's address because he wanted to send her an Easter card. He also asked Chamberlain

if they could have lunch together. Chamberlain told appellant that she was not comfortable with giving her address to him or having lunch with him. (53 RT 7559.)

Chamberlain testified that appellant called her again in March of 1997. Appellant expressed how much she meant to him and asked her if she wanted to get together with him. Chamberlain told appellant that she was not comfortable with the idea of meeting up with him. (53 RT 7560.) Appellant asked Chamberlain if she was a "Type A personality, the type of person who wanted to just sweep things under the carpet and not deal with them." (53 RT 7560.) She asked him why they were talking about that, and he began to ask her about her music preferences. Chamberlain told appellant that she was moving to Seattle in a month, and their telephone conversation ended. (53 RT 7561.)

Chamberlain testified she and appellant took photos of each other during the course of their dating relationship. (53 RT 7561.) In court, Chamberlain recognized various photos of her and appellant but she never saw the photos with nude body parts pasted over her body. (53 RT 7562-7566.) In one photo of them and another woman, nude bodies and male appendages were pasted over the photo. (53 RT 7565.) In a photo taken in Rosarito, Mexico, large-size breasts and a nude model's body were pasted over her body. (53 RT 7566.) Chamberlain did not notice that appellant had an interest in cutting and pasting sexually explicit pictures. (53 RT 7561.) Chamberlain testified that appellant always treated her well and did not seem like the type of person who would cut and paste pornography. (53 RT 7566-7567.)

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN NOT DECLARING A DOUBT AS TO APPELLANT'S COMPETENCE TO STAND TRIAL

Appellant contends the trial court erred and violated his constitutional rights by failing to declare a doubt as to his competence to stand trial. (AOB 74-107.) He asserts his mistrust of defense counsel, his belief of a conspiracy against him, and his belief that the evidence against him was fabricated, were evidence of his inability to rationally understand the proceedings and cooperate with counsel. (AOB 75-95, 102-103.) To the contrary, the evidence does not show appellant was unable to understand the nature of the criminal proceedings or that he was unable to assist counsel in the conduct of the defense in a rational manner. Thus, the court did not err in failing to declare a doubt as to appellant's competency.

Due process forbids the criminal prosecution of a person who is mentally incompetent. (*Pate v. Robinson* (1966) 383 U.S. 375, 378; *People v. Lightsey* (2012) 54 Cal.4th 668, 690-691 ("*Lightsey*").) The constitutional test is whether the defendant "'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him.'" (*Dusky v. United States* (1960) 362 U.S. 402, 402 (per curiam); *People v. Halvorsen* (2007) 42 Cal.4th 379, 401 ("*Halvorsen*").)

Paralleling this constitutional directive, a person cannot be tried or sentenced while he or she is mentally incompetent. (Pen. Code, § 1367, subd. (a).) A defendant is mentally incompetent if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. (*Ibid.*; *Halvorsen*, *supra*, 42 Cal.4th at p. 401.)

A criminal defendant "shall be presumed … mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent." (Pen. Code, § 1369, subd. (f).) If "a doubt arises in the mind of the judge as to the mental competence of the defendant" at any point during the criminal proceedings, the court must declare a doubt as to the defendant's competence and inquire of the attorney for the defendant whether, in the attorney's opinion, the defendant is mentally incompetent. (Pen. Code, § 1368, subd. (a).)

Under both state and federal law, "a trial court is obligated to conduct a full competency hearing if substantial evidence raises a reasonable doubt that a criminal defendant may be incompetent. This is true even if the evidence creating that doubt is presented by the defense or if the sum of the evidence is in conflict. The failure to conduct a hearing despite the presence of such substantial evidence is reversible error." (*Lightsey*, *supra*, 54 Cal.4th at p. 691, citing *People v. Welch* (1999) 20 Cal.4th 701, 737-738; see *People v. Sattiewhite* (2014) 59 Cal.4th 446, 464.)

"A trial court's decision whether or not to hold a competence hearing is entitled to deference, because the court has the opportunity to observe the defendant during trial." (*People v. Rogers* (2006) 39 Cal.4th 826, 847; see also *People v. Lewis* (2008) 43 Cal.4th 415, 525, rejected on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919-920.) "'An appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper.' [Citations.]" (*People v. Mai* (2013) 57 Cal.4th 986, 1033 ("*Mai*"); see also, *People v. Marshall* (1997) 15 Cal.4th 1, 33.) An appellate court reviews a trial court's decision whether to grant a competency hearing for abuse of discretion. (*People v. Ramos* (2004) 34 Cal.4th 494, 507.)

The record is devoid of any evidence that appellant was at any time unable to understand the nature of the proceedings or to assist his counsel in a rational manner. The record discloses no evidence – substantial or otherwise – that appellant was mentally incompetent. Appellant told the trial court that he did not have a history of being treated for mental illness and that he had not taken any psychiatric drugs. (6 RT 540.) Nor did any witness testify that appellant had a mental illness or deficiency which rendered appellant incapable of understanding the purpose or nature of the criminal proceedings against him or of assisting counsel. When the court asked appellant's attorney whether he had any reservations about appellant's ability to stand trial, the attorney specifically answered that he did not know of anything which would cause him to declare doubt as to appellant's competency under Penal Code section 1368. (6 RT 540.)

Furthermore, appellant did not exhibit irrational behavior or utter strange words. To the contrary, his responses and comments to the trial court were appropriate and indicated his understanding of the nature of the proceedings and his ability to cooperate with counsel. (See 6 RT 541, 544; 7 RT 573-600.) In explaining to the court why he wanted to represent himself, appellant clearly articulated he wanted to be more informed about the particulars of his case. He specified his complaint was not that his attorneys had deprived him of any information, but that he had not received additional information from them in over a year and that he was not privy to certain matters. (6 RT 522-526.) When the court asked appellant whether he was uncertain about receiving the entire story from his attorneys, appellant reiterated that he simply wanted to be certain he was receiving accurate information from his attorneys. (7 RT 580-581.)

While appellant concedes he was never overtly disruptive in the courtroom, he argues his mistrust of counsel and firm belief of a conspiracy against him compelled a declaration of doubt as to his mental competency.

Further, he argues the prosecution evidence indicated he was severely disturbed because he killed his roommate and then made horrifying efforts to conceal his crime. Additionally, he argues his collection of commercial and hand-crafted pornographic material, the abuse and neglect he experienced during his early years of development, and his mother's alleged schizophrenia raised questions about his mental health. (AOB 75-77.)

First, simply because appellant was dissatisfied with his attorneys' representation and disagreed with the defense strategy did not mean he was unable to understand the nature of the criminal proceedings or assist his attorneys in a rational manner. At most, he was unwilling to cooperate with counsel. He was not incapable of assisting them in a rational manner. (See *Mai*, *supra*, 57 Cal.4th at p. 1034 ["uncooperative attitude is not, in and of itself, substantial evidence of incompetence."].) Second, while the horrific and gruesome acts underlying his crime and his vast collection of pornographic material clearly manifested yet another "disturbed" criminal, neither the acts nor the pornography suggested that appellant was unable to understand the nature of the criminal proceedings or help his attorneys in a rational manner. He simply was unwilling to help his attorneys because he did not trust them. Third, appellant might have been abused by his biological mother and neglected by his maternal grandmother and aunt while he was under their care, but he was placed with foster parents who provided for him and loved him for many years. (52 RT 7205-7207, 7212-7213.) While appellant was living with his foster parents, he did well in school, played sports, and developed his art skills. (52 RT 7218, 7220, 7222, 7235, 7237-7239, 7246-7251, 7253-7254, 7258-7259, 7289-7290, 7303-7304, 7314-7315.) Nothing during the time that he spent with his foster family even remotely suggested he had a mental illness or deficiency

which would later preclude him from understanding the nature of the criminal proceedings or cooperating with his attorneys.

In short, there was no evidence indicating that appellant, as a result of a mental disorder or developmental disability, was unable to understand the nature of the criminal proceedings or to assist his attorneys in a rational manner. (§ 1367, subd. (a); *Halvorsen*, *supra*, 42 Cal.4th at p. 401.) Thus, the trial court neither erred nor violated appellant's constitutional rights in failing to declare a doubt as to appellant's competency to stand trial.

II. THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTION TO INTRODUCE APPELLANT'S ALTERED PHOTOGRAPHS OF GALLEGO AND OTHERS INTO EVIDENCE

Appellant contends the trial court erred and violated his constitutional rights by permitting the prosecution to introduce, in the guilt and penalty phases, several of appellant's altered photographs of Gallego and others and refer to them as "pornography." (AOB 107-139.) He argues these photographs were irrelevant, inflammatory, and prejudicial. He further asserts these photographs lightened the prosecution's burden of proof and persuaded the jurors that he was a bad person. (AOB 108.) Appellant's contention is without merit because his altered photographs of Gallego were relevant to demonstrate that appellant had sexually sadistic fantasies of her and was obsessed with her. Additionally, his altered photographs of his other women were relevant to show the jurors that Gallego, a nice and hardworking young lady, was not the only person who had no idea that appellant, her roommate, was the sexually sadistic man that he was.

A. Factual Background

At the preliminary hearing, Detective Hergenroeather testified that he found pornographic material from men's magazines in Gallego's bedroom. Detective Hergenroeather also found a videocassette tape entitled "Two in the Goo" inside the videocassette tape recorder in her bedroom. (Prelim.

Hrg. RT 18-19.) Inside appellant's bedroom, Detective Hergenroeather found close to a thousand pages of pornography. (Prelim. Hrg. RT 19-21.) These pornographic materials included: photographs of Gallego, either alone or with her friends, with a cut-out image of a penis and/or a woman's breasts super-imposed on to the photographs; a picture with cut-out images of penises super-imposed on to it and had writing on it that read, "I'll get you in a tight assed clench choke hold. Your fat cock won't be able to pull its plumb head out of me, and then I'll flex hard and squeeze. I'll come from each inch. Now spank my tight little ass cheeks hard because I've been a bad little girl, Daddy."; a picture of a man holding a woman with cut-out images and/or drawings of penises and vaginas on it; a cut-out image of Gallego's face and a cut-out image of a penis super-imposed on to a sexually explicit photograph to create the appearance that Gallego was holding the penis; a cut-out image of Gallego's face super-imposed on to a sexually explicit photograph of another woman with drawing on it to make the woman look like she had a narrowed waist and an enlarged vagina; a cut-out image of Gallego's face super-imposed on to a photograph of a woman with an exposed vagina; and, a photograph of Gallego and her friends with cut-out images of women's breasts super-imposed on to it. (Prelim. Hrg. RT 20-25.)

On February 25, 2002, the defense filed a motion in limine to exclude evidence of "pornography" seized from appellant's residence. (3 CT 698-704.) The defense sought to exclude "pornography" in the form of magazines, cutouts from magazines, cut-and-paste depictions combining photos of individuals known and unknown to appellant, and photos from magazines, handwritten drawings, advertisements, and several videos. (3 CT 698-699.) The defense argued those materials were irrelevant and should be excluded pursuant to Evidence Code section 352. (3 CT 698-704.)

On February 25, 2002, the prosecution filed its own motion in limine regarding the sexually explicit materials. The prosecution argued the materials were necessary and relevant to establish appellant's intent, motive, and state of mind as he was charged with the special circumstance of murder in the course and commission of rape. The prosecution alleged appellant had an obsession with pornography and sexual sadism. The prosecution noted that most of the sexually explicit images had been altered by appellant: appellant inserted a penis in the model's mouth, vagina, or anus in numerous images; appellant added words to the pictures, showing his desire of what he wished the models were saying; in many of the photos, appellant replaced the head of the model with the picture of a little girl; appellant repeatedly showed his obsession with young girls and their lack of pubic hair; appellant replaced many of the models' faces with pictures of Gallego's face; and, appellant altered the images by drawing genitalia and breasts and altering their sizes or appearances. (4 CT 805.) In reliance on *People v. Memro* (1995) 11 Cal.4th 786, 861 ("*Memro*"), the prosecution argued appellant's altered images should be admitted into evidence because they demonstrated his sexually sadistic fantasies and obsession with Gallego. (4 CT 805-806.)

On March 7, 2002, the defense filed a written response to the prosecution's in limine motion. (4 CT 827-830.) The defense argued the prosecution's reliance on *Memro, supra*, 11 Cal.4th 786, was misplaced because *Memro* was factually distinguishable. (4 CT 827-828.) Additionally, the defense argued appellant's possession of pornographic materials was not an element of any charged offense, the prosecution's description of appellant's collection of materials was misleading, and the fact that appellant might have chosen to create fantastical pictures of women was not proof of violence or rape, but only perhaps that he was out of touch with the physical realities of the female human anatomy. (4 CT

829.) The defense requested an order precluding the prosecution from admitting these materials into evidence. (4 CT 829.)

On March 12, 2002, the prosecution filed a written opposition to the defense's motion in limine to exclude "pornography." (4 CT 882-886.) The prosecution reiterated its argument that the sexually explicit materials were necessary and relevant to establish appellant's intent, motive, and state of mind. (4 CT 883-885.)

On April 4, 2002, the trial court heard the in limine motion to exclude "pornography."[19] (16 RT 1335.) The prosecutor stated the police collected the bags of appellant's pornographic materials and writings from his apartment and organized them according to the locations where they were found. (16 RT 1336.) At the outset, the court observed there were six to ten cubic feet of the pornographic materials. (16 RT 1337.) The prosecutor referred to the materials as "morphed" photography. (16 RT 1345-1346.) The prosecutor described these materials as images or pictures that appellant super-imposed or cut and pasted with the images of other models' heads, faces, and/or naked body parts. (16 RT 1346-1353.) Some of the photographs also had sexually explicit handwritten descriptions of body parts or functions on them. (16 RT 1352-1353.)

Throughout the in limine motion hearing, the trial court made the following observations of some of the altered photographs: many of the models in the photos had no pubic hair on them or had pasted cut-out images of vaginas with no pubic hair (16 RT 1353-1356, 1358, 1360-1361,

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[19] In his opening brief, appellant indicates the trial court had ruled the altered pornographic materials involving witness Brenda Chamberlain would not be admissible in the prosecution's case in chief at a prior hearing on April 2, 2002. (AOB 110.) The record, however, indicates the court was referring to appellant's job application to the Chula Vista Police Department, not the pornographic materials regarding Chamberlain. (14 RT 1040-1049; see also 3 CT 682-684.)

1363, 1365); one magazine had a pictorial series of six pictures depicting two women in sexual positions involving handcuffs (16 RT 1365-1366); many of the pictures had a theme of young-looking women with a lack of pubic hair (16 RT 1369); one of the images showed a woman shaving her pubic hairs (16 RT 1369); and, one of the images showed two women in handcuffs (16 RT 1369).

The prosecutor noted some of the other sexually explicit materials that the police found in appellant's bedroom, including "cut-and-paste" photographs of Marilyn Powell's daughters. (16 RT 1372-1373.) The trial court interjected that the materials shared common themes of cutting and pasting and the fact that some of the faces were remarkably young and childish. (16 RT 1373.) The prosecutor continued to note that the materials included pornographic magazines that had body parts colored on the pages, pictures depicting sexual activity, the name of appellant's friend Leilani Kaloha written on them, and a "rape" reference handwritten on them. (16 RT 1373-1374.) The materials also included sexually explicit pictures with the face of appellant's friend, Brenda Chamberlain, super-imposed on the models in the pictures. (16 RT 1374-1375.)

The prosecutor added that the police found a pornographic videocassette tape entitled "Two in the Goo" in the videocassette recorder in Gallego's bedroom. (16 RT 1375.) The prosecutor believed appellant watched the movie inside Gallego's bedroom after appellant removed her bed and other property from her bedroom. The trial court noted that the theme of the movie was similar to the visual materials – young women and a relative lack of pubic hair. (16 RT 1375.)

After reviewing all of the materials submitted by the prosecutor, the trial court preliminarily indicated some of the materials were relevant and appropriate for admission. (16 RT 1380-1381.) The court stated:

> It seems to me, obviously, you're entitled to show the jury the defendant's sexual content of his thoughts about the victim for intent, motive.
>
> So some of this is going to come in.
>
> I expect to hear from the defense some arguments about the relevance of other, specific themes. And I've got a concern about just the suffocating mass of it.

(16 RT 1381.)

The trial court asked the prosecutor what was her offer of proof. (16 RT 1382.) From Exhibit 97, the prosecutor proposed to offer the items marked "Child Porn, Marilyn Powell's Kids," "Patricia," and "Brenda." (16 RT 1383.) As to Exhibit 107, which apparently contained two envelopes entitled "Miscellaneous Porn" and "Miscellaneous Cut-And-Paste Porn," the prosecutor proposed to offer the smaller envelope entitled "Brenda Chamberlain and Girl Shaving Pubic Hairs" that was contained in "Miscellaneous Porn." (16 RT 1383-1385, 1387.) Out of the envelope entitled "Miscellaneous Cut-And-Paste Porn," the prosecutor proposed to offer three images: an image of a handcuffed woman and a woman urinating into the mouth of another woman; an image depicting a woman being raped; and, an image depicting a woman shaving her pubic hairs. (16 RT 1385-1386.)[20] From Exhibit 87, the prosecutor proposed to offer the cut-and-paste photograph of Gallego. From Exhibit 104, the prosecutor sought to introduce a cut-and-paste photograph of Marilyn Powell's

[20] Exhibit 107 contained one additional envelope entitled "V's Friend, Unknown." (16 RT 1387-1388.) The prosecutor did not offer the image contained in that envelope into evidence. (16 RT 1388.)

daughters and friends, the material with the reference to Leilani Kaloha and handwritten captions describing rape, and the cut-and-paste image of Brenda Chamberlain. (16 RT 1389-1390.) The prosecutor believed that she was seeking to introduce approximately 25 percent of the total amount of pornography that was found in appellant's apartment. (16 RT 1391.)

The prosecutor argued the photographs of Gallego were relevant and admissible because appellant had an obvious fascination with Gallego and because it manifested the different things that appellant fantasized about doing to Gallego. (16 RT 1392.)

When the trial court inquired about the relevance of the altered photographs related to Brenda Chamberlain and Marilyn Powell's children, the prosecutor explained that the photographs might be more relevant to the penalty phase because neither Chamberlain nor Powell had ever seen the photographs, the photographs showed those two women something that they could never imagine, and the man that those two women knew was not the same person who created those photos. (16 RT 1392-1393.) The prosecutor added that the photographs, in general, manifested appellant's absolute disrespect for women regardless of whether he knew them, loved them, or cared about them. (16 RT 1393-1394.)

Defense counsel argued the sexually explicit materials were irrelevant, inflammatory, and prejudicial. (16 RT 1407-1424.) Additionally, counsel argued the prosecution was using the materials as conduct evidence insofar as appellant not only possessed the materials but that he possessed them with a specific state of mind. (16 RT 1424.)

After listening to additional arguments by the prosecutor and defense counsel and inviting further comments and discussions, the trial court ruled the altered photographs of Brenda Chamberlain would not be admissible.

(16 RT 1424-1461.)[21] The court reasoned that application of the Chamberlain photos might not make any sense if, at the time that Chamberlain knew appellant, there was no evidence that he possessed the materials. The court explained, "Then it wouldn't have any logical relevance to whether he could do this and still look unthreatening or raise the hackles on a reasonable person's neck." (16 RT 1455.)

As for the altered photographs of Marilyn Powell's friend and adult daughter, the court overruled the defense's relevance objection, Evidence Code section 352 objection, and related Fourteenth Amendment due process arguments and recommended that the prosecutor select several photographs for admission and discuss her selections with defense counsel. (16 RT 1466-1469.) The court stated it would then hear any defense objections after their discussions. (16 RT 1469-1473.)

As for the generalized or "standard" pornography (i.e., the materials which did not have appellant's friend's or acquaintance's face super-imposed on them), the trial court gave defense counsel the choice of deciding whether counsel wanted the materials to be either all admitted into evidence or all excluded from evidence. (16 RT 1473-1474.) The court found those materials to be admissible and relevant because they had the general theme of the shaved pubic area. (16 RT 1474.)

To summarize, the trial court specified it was authorizing all of the pictures that had Gallego's head super-imposed on them to be admitted into evidence (Evidence Item Numbers 87 and 92). (16 RT 1474-1475.) From Evidence Item Numbers 92, 104, and 107, which included pictures of Marilyn Powell's friends and children, the court was allowing a total of five

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[21] The trial court made certain that it received comments from all of the attorneys. At one point, the court even stated to defense counsel: "I'm not comforted, Mr. Gates, when you don't want to talk to me because you're helpful on this." (16 RT 1462.)

of the adult and adult-looking friends and children to be admitted into evidence. The court indicated it was also considering allowing a sample of the "standard" pornography, depending on defense counsel's decision, to be admitted into evidence. (16 RT 1475.)

Returning to the trial court's inquiry about the "standard" pornography, defense counsel Richard Gates reminded the court that he had already interposed objections and that the court had overruled those objections. The court noted that it had overruled the defense objections that the pornography constituted "disposition evidence" and should be excluded on relevance, due process, and Evidence Code section 352 grounds. (16 RT 1476.) Counsel asked the court whether it was considering permitting the introduction of a "representative sample" of the altered adult pornography depicting the shaved pubic area or whether the court would be permitting instead the admission of a single issue of a magazine that appeared to be focused more on kids and reveal shaved pubic areas so that the jury would understand how the "morphing process" went and could see that "there's cutouts." (16 RT 1476.) The court commented that it did not care "about morphed and unmorphed" photographs and that the more relevant issue for purposes of the discussion was "children versus non-children" photographs. (16 RT 1477.) Agreeing with the trial court, counsel proposed to find commercial magazines depicting models with shaved pubic areas since counsel believed those were the evidentiary impact of what the court was looking for and which counsel preferred to present to the jury, "as opposed to more morphing." (16 RT 1477.)

When the trial court asked defense counsel again whether the defense wanted any additional pornography to be admitted or excluded into evidence, counsel stated the defense was objecting to the admission of any additional pornography. (16 RT 1477.)

The trial court subsequently indicated that there needed to be a limit on the number of photos which the prosecutor could introduce into evidence but that it was inclined to allow the prosecutor to present a photo board with pictures of her selection, subject to further commentary by the defense and analysis by the court. The court specified, however, that the point would be to show that there was a lot of other pornography and that the pornography tended to focus on shaved women. The court added that it would also "propose not pictorially but testimonially to have the jury aware of the mass, the quantity that there was" because the quantity and the effort that went into the pornography" were relevant to the issues of motive and intent. (16 RT 1478.)

At defense counsel's suggestion, the trial court asked the prosecutor to show counsel and the court any photos before she adhered them on to a photo board. (16 RT 1479-1480.) The court stated that if the court approved all of the photos that the prosecutor selected and not all of the photos fit on a photo board, then the prosecutor could select whichever ones she wanted to put on the photo board. The court added that the prosecutor could make her own aesthetic presentation choices. (16 RT 1480.)

Defense counsel inquired whether the trial court was going to ask that the prosecution's witness who was going to testify about the pornography be careful in limiting his or her testimony to the volume of pornography and not characterize the pornography. The court stated the witness would be allowed to testify about the volume of pornography and that it did not want the witness to describe the child pornography. Counsel reiterated that the testimony about the pornography was also over the defense objection on the same grounds. (16 RT 1480.) The court indicated it understood that everything it had ruled on the pictures, except for the things it had excluded

(which had been the vast bulk of the pornography), had been over the defense objection. (16 RT 1481.)

On April 5, 2002, defense counsel asked the trial court if they could revisit the issue of the pornography, specifically the prosecution's preparation of an additional photo board. (17 RT 1485.) Counsel wanted to be sure that everyone understood what items would not be allowed to be depicted on the photo board. (17 RT 1486.) The court reiterated that it was not allowing the prosecution to have "a blank check" to bring in subject matter that it had already excluded. The prosecutor assured the court that she understood that was the case. (17 RT 1486.) The court commented, "But this is why I wanted us to take a look at the DA's selections before they get mounted onto a board." (17 RT 1486-1487.) Counsel understood. (17 RT 1487.)

As the parties discussed photographs depicting the locations in appellant and Gallego's apartment where the police found appellant's pornography, defense counsel made clear that the defense had a continuing objection to the introduction of any pornography. The court stated it understood the defense's continuing objection. (17 RT 1521.) While counsel objected to the photos depicting the locations, counsel acknowledged the photos were fair depictions of appellant's bedroom. (17 RT 1521-1522.) The court ruled the photos were admissible, specifying the prosecution could let the jury see what the stacks of pornography looked like when the police entered the apartment. (17 RT 1522.) The court also overruled a defense objection to a photograph of pornographic videotapes found in appellant's room. (17 RT 1526-1527.)

On April 15, 2002, discussions about the admissibility of pornography continued as defense counsel sought to present character evidence vis-à-vis Marilyn Powell and Brenda Chamberlain. (19 RT 1787-1833.) Counsel anticipated that Powell and Chamberlain could testify there was nothing

unusual or deviant about appellant's sexual tastes and practices with them, based on their own personal experience. (19 RT 1788-1790.) Counsel argued the defense should be permitted to present evidence of "non-sexual deviancy" to counter the prosecution's evidence of sexual "deviancy." (19 RT 1789.)

The prosecutor did not have any objection to the introduction of character evidence if appellant's prior girlfriends, Powell and Chamberlain, were going to testify about appellant's character for sexual preferences as it "open[ed] the door" for the pornography. (19 RT 1792-1793.) The prosecutor noted, however, that the proffered evidence also opened the door for appellant's use of marijuana. (19 RT 1793-1794.) The prosecutor further argued she should be permitted to show the altered photos to Chamberlain and ask her whether or not she had any reason to believe appellant was creating them when they were seeing each other. (19 RT 1800.) The prosecutor explained that Chamberlain did not know appellant's sexual character at the time that they were seeing each other; but, after she saw the altered images and realized that appellant had been stealing her photos and altering them, she would probably have a different view of his character. (19 RT 1802-1803.)

Preliminarily, the trial court indicated its thoughts on the defense's character evidence and pornography as follows:

> It seems to me that, to the extent that the defense puts on the character evidence that they're talking about, which appears to me to be perfectly legitimate character evidence, given the issues here, that it's appropriate for the prosecution to cross-examine generally in areas that suggest maybe these ladies didn't know so much about the defendant, either they didn't understand him when they saw him, or he became a different person after they stopped seeing him.
>
> If he's portrayed as someone with a not-overwhelmingly-vigorous sex drive or somebody with an average sex drive,

middle-of-the-road kinds of tastes, then it seems to me evidence that he had a significant pornography collection is legitimate.

And under my rulings already, the jury is going to hear about that and that they can be asked, "Well, gee, did he have this stuff then?"

"Yes." "No."

Depending on what they say. It sounds like they're not going to be aware of it.

And that they can be asked whether knowing about all of this would change their view about him. I think that's perfectly legitimate.

Where I start to part company with the People is when we get into child porn. And it's basically a 352 issue in my mind.

There's going to be a lot of evidence that's going to cause this jury to feel – to have some negative views of the defendant. I think the child porn risks demonizing him beyond repair in front of the jury. It's that risk.

And so, unless it's absolutely critical to the . . . prosecution, I'm reluctant to allow it. It seems to me the prosecution can do what they need to do without the child porn.

I concede that it would be useful to them and that, particularly with Marilyn Powell, getting her to talk about how she feels about him stealing her kids' pictures and pasting them on pornographic materials is going to put quite the fine point on her view of him.

But I don't think the cost in the fairness of the proceedings is worth the added enhancement. And I think you're going to get plenty of mileage out of what's already in.

That's my sense at this point.

Moving on to a related issue – and that's his aggressive or nonaggressive behavior, if he's portrayed as sort of a meek, mild, nonaggressive guy, the pretty dramatically aggressive writings are going to come in.

> And these witnesses are – should be allowed to look at them. And the jury should be made aware, to an extent we haven't determined yet, certainly – but the jury should be made aware that there are such writings and get a flavor of them.

(19 RT 1804-1806.)

Following a short recess in the proceedings, the trial court ruled that if Chamberlain testified as to her sexual relationship with appellant, the prosecution would be permitted to show Chamberlain a certain number of appellant's altered photos depicting Chamberlain. The court explained the prosecutor should be permitted to ask Chamberlain "whether she was aware of this stuff happening when they were together. And even if she wasn't and even if it happened later, would it change her opinion about him?" (19 RT 1816.) The court stated the prosecutor would be permitted to ask similar questions with Powell, based on the altered photos of Powell's adult children. (19 RT 1817.) Indicating it did not think there needed to be a lot of the altered photos of Chamberlain, the court stated it wanted to see the photos selected by the prosecutor. (19 RT 1817.)

On June 13, 2002, the prosecutor showed the photo boards with appellant's altered photos to defense counsel and the trial court. (32 RT 3799.) The prosecutor informed the court that the prosecution would be calling Chamberlain as a witness in the penalty phase if the defense did not call her as their witness. (32 RT 3807.) The court reiterated that the prosecutor could show Chamberlain some of the altered photos and ask her if she was aware of them to explore whether she knew much about appellant's character. (32 RT 3808.)

In a subsequent discussion about the amount of pornography, the prosecutor noted the fact that there were more altered photos than the number displayed on the prosecution's photo boards was bound to come out through Chamberlain's testimony or the police detective's testimony. (32 RT 3816.) Indicating it would be appropriate for the jury to know in a

general sense that there were more photos, the trial court specified it had authorized evidence as to the quantity of pornography and not opinions characterizing it. Defense counsel thought they could count on the detective to better provide that answer. The court agreed. (32 RT 3817.)

During the trial, Detective Hergenroeather testified that he found, in appellant's bedroom, pornographic videocassette tape and hundreds of pornographic magazine pages and photographs of nude women and body parts. (37 RT 4794, 4801-4802, 4806-4807, 4810.) These materials included the altered photos. (37 RT 4801-4806, 4811.)

Powell testified that appellant had a general interest in bondage-type and "S & M" pornography. (41 RT 5452.) The prosecutor showed photos to Powell, who testified in pertinent part that she did not know appellant had stolen them from her house and altered them. (41 RT 5453-5458.)

B. The Photos Were Relevant and Admissible

Appellant first argues his statutory and constitutional rights were violated by the admission of the irrelevant evidence and the drumbeat of alleged "pornography." He argues the sexually graphic material seized from his apartment were not legally obscene, were protected by the First Amendment, and were not relevant to proving guilt of the charges. (AOB 107-139.) Appellant is mistaken because he was not punished for possessing sexually graphic materials or for exercising his First Amendment right to freedom of expression. As the trial court made clear at the in limine hearing, the court permitted a limited number of appellant's altered photographs of Gallego and other women to be admitted into evidence for the purposes of establishing intent and motive, showing his sexually sadistic fantasies and obsession with Gallego, showing his obsession with shaved pubic areas, and, similar to the Fresh Complaint Doctrine or the Child Abuse Accommodation Syndrome, keeping the jury from wondering why Gallego continued to live with appellant if she had

known about his sexually sadistic nature. Contrary to appellant's argument, the pornographic materials were relevant, and their probative value outweighed their potential for prejudice.

California Evidence Code section 350 specifies that no evidence is admissible except relevant evidence. Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Although "'there is no universal test of relevancy, the general rule in criminal cases [is] whether or not the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the prosecution[.]'" (*People v. Freeman* (1994) 8 Cal.4th 450, 491.)

Evidence Code section 352, however, authorizes a trial court to exclude relevant evidence. "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) For purposes of Evidence Code section 352, prejudice means "'evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citation.]'" (*People v. Heard* (2003) 31 Cal.4th 946, 976.)

"A trial court has 'considerable discretion' in determining the relevance of evidence. [Citation.] 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. [Citation.]" (*People v. Merriman* (2014) 60 Cal.4th 1, 74 ("*Merriman*").) An appellate court reviews a trial court's rulings regarding relevancy and admissibility under Evidence Code section 352 for an abuse of discretion. The reviewing court

will not reverse the trial court's rulings on such matters unless it is demonstrated that the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*Merriman*, *supra*, 60 Cal.4th at p. 74.)

Evidence of sexual images possessed by a defendant may be admissible to prove his intent to commit a sex offense. (*People v. Page* (2008) 44 Cal.4th 1, 40 ("*Page*").) In *Memro*, *supra*, 11 Cal.4th 786, the defendant was charged with first degree felony murder based upon a violation of Penal Code section 288, which prohibits the commission of a lewd and lascivious act upon a child under the age of 14 years. The defendant enjoyed taking photographs of young boys in the nude, and he had escorted his seven-year old victim to his apartment with the intent of taking photographs of the victim in the nude. When the victim said he wanted to leave, the defendant strangled him and tried to sodomize his dead body. The trial court admitted magazines and photographs possessed by the defendant that contained sexually explicit stories, photographs, and drawings of males ranging in age from prepubescent to young adult. This Court concluded the trial court did not abuse its discretion because the photographs, presented in the context of the defendant's possession of them, "yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction." (*Memro, supra,* 11 Cal.4th at p. 865; see also, *Clark*, *supra*, 3 Cal.4th, at p. 129 [the defendant decapitated a victim and solicited oral copulation from other victims; picture from a pornographic book depicting a decapitated head orally copulating a severed penis "was probative of defendant's interest in that matter"].)

Here, the altered photographs of Gallego were highly relevant and their strong probative value far outweighed their potential for prejudice. The photographs tended to show appellant had sexually sadistic fantasies

and an obsession with Gallego. Indeed, appellant stole photographs from Gallego and he either cut out her heads from those photographs and pasted them on to other pictures of naked bodies with or without other super-imposed body parts, or he cut body parts from other pictures and pasted them on to her photographs to create sexually graphic images. (Prelim. Hrg. RT 20-25; 16 RT 1345-1353; Exhs. 76, 77, 78, 79, and 84.) Also, Detective Hergenroeather's testimony about the amount of sexually graphic materials found in appellant's apartment was relevant because it disclosed the level and severity of appellant's obsession with Gallego – specifically, it showed how appellant stole Gallego's photographs and then spent time to cut and paste images and body parts from those photographs and magazines to create the sexually graphic images.

As for the altered photographs of Marilyn Powell's friends and adult daughter, they demonstrated that appellant had the ability to hide his sexually sadistic fantasies from Gallego behind their seemingly normal roommate relationship, just as he was able to do with Powell when he and Powell were in a dating relationship. Powell did not know appellant had been stealing photos from her either and altering them. (41 RT 5453-5457.)

As the record demonstrates, the trial court took extreme measures to ensure appellant would not be prejudiced by the sexually graphic images that he created. The court made sure that none of the child pornography was admitted into evidence. The court made certain that only the smallest sampling of the relevant images (aside from the photographs of Gallego) were admitted into evidence. (16 RT 1474-1477, 1479-1480.) Additionally, the court invited defense counsel's participation and always sought counsel's comments in trying to decide the admissibility of each set of photographs. (16 RT 1462.) The amount and level of caution exercised by the court in weighing the probative value of the different types of sexually graphic materials found in appellant's apartment leave no doubt

that the court properly exercised its discretion in admitting the few sexually graphic photographs that were admitted in this case.

Even assuming arguendo that the trial court abused its discretion in admitting the limited pornographic materials in the instant case, any error was harmless. (See *Page*, *supra*, 44 Cal.4th at p. 42 ["In the absence of a violation of federal rights, we evaluate whether 'it is reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error."]; *People v. Watson* (1956) 46 Cal.2d 818, 836 ("*Watson*").] The evidence amply demonstrates that appellant killed Gallego while he was engaged in the commission or attempted commission of rape.

First, the evidence shows appellant and Gallego were not having an intimate sexual relationship. Appellant told his friends, Leilani Kaloha and Marilyn Powell, that he and Gallego were nothing more than friends. (41 RT 5431-5432, 5442-5443, 5465-5466.) At one point, he even told Powell that he hated Gallego and referred to Gallego as "a fucking bitch." (41 RT 5465.) And, yet, his semen was found in Gallego's vagina and on her bloodstained mattress. (37 RT 5072; 40 RT 5123-5124.)

Second, appellant left a handwritten to-do list that, similar to his altered photos of Gallego, revealed his sexual obsession with and sexually sadistic fantasies of her. That to-do list included such tasks as: "shave + plug a virgin"; "pussy & clenching"; "ass cheeks"; "pound 'em"; "rub your nuts"; "lubed-up tits & lubed-up asshole!!!"; and, "30 & afraid to take a dick." (Exhs. 59 and 60.) The list also had a drawing of two people lying on top of each other next to a caption that read: "you got daddy all big n wet, now let's spank that tight lil asshole." (Exhs. 59 and 60.)

Consistent with the tasks listed on appellant to-do list and the non-consensual nature of the sexual contact between appellant and Gallego, Gallego's body had injuries on her lower back and wrists that were caused

by handcuffs. Additionally, her body had a scarf that was loosely looped around her neck with a hastily-made knot, like the scarf was used as a gag. (34 RT 4121, 4189; 37 RT 4729, 4731, 4753; 35 RT 4336, 4338; 37 RT 4756-4757, 4760, 4762.)

Fourth, appellant confessed to his cell mate in county jail, Edward Lee, that he killed his Brazilian roommate. (40 RT 5330-5335.) Appellant told Lee that after he killed the girl, he tried to hide her identity by using bolt cutters to cut the girl's fingers off but her skin was tough and he had to jerk the bolt cutters around to get her fingers to pop off. (40 RT 5335-5336.) Appellant said he bagged up the girl's fingers after he cut them off and that he then tried to get rid of her body by putting it in a truck and driving it up to Carlsbad. (40 RT 5341-5342.) Appellant did not tell Lee where he ultimately dumped the girl's body; he disclosed only that he got a truck to put stuff in a dumpster and that an old lady was watching him while he was at the dumpster and that he put the stuff in the dumpster anyway. (40 RT 5342-5343.) Appellant also told Lee that he drained the girl's blood in the bathroom. (40 RT 5343.)

Indeed, the medical examiner, Christopher Swalwell, testified that Gallego suffered a head injury caused by a blunt object, that she sustained bleeding in the scalp around the head injury, that she suffered a horizontal cut wound across the left side of her neck that went all the way down to her cervical spine, and that she would have gone into shock and died in a matter of minutes after her jugular vein was severed. (34 RT 4157, 4159-4160, 4162-4164, 4166-4168.) Swalwell further explained that Gallego had two major body parts that would have bled on to her mattress: her neck as a result of the cut; and, her scalp as a result of the laceration. Swalwell concluded that she died as a result of the blood loss from her injuries. (34 RT 4171.) Hence, Gallego's mattress was soaked with her blood. (40 RT 5123.)

In short, the evidence leaves no reasonable doubt that appellant killed Gallego while he was engaged in the commission or attempted commission of rape. Accordingly, there is no reasonable probability that appellant would have obtained a more favorable result but for the admission of appellant's altered photographs of Gallego and the other women. Any error in the admission of such photographs was harmless. (*Watson, supra*, 46 Cal.2d at p. 836.)

III. THE TRIAL COURT PROPERLY ALLOWED FORENSIC DENTIST NORMAN SPERBER TO TESTIFY AS A TOOL MARKS EXPERT

Appellant contends the trial court erred and violated his constitutional rights by allowing Dr. Norman Sperber, a forensic dentist, to testify as a tool marks expert and render the opinion that a mark on Gallego's back was consistent with handcuffs. (AOB 140-159.) Appellant alleges Dr. Sperber's testimony was "unreliable and non-scientific" and that the probative value of his testimony was substantially outweighed by its prejudicial effect. (AOB 156-159.) Appellant's contention is without merit. The trial court properly found Dr. Sperber qualified as an expert on tool marks analysis in light of his education and training.

A. Factual Background

The defense filed an in limine motion to exclude the expert testimony of Dr. Sperber. (3 CT 657-669; 14 RT 1003.) At the outset of the hearing on the motion, the trial judge noted that Dr. Sperber had testified a couple of times in his courtroom on both bite mark and tool mark evidence and that it was hard to believe Dr. Sperber was not going to qualify as an expert. (14 RT 1003.)

Defense counsel Dawnella Gilzean, who was aware that Dr. Sperber testified as an expert in the 1998 case of *People v. Ivan and Veronica Gonzales* before Judge Wellington, argued the *Gonzales* case was factually

distinguishable from the instant case because Dr. Sperber's tool marks analysis in the *Gonzales* case was supported by physical evidence and eyewitnesses. (14 RT 1003-1005.) Ms. Gilzean added that Dr. Sperber stated in the *Gonzales* case that he was not a tool marks expert. (14 RT 1005.)

The trial court conducted an Evidence Code section 402 hearing to determine whether Dr. Sperber qualified as an expert on tool marks analysis in the instant case. (14 RT 1005-1015, 1090-1158.) At the Evidence Code section 402 hearing, Dr. Sperber stated that he received his training and gained his experience on the effects of tools or instruments on skin in dental school, where he learned about tissue inflammation and reparative cells, and from his daily treatment of patients in a clinical setting. (14 RT 1092-1093.) Dr. Sperber explained that teeth leaving injury patterns which looked like teeth marks was not a great departure from a hammer leaving a mark that looked like a hammer. (14 RT 1093.) Dr. Sperber further stated he had testified about tool marks examination in approximately 20 cases. (14 RT 1091-1092.) He had testified about marks on human skin or tissue caused by dog bites, telephone cords, hammers, a tire iron, a lug wrench, a belt, a shoe print, bare knuckles, a boot, fingernails, brass knuckles, hair dryer, fabric, bricks, pistols, swords, chain link wires, and a broken pistol grip. He had also testified about marks on a metal frame that were left by a screwdriver. (14 RT 1093-1096.)

Dr. Sperber testified as follows about his consultation on the instant case. He was asked if he had any ideas about a mark on Gallego's lower back area. (14 RT 1096.) The mark or injury was shaped in a rectangular form, but not perfectly. (14 RT 1097.) He had a suspicion that handcuffs were used on Gallego after he learned from the detectives that appellant possessed handcuffs at one point or another. (14 RT 1098.) He examined the injury by selecting a set of handcuffs from the police department's

property room, then turning Gallego's body facing downward, and handcuffing her hands behind her back. With her elbows slightly bent,[22] the handcuffs were close to the horizontal mark on the lower part of her back. (14 RT 1104-1105.) When he removed one of the handcuffs and placed the ratchet portion (solid part) of the handcuffs next to the mark, the width of the ratchet portion was approximately the same width as the mark on Gallego's back. (14 RT 1106-1110.) Gallego also had a bruise on her arm that was consistent with bruising left by handcuffs. (14 RT 1112-1113.)

On redirect-examination, Dr. Sperber further testified that Gallego's prominent back injury, along with her wrist and arm injuries which he previously saw in photographs, made him think that the injuries might have been caused by handcuffs. (14 RT 1146-1147.) Dr. Sperber opined that the marks on Gallego's wrist and back were caused by handcuffs. (14 RT 1149.)

Following the Evidence Code section 402 hearing, the trial court found Dr. Sperber had the education and experience to form the opinion that handcuffs likely caused the marks on Gallego's wrists and back. (14 RT 1003; 15 RT 1166.) The court ruled Dr. Sperber's opinions could be helpful to the jury and that the weight of those opinions would be a matter for the attorneys to argue. (15 RT 1166.)

Defense counsel alleged Dr. Sperber would also be testifying that Gallego sustained the bruise on her back while she was alive when he did not have any training in pathology. Counsel argued Dr. Sperber should not be permitted to express that opinion because the prosecution had failed to

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[22] Dr. Sperber explained that he put handcuffs on Gallego and her arms went into the regular position that a live person's arms would also have gone; in other words, he did not place Gallego's arms or elbows in any specific or particular positions. (14 RT 1105-1106.)

timely provide that information to the defense and because that opinion was beyond Dr. Sperber's expertise in forensic dentistry. (15 RT 1168-1170, 1172.)

Defense counsel further alleged that Dr. Sperber "manipulated" the photographs of his attempt to determine whether handcuffs left a mark on Gallego's back, "manipulated" the attempt itself because someone held a handcuff against the mark, failed to consult Dr. Swalwell's autopsy report, and would not be expressing an opinion that was beyond a reasonable doubt insofar as Dr. Sperber found the handcuffs "pretty much" lined up with the mark on Gallego's back. (15 RT 1174-1176.) While counsel acknowledged that an expert did not have to testify beyond a reasonable doubt and that Dr. Sperber had experience in tool mark analysis, she maintained that Dr. Sperber did not have any formal training on the causation of bruises or tool marks analysis. (15 RT 1176-1177.)

The trial court reiterated that Dr. Sperber could testify about his opinion regarding the handcuff marks on Gallego's back; however, the court was not certain if it should allow Dr. Sperber to testify whether Gallego's marks were pre-mortem or post-mortem bruises. (15 RT 1178.) Upon the court's invitation, the prosecutor noted Dr. Sperber received formal training on pathology by attending some medical school classes and two or more autopsies per month since 1984. (15 RT 1179-1180.) The prosecutor also noted the validity of Dr. Sperber's opinion was an issue concerning the weight of the evidence and not the admissibility of the evidence. (15 RT 1180.)

The trial court overruled the defense objection to Dr. Sperber's opinion that handcuffs likely caused the marks on Gallego's wrists. Based on Dr. Sperber's education in dentistry and experience in tool marks analysis, the court found Dr. Sperber had "more than ample qualifications" to render an opinion as to whether a particular type of object caused a mark

on human flesh or what were the mechanics of causing such a mark. (15 RT 1182.) The court stated it was not aware of any formal training on tool marks analysis but that if there was, people like Dr. Sperber would be the ones who would have received that training. The court added that it was hard to imagine a more logical background for understanding tool marks evidence than forensic dentistry and odontology, given the similarities between teeth and hard objects, such as screwdrivers, making marks on human skin. The court also noted that specific, formal classroom education was not a requirement for a person to be an expert and that experience was one way for a person to become educated on a subject. The court further stated that it was not aware of anyone who had more experience than Dr. Sperber in the field of tool marks analysis and that Dr. Sperber had a national reputation for tool marks analysis. (15 RT 1182.)

Additionally, the trial court concluded Dr. Sperber had the professional training and experience in tissue pathology to render the opinion that the marks on Gallego's wrists and back were bruises. The court explained that Dr. Sperber had knowledge distinct from what the jury would have. (15 RT 1184-1185.)

The trial court declined to exclude Dr. Sperber as a witness on the ground that the prosecution gave late notice to the defense of Dr. Sperber's opinion that handcuffs likely caused the marks on Gallego's wrist. The court reasoned that late notice was not a legal basis for exclusion. (15 RT 1183-1184.)

B. Dr. Sperber Qualified as a Tool Marks Expert

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates." (*People v. Bloyd* (1987) 43 Cal.3d 333, 357 ("*Bloyd*"); see Evid. Code, § 720, subd. (a).) "Whether a person qualifies as an expert in a particular

case . . . depends upon the facts of the case and the witness's qualifications. [Citation.]" (*Bloyd, supra*, 43 Cal.3d at p. 357.) "'The competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement. In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited.' [Citation.]" (*People v. Kelly* (1976) 17 Cal.3d 24, 39 ("*Kelly*"); see *People v. Hogan* (1982) 31 Cal.3d 815, 853, disapproved on another ground in *People v. Cooper* (1991) 53 Cal.3d 771, 836 ("*Cooper*").)

"The qualification of expert witnesses, including foundational requirements, rests in the sound discretion of the trial court. [Citations.] That discretion is necessarily broad . . . . Absent a manifest abuse, the court's determination will not be disturbed on appeal. [Citations.]" (*People v. Ramos* (1997) 15 Cal.4th 1133, 1175; *Cooper, supra*, 53 Cal.3d at p. 813.) "The trial court's '"decision will not be reversed merely because reasonable people might disagree."'" (*Polanski v. Superior Court* (2009) 180 Cal.App.4th 507, 537.) "'"Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility."' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 322.) "Error regarding a witness' qualifications as an expert will be found only if the evidence shows that the witness '"'*clearly lacks* qualification as an expert.'"' [Citation.]" (*People v. Farnam* (2002) 28 Cal.4th 107, 162 ("*Farnam*"); emphasis in original.)

In light of the "considerable latitude" afforded a trial court in determining the qualifications of an expert (*Cooper, supra*, 53 Cal.3d at p. 813), the trial court in the instant case properly exercised its discretion in allowing Dr. Sperber to testify as an expert on tool marks analysis. Dr. Sperber had special knowledge, experience, training, and education in tool

marks examination. He received training and gained experience in determining the effects of tools on the human skin in dental school and from his treatment of patients in the clinical setting. (14 RT 1092-1093.) Prior to the Evidence Code section 402 hearing on Dr. Sperber's qualifications to testify as an expert, he had testified as a tool marks expert in 20 cases. (14 RT 1091-1092.) He had testified about marks that were left on human skin by dog bites, telephone cords, hammers, a tire iron, a lug wrench, a belt, a shoe print, bare knuckles, a boot, fingernails, brass knuckles, a hair dryer, fabric, bricks, pistols, swords, chain link wires, and a broken pistol grip. (14 RT 1093-1096.) Given his dental training and experience on tool marks analysis, Dr. Sperber was more than qualified to testify as an expert on tool marks examination and analysis. Contrary to appellant's claim, the court did not abuse its discretion in permitting Dr. Sperber to testify that the marks on Gallego's wrist and back were consistent with a pair of handcuffs.

Appellant alleges the validity of tool marks analysis has been called into question by the National Academy of Sciences, vis-à-vis a 2008 report titled "Strengthening Forensic Science in the United States: A Path Forward." (AOB 146-156.) The 2008 report is not a proper subject for this appeal because it was published nearly six years after appellant's trial. Furthermore, the report had nothing to do with Dr. Sperber's qualifications as a tool marks expert. Moreover, while that report discusses some of the weaknesses of tool marks analysis, it did not invalidate that field of science. Thus, the report fails to support appellant's claim that the trial court abused its discretion in allowing Dr. Sperber to testify as a tool marks expert.

Further, to the extent that appellant complains Dr. Sperber "leveraged his non-expertise" in bite marks to "an even more unreliable endeavor" by identifying handcuff marks when there purportedly were no handcuffs, appellant is mistaken. The record indicates appellant possessed handcuffs

at one point or another. Charles Ijames, appellant's roommate, testified that appellant had a pair of handcuffs which he occasionally used to lock up his bike. (34 RT 4280.) Ijames described appellant's handcuffs as silver, shiny, and chrome-like. (34 RT 4281.) Marilyn Powell, who dated appellant, also testified that appellant had a pair of handcuffs that he used to lock his bike. (41 RT 5459.) Powell testified she saw the handcuffs two to three times a week, from April to August of 1998. She described his handcuffs as looking like the ones used by the police for arrests – big, heavy, strong, and silver, with a chain linking the cuffs. (41 RT 5460-5461.)

In any event, the trial court specifically instructed the jurors that they were not bound by an expert witness' opinion and could disregard any opinion which they found to be unreasonable. Pursuant to CALJIC No. 2.80 ["Expert Testimony – Qualifications of Expert"], the court instructed the jurors that in determining what weight to give to any opinion expressed by an expert witness, they should consider the qualifications and believability of the witness, the facts or materials upon which each opinion was based, and the reasons for each opinion. The court also instructed the jurors that the expert witness' opinion was only as good as the facts and reasons on which it was based and that if the jurors found any fact had not been proved or had been disproved, the jurors had to consider that in determining the value of the opinion. (8 CT 1794; 45 RT 6263.) Hence, any error in the trial court allowing Dr. Sperber to testify as an expert on tool marks analysis was harmless. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

Moreover, the evidence amply supports appellant's murder conviction and the true findings on the special circumstance allegations. (See Argument II [rape], *supra*; Argument XII [lying in wait], *infra*; Argument XIV [financial gain], *infra*; Argument XVIII [murder].) Any error

committed by the trial court in permitting Dr. Sperber to testify on tool marks analysis was harmless. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

IV. THE TRIAL COURT PROPERLY DENIED THE DEFENSE'S REQUEST FOR THE RELEASE OF A TELEVISION PRODUCTION COMPANY'S VIDEOTAPES

Appellant contends the trial court erred and violated his constitutional rights by refusing to release to defense counsel a television production company's videotapes of the prosecutor's preparation for this case, in particular a meeting wherein prosecutors decided to pursue capital punishment. (AOB 159-177.) To the contrary, the court properly denied the defense's request for the release of the videotapes because appellant failed to make the requisite showing that the videotape footage would materially aid his defense.

A. Factual Background

In 2002, Trial & Error Productions Inc. ("TEP") was filming a documentary television series for NBC television that gave viewers a "behind-the-scenes" look at deputy district attorneys as they prepared for and tried criminal cases. (3 CT 524.) NBC never aired an episode of appellant's case, and all of the footage on the videotapes remained unpublished. (3 CT 524.)

On January 8, 2002, the defense faxed a subpoena duces tecum to TEP, seeking the production of videotapes of outtakes gathered during the preparation for the television program relating to appellant's case. (3 CT 524.)

On January 22, 2002, counsel for TEP moved to quash the subpoena on the grounds that the subpoena had not been properly served and the footage in the videotapes was protected from compelled disclosure by Article I, section 2(b) of the California Constitution, California Evidence Code section 1070, and the First Amendment to the United States

Constitution. (3 CT 519-560; 11 CT 2461-2463; 12 RT 881-888.) The defense filed a brief in support of disclosure of the videotapes. (3 CT 561-583.)

On February 6, 2002, at the hearing on the motion to quash the subpoena, counsel for TEP argued the defense had failed to make the threshold showing of a reasonable possibility that anything specific in the video footage would materially assist in appellant's defense. TEP's counsel added the defense could not meet that threshold because the video footage did not contain any interviews of percipient witnesses. (12 RT 888-889.) Appellant's trial counsel noted the defense already had one of the videotapes, specifically the recorded interview of Gallego's mother. (12 RT 890-891.)

After listening to additional argument by TEP's counsel, the trial court ordered TEP to release the videotapes so that the court could review them. (11 CT 2463; 12 RT 970-971.) The videotapes that TEP released to the court were designated as Court's Exhibits 1, 2, 3, and 4. Court's Exhibit 1 was a recording of an interview with Gallego's mother. Court's Exhibit 2 was a recording of a meeting where former District Attorney Paul Pfingst and two of his deputies discussed whether they should seek the death penalty in appellant's case. Court's Exhibit 3 was a recording of Pfingst's announcement that he would be seeking the death penalty against appellant. Court's Exhibit 4 was a recording of a discussion between Deputy District Attorneys Brenda Daly and Greg Thompson regarding appellant's case. (11 CT 2463; 12 RT 963-971.)

On February 7, 2002, the trial court issued an ex parte court order stating that after reviewing the four videotapes and considering the factors set forth in *Delaney v. Superior Court* (1990) 50 Cal.3d 785 ("*Delaney*"), it was ordering only the release of Court Exhibit 1 to the defense. The court

explained that the other three videotapes would remain under seal as part of the record in the case. (11 CT 2464.)

In late 2010, during the record correction process, appellant's appellate counsel requested copies of the previously-sealed videotapes. (41 CT 9299-9306.) The trial court ordered the videotapes to be released to the District Attorney's Office for the purpose of having copies made and provided to appellate counsel. (41 CT 9307-9308; 42 CT 9319-9321.) The trial prosecutor initially agreed to make copies of the sealed items but was unaware of the nature of the items. (42 CT 9335.) Upon receiving the court order permitting her to copy the sealed items for appellate counsel, the prosecutor noticed the videotapes related to the TEP footage and was concerned about copying the items when TEP had not been given notice of the court-ordered dissemination of the videotapes. (42 CT 9335-9336.) The prosecutor requested that the court withdraw its February 24, 2011 order and reseal Court's Exhibits 1, 2, 3, and 4. (42 CT 9334-9337.)

At an ex parte hearing on February 16, 2011, the prosecutor informed the trial court that she needed to contact third party privilege holders regarding appellate counsel's request. The court continued the matter to give the parties time to address the matter in writing. (42 CT 9338-9343.)

On March 7, 2011, the trial court informed appellate counsel and the District Attorney's Office of its intention to have the videotapes unsealed so that copies could be made for appellate counsel, after which the tapes would be kept in the court's possession and resealed with a protective order indicating the video coverage could only be used for the purpose of pursuing a writ or appeal. The court ordered the District Attorney's Office to inform NBC of the court's intention to unseal the videotapes and have copies made for appellate counsel, the District Attorney's Office, the Attorney General's Office, and the court's file. (42 CT

On March 21, 2011, NBC Universal Media, making a special appearance on behalf of TEP, opposed appellate counsel's request to unseal the videotapes. NBC opposed the request for access to the videotapes on the ground that the videotapes consisted of unpublished newsgathering information protected from compelled disclosure by the California Shield Law and the First Amendment to the United States Constitution. NBC argued the defense failed to make any legally cognizable attempt to demonstrate how the material he sought would materially assist the defense. NBC also argued the release of the videotapes to the defense pursuant to a protective order would violate the Constitutional protection provided to the videotapes. (42 CT 9348-9453.) On April 18, 2011, appellate counsel filed a response to NBC Universal Media's opposition. (42 CT 9471-9491.)

In a written ruling filed on April 20, 2011, the trial court vacated its February 4, 2011 order to unseal Court's Exhibits 2, 3, and 4, and ordered those three videotapes to be re-sealed. The court ordered the unsealing and delivery of Court's Exhibit 1 to the trial prosecutor for the purpose of making copies for both the prosecution and appellant, as well as the subsequent return of the videotape to the court. (42 CT 9492-9495.)

On September 12, 2011, appellate counsel filed a motion in this Court, seeking the release of the three sealed videotapes for purposes of post-conviction review. This Court denied the motion on April 25, 2012.

B. The Reporter's Shield Law Protected Against the Release of the Videotapes

The California Constitution provides newspersons, including reporters who are engaged in legitimate journalistic pursuits, protection against compulsory disclosure of the information they acquire in gathering news. *Ramos, supra,* 34 Cal.4th at p. 523; *Delaney, supra,* 50 Cal.3d at p. 798; Cal. Const., art. I, § 2(b); Evid. Code, § 1070 [immunity applies to any

unpublished information obtained in gathering, receiving, or processing information for communication to public].) The Shield Law must yield to a criminal defendant's constitutional right to a fair trial when the newsperson's refusal to disclose information would unduly infringe on that right. (*Ramos*, *supra*, 34 Cal.4th at p. 501, citing *Delaney*, *supra*, 50 Cal.3d at p. 793.) In order to compel the disclosure of information covered by the Shield Law, the defendant must make a threshold showing of a reasonable possibility that the information will materially assist in his defense. While the showing need not be detailed or specific, "it must rest on more than mere speculation." (*Cooper*, *supra*, 53 Cal.3d at p. 820, citing *Delaney*, *supra*, 50 Cal.3d at pp. 808-809.) If the defendant meets the threshold showing, a court then balances various factors in determining whether to compel disclosure of the information. (*Cooper*, *supra*, 53 Cal.3d at p. 820, citing *Delaney*, *supra*, 50 Cal.3d at pp. 809-813.) These factors include whether the information is confidential or sensitive, the interests that the Shield Law protects, the importance of the information to the defendant, and, in some cases, whether there is an alternative source for the information. (*Ramos*, *supra*, 34 Cal.4th at p. 526, citing *Delaney*, *supra*, 50 Cal.3d at p. 813.)

Here, appellant failed to make the threshold showing of a reasonable possibility that the videotape footage would materially assist his defense. (*Delaney*, *supra*, 50 Cal.3d at pp. 808-809.) Appellant acknowledges his appellate counsel stated she did not necessarily plan to use the videotapes in her pleadings and that she would let the court and prosecution know if she decided to do so. (AOB 164; 42 CT 9353.) Yet, he argues *Delaney* made clear that a defendant is not required to show beforehand that the evidence sought will go to the heart of the case. (AOB 164.) While that may be true, *Delaney* also specified the defendant bears the burden of making the requisite threshold showing of a reasonable possibility that the information

will *materially assist* his defense. (*Delaney*, *supra*, 50 Cal.3d at pp. 808-809.) Appellant did not come close to meeting this burden by saying that his attorney was uncertain if she would use the information but would let the court and prosecution know if she did in fact do so. For this reason alone, the trial court properly denied the defense request for the release of the videotape footage. Where the defense merely expressed a desire to see all available evidence in case some of it was relevant to an appellate issue, the court acted properly in not overriding the reporter's shield, as courts across the country have held. (See e.g., *United States v. Lloyd* (7th Cir. 1995) 71 F.3d 1256, 1268 ("conjecture and speculation" as to existence of useful information does not defeat reporter's privilege); *United States v. Cuthbertson* (3d Cir. 1980) 630 F.2d 139, 146 (broad request for material "based solely on the mere hope that some exculpatory material might turn up" should be quashed). Moreover, *Delaney* made clear that the defendant's showing of meeting the threshold requirement "must rest on more than mere speculation." (*Delaney*, *supra*, 50 Cal.3d at p. 809.)

In short, appellant failed to make a showing that the videotape footage he sought would materially aid his defense. Therefore, the trial court properly denied the defense request to release the third party videotapes. Yet, even assuming arguendo that the court erred in denying the request, the error was harmless because substantial evidence supports appellant's murder conviction and the true findings on the special circumstance allegations. (See Argument II [rape], *supra*; Argument XII [lying in wait], *infra*; Argument XIV [financial gain], *infra*; Argument XVIII [murder], *infra*.) (*Watson*, *supra*, 46 Cal.2d at p. 836.)

V. THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTION TO INTRODUCE PHOTOS OF GALLEGO, PHOTOS OF THE LOCATIONS WHERE APPELLANT SCATTERED GALLEGO'S BODY PARTS, AND PHOTOS OF GALLEGO'S AUTOPSY INTO EVIDENCE

Appellant contends the trial court abused its discretion and violated his constitutional rights by admitting "gory, gruesome and inflammatory" photographs that were irrelevant and cumulative and whose only purpose was to inflame the passions of the jurors. (AOB 177-183.) He takes issue with the following photographs that were admitted over defense objection:

- Exhibit 1 (photo board of Gallego with dog);
- Exhibit 5 (nine photos depicting Petsmart location and dumpsters);[23]
- Exhibit 6 (three photos depicting large trash can);
- Exhibit 8 (two autopsy photos depicting bruised left wrist with ruler);
- Exhibit 9 (two autopsy photos labeled "Handcuff Mark Comparison");
- Exhibit 10 (two autopsy photos labeled "Handcuff Mark Comparison" with overlay);

[23] Appellant refers to "Exhs. 5-9 (photos, Petsmart Location and dumpsters)." (AOB 179.) Exhibit 5 consists of nine photographs depicting the Petsmart location and dumpsters; Exhibits 6 through 9 do not consist of photographs depicting the Petsmart location and dumpsters.

- Exhibit 15 (three photos depicting trash can and Gallego's body in plastic bag in autopsy room);
- Exhibit 16 (two autopsy photos depicting head and neck views);
- Exhibit 17 (autopsy photo depicting full body view);
- Exhibit 18 (autopsy photo depicting four severed fingertips);
- Exhibit 22 (three autopsy photos depicting head and skull);
- Exhibit 61 (autopsy photo depicting Gallego's back);
- Exhibit 62 (autopsy photo (close-up) depicting Gallego's back with handcuffs on wrists);
- Exhibit 74 (photo board containing three color photos depicting close-ups of Item Nos. 83, 85, 87, 98, 99);[24]
- Exhibit 112 (photo depicting wrist area); and,
- Exhibit 115 (three autopsy photos depicting Gallego's face and hands).

(AOB 179.)

Appellant also alleges the prosecutor aggravated the prejudice from the photographs by arguing that the photographs demonstrated he did not kill in an out-of-control explosion of emotion but rather, in a "pre-planned, cold and calculating" manner. (AOB 179-180.) Appellant's contention is without merit because the photographs at issue were relevant and were neither cumulative nor inflammatory.

Preliminarily, respondent notes the photographs at issue are not as "gory" or "gruesome" as appellant describes them to be in the opening

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[24] Item No. 83 consisted of items that were collected from the bookshelf in the southeast corner of appellant's bedroom (a glass pipe, condoms, a camera, and camera film); Item No. 85 consisted of hats, clothing, and accessories that were found on top of appellant's bed; Item No. 87 consisted of miscellaneous photos and pages of magazines that were found on top of appellant's bed; and, Item Nos. 98 and 99 consisted of bags of writings, pornography, and papers that were collected from appellant's apartment. (See 37 RT 4793-4795, 4807.)

brief. First, Gallego did not have any blood on her body. (34 RT 4120-4121, 4168-4169.) While some of the photographs at issue may show a human body, there is neither the horrific specter of bloodshed nor carnage. Second, Gallego is barely even cognizable in the photos of the trash can as she is sealed in a plastic bag; in fact, appellant made sure to seal her in a bag. (34 RT 4104, 4120; 37 RT 4728.) Third, the photographs depicting the Petsmart location and dumpsters are merely location photos showing the area and dumpster bins where the landscapers found Gallego's severed fingertips. Last, the autopsy photographs merely depicted Gallego's injuries and parts of her body. As previously mentioned, Gallego did not have any blood on her body; her autopsy photos did not have any blood in them. Respondent agrees that autopsy photographs are not pleasant to view, but the photographs with which appellant takes issue are certainly not the unduly "gory," "gruesome," "highly inflammatory," or "horrifying" images that would have amounted to an abuse of the trial court's discretion or a violation of appellant's constitutional rights in their admission into evidence.

> "'The admission of allegedly gruesome photographs is basically a question of relevance over which the trial court has broad discretion.' [Citations.] The further decision whether to nevertheless exclude relevant photographs as unduly prejudicial is similarly committed to the trial court's discretion: 'A trial court's decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value.'" [Citations.]

(*People v. Duffy* (2014) 58 Cal.4th 527, 557.)

Likewise, a trial court has broad discretion to admit autopsy photographs. (*People v. Burney* (2009) 47 Cal.4th 203, 243 ("*Burney*"); *People v. Riel* (2000) 22 Cal.4th 1153, 1193; *People v. Ochoa* (1998) 19

Cal.4th 353, 415.) A court abuses its discretion only when its ruling exceeds the bounds of reason. (*People v. Kipp* (1998) 18 Cal.4th 349, 371.)

None of the autopsy photographs in the present case was unduly prejudicial. Although photographs of murder victims often are graphic and disturbing, none of the photographs here were "so gruesome as to have impermissibly swayed the jury." (*People v. Smithey* (1999) 20 Cal.4th 936, 974.) The defense tried to convince the jury that appellant did not intend to handcuff Gallego, gag her, rape her, or kill her. (45 RT 6332-6408; 46 RT 6411-6440.) However, the photographic evidence indicated appellant premeditated and deliberated the killing or had been lying in wait for a surprise attack on Gallego. Among her other injuries, the autopsy photographs showed appellant slit Gallego's throat multiple times, down to the bone. Thus, the photographs were probative on the issue of malice and intent to kill. (*People v. Loker* (2008) 44 Cal.4th 691, 705 ("*Loker*").) The prosecution was entitled to present photographic evidence to prove appellant intended to kill Gallego. (See *Burney*, *supra*, 47 Cal.4th at p. 243, quoting *Loker*, *supra*, 44 Cal.4th at p. 705 ["The prosecution was not obligated to '"'accept antiseptic stipulations in lieu of photographic evidence"'" on these issues."].) Further, the autopsy photos corroborated the medical examiner's testimony about Gallego's injuries, as well as Dr. Sperber's testimony about Gallego's wrists being handcuffed. (34 RT 4128-4131, 4135-4139, 4143-4144, 4155-4158, 4159-4164, 4166-4168, 4177, 4179; 35 RT 4333, 4336, 4338, 4756-4757, 4759-4760, 4762.) Thus, the photographs had substantial probative value.

Additionally, photographs of a crime scene are relevant to show how a crime was committed and to corroborate or illustrate witness testimony about the crime. (*People v. Scheid* (1997) 16 Cal.4th 1, 14-15, 18.) In *Scheid*, this Court rejected the defendant's argument that a photograph of the murder victim's "bloodied, lifeless body" was irrelevant because the

defendant was not at the scene during the actual shooting, the defendant was being prosecuted on a felony-murder theory and thus there was no issue of malice, and the parties were willing to stipulate as to the cause of death and the murder weapon. (*Id*. at pp. 14-15.) This Court explained that the defendant's position was "based upon an inappropriately narrow view of the concept of relevancy." (*Id*. at p. 14.) This Court further stated that a photograph which showed a murder had been committed was relevant even if it was cumulative to other evidence, and the only ban on cumulative evidence arose under Evidence Code section 352. (*Scheid*, at pp. 15-16.) Further, the photograph did not lose its relevancy merely because malice was not at issue or because the defendant did not dispute the circumstances of the crime. (*Id*. at pp. 16-17.) This Court reasoned the prosecution was not obligated to prove details solely through witness testimony and was entitled to establish the fact that a murder had been committed "through the use of the most probative and compelling evidence available . . . ." (*Id*. at p. 17; see also *People v. Ramirez* (2006) 39 Cal.4th 398, 452 [gruesome photo of victim with her eyes cut out admissible because highly relevant]; *People v. Carter* (2005) 36 Cal.4th 1114, 1168 [that photos of murder victims are graphic and disturbing does not render them unduly prejudicial]; *People v. Michaels* (2002) 28 Cal.4th 486, 532 ["[a]lthough photographic evidence is often cumulative of testimonial evidence, that fact does not require its exclusion, '[b]ecause the photographic evidence could assist the jury in understanding and evaluating the testimony'"].)

Here, the photographs depicting the Petsmart in the Midway area and the dumpsters gave the jurors a view of the location where Steve Gomez discovered Gallego's severed fingertips and appellant's cleaning supplies. (33 RT 4004-4013.) The photographs also showed the jurors exactly what Ilana Ivascu saw on August 13, 2000, when an African-American man backed a U-Haul truck in front of the dumpster next to the Petsmart in the

Midway area, flicked an object, later discovered to be a human thumb, into the trees in the side yard area, and tossed a garbage bag into the dumpster before returning to the truck and driving away. (33 RT 4045-4057, 4072-4080.)

Here, in determining that the photographs were admissible, the trial court found they were not inflammatory or prejudicial. The court also found they would be of assistance to the jury in understanding the events of the crime and the extent of the injuries that appellant inflicted on Gallego. (15 RT 1258-1259.) The facts of the crime are not pleasant, and the photographs aid in the understanding of the crime. The court carefully weighed the prejudicial effect of the crime scene photographs against their probative value and concluded they were admissible. The court even devised a plan to limit the jury's exposure to the photographs. The court stated:

> . . . It's not the first time I've had a trial with unpleasant photographs. And, frankly, I'm keenly aware of a couple of things when we have those. One is not wanting to inflame the jury and another one is not wanting to push their emotions to the point where reason becomes difficult just for their own sake.
>
> So these pictures are going to be visible while there's testimony about them, and then they're going to be put face to the wall where we have them stacked up wherever we have room for them when other matters are going to be testified to. These are not anywhere near as disturbing, in my view, as the autopsy photos, and I think that I – I respect your ringing the bell early. The bell is going to be the loudest when we get to the autopsy photos.

(15 RT 1259.)

Mindful of the unpleasantness of the photographs, the court also made sure there were no gratuitous multiples. (15 RT 1237-1238.) Simply stated, this record does not reflect any abuse of the broad discretion vested in the trial court.

Contrary to appellant's argument that the photographs at issue served no evidentiary purpose and only inflamed the jury (AOB 180), the photographs were indispensable to a clear explanation of appellant's crimes. Witnesses described Gallego's injuries, but the autopsy photographs showed the precise injuries that were inflicted by appellant. Similarly, the crime scene photographs showed the circumstances surrounding the planning of appellant's crimes, as well as his state of mind.

Further, contrary to appellant's argument that the photographs were cumulative because witnesses testified to the appearance of the crime scenes in detail as well as Gallego's appearance and injuries (AOB 180-181), the prosecution was not required to rely solely on oral testimony in presenting its case. The burden to prove guilt beyond a reasonable doubt permits the prosecution to use physical evidence, including photographs, to substantiate its case. (*People v. Pride* (1992) 3 Cal.4th 195, 243.)

In short, the trial court properly exercised its discretion in admitting the photographs at issue after finding their probative value outweighed their potential for prejudice. Even assuming arguendo that the court erred in admitting the photographs, the error was harmless because substantial evidence supports appellant's conviction and the true findings on the special circumstance allegations. (See Argument II [rape], *supra*; Argument XII [lying in wait], *infra*; Argument XIV [financial gain], *infra*.) (*Watson*, *supra*, 46 Cal.2d at p. 836.)

VI. THE TRIAL COURT DID NOT ERR IN NOT PRECLUDING THE PROSECUTOR FROM ARGUING IN HER OPENING STATEMENT

Appellant contends the trial court erred and violated his constitutional rights by failing to preclude the prosecutor from arguing in her opening statement. (AOB 183-186.) Appellant takes issue with the following statements made by the prosecutor in her opening statement: "the victim lost her hopes and dreams as the defendant 'drained' the life from her" (33

RT 3932-3933; "all the victim's blood had been 'drained' out" (33 RT 3940, 3943); "we 'know' the victim was raped, 'gagged,' and handcuffed, and that a 'gag' was found around her neck" (33 RT 3931, 3936, 3940, 3942); and, "the victim was raped and 'tortured'" (33 RT 3942). (AOB 185.) Appellant argues the court's error in permitting the prosecutor to "argue" highly inflammatory facts that would not and could not be proven was egregious because it predisposed the jurors at the outset to assume that even more had been done than could be proven and it lightened the prosecution's burden of proving that he was guilty of the charges. Appellant's contention is without merit because the prosecutor's statements were based on the evidence.

A. Factual Background

On February 25, 2002, the defense filed a motion in limine to preclude argument in the opening statement. (4 CT 797-800.) In the in limine motion, the defense stated the prosecution had described appellant as having "drained" Gallego's blood, "gagged" her by looping a scarf around her neck, and "tortured" her (even though the trial court had dismissed the torture allegation on December 19, 2001). (4 CT 797-800.) The defense sought an order precluding the use of these descriptions during the prosecution's opening statement and examination of the witnesses. (4 CT 797.)

At the outset of the hearing on the in limine motion, the trial court noted the prosecution is usually given broad latitude with respect to an opening statement because the purpose of the opening statement is to introduce the jury to the evidence. (17 RT 1594.) With respect to the description of the draining of the blood, the court pointed out that Gallego did not have much blood left in her by the time she was found by the authorities and commented that "it would be a fair statement that her blood had been drained out." (17 RT 1594-1595.) The court continued:

> . . . And since it's the People's theory that her blood got drained out by [appellant] opening her veins, I don't think it's unfair for [the prosecutor] to say that he drained the blood. I think that that – that seems to be an appropriate comment.
>
> If [the prosecutor] tries to paint the picture of [appellant] hanging the victim like cattle to drain the blood, I invite you to object and I'll step in. But I don't think that's going to happen.
>
> You're not going to be doing that, are you, [Prosecutor]?

(17 RT 1595.)

The prosecutor assured the trial court that she would not be making any such comments about appellant hanging Gallego like cattle. (17 RT 1595.)

As to the defense's concerns about Gallego being described as having been gagged, the trial court stated it saw photos of a scarf being looped a couple of times around Gallego's neck and "a clumsy, big knot" in the scarf. (17 RT 1595.) The court added that it had never seen a woman tie a scarf like that for fashion purposes and that it was inclined to find the prosecutor could make a legitimate inference and urge the jury to consider that Gallego was gagged. (17 RT 1595.)

As to the defense's issue with Gallego being described as having been tortured, the trial court noted that while it had stricken the torture special circumstance allegation because it did not find sufficient evidence in the preliminary hearing to support the allegation, the court understood torture would be used in the case in a colloquial sense. (17 RT 1595.) The court asked the prosecutor if she was going to be offering a torture theory of first degree murder. (17 RT 1595-1596.) The court explained that if the prosecutor was not going to be offering that theory, then it would become easier to say the word "torture" in the colloquial sense. (17 RT 1596.) The prosecutor said she would not be offering that theory and noted the court had previously mentioned it would not prohibit her from using the word

"torture." (17 RT 1596.) The court recalled its previous ruling, stating "That's why . . . I don't think it's unfair for the People to describe what is reasonably concluded from the evidence as tortuous in the live sense." (17 RT 1596.)

Defense counsel Dawnella Gilzean argued the description that appellant "drained the blood" of Gallego, as opposed to a statement indicating the evidence would show Gallego bled to death because of appellant's conduct, was argumentative. (17 RT 1596-1598.) Counsel argued the "gagging" description was inappropriate because there was no evidence showing the scarf had been tied around Gallego's mouth to gag her. Counsel stated there was no evidence of any injury in or around Gallego's mouth area and there was no evidence of saliva on the scarf. (17 RT 1599-1600.) As for the word "torture," counsel stated the word would be more appropriate for use in closing argument. Counsel added that any comment in an opening statement about how the evidence would show Gallego was "tortured" would be a conclusion and, thus, argumentative and inappropriate. (17 RT 1600-1601.)

The trial court stated, "I'm not aware of any authority that conclusions can't be addressed in opening statement. In fact, I – it was my indication that the case law has expressly said if what the D.A. says is a rational conclusion from the evidence that's going to be offered, that's okay." (17 RT 1601.) When defense counsel Gilzean expressed concern about any inconsistencies between the conclusions to be drawn from the prosecutor's opening statement and the legal conclusions set out in the charges of the information, the court stated that the jury was never going to know that the torture special circumstance allegation was at issue or was dismissed. (17 RT 1601-1602.) When counsel continued to express concern that jurors might already know about the torture allegation, the court commented, "See that they don't." (17 RT 1602.)

The trial court was more interested in what the medical experts thought about whether Gallego had been gagged and inquired further with the prosecutor about her theory that appellant had gagged Gallego to muffle her screams. (17 RT 1602.) The prosecutor stated the forensic DNA expert she had consulted was Shawn Montpetit. The prosecutor explained that Montpetit had considered the notion that the scarf around Gallego's neck was wet and soaked with water and that the first thing that would have been dissolved in water would have been evidence, such as spit or saliva. (17 RT 1603.) The prosecutor added that, from an investigative standpoint, the detectives did not think the scarf was tied around Gallego's neck to cover one skinny wound on her neck and leave the rest of her body naked. The prosecutor argued the prosecution should be permitted to draw the reasonable inference that Gallego was gagged based on the evidence and the defense had every right to dispute the inference and argue Gallego was not gagged. (17 RT 1604.)[25]

The trial court concluded there was no basis to preclude the prosecutor from making the comments at issue. The court denied the defense's in limine motion. (17 RT 1607.) The court specified:

> I think the principal sanction for overreaching in opening statements is that if the D.A. writes a check in the opening statement that she can't cash, the defense is going to be real clear about that at the end of the case. And if it appears to the jury that she's overselling her case, she's going to undermine her credibility away. That isn't good for her, and I think prosecutors know that.
>
> But I – I think that all of these conclusions are conclusions that can reasonably be drawn from the evidence. Some of them seem, to me, to be weaker than others. But there is enough

[25] The trial court asked the prosecutor if there were any ligature marks on Gallego's body that were consistent with gagging. The prosecutor stated that ligature mostly applied to the neck area and that there was no evidence of strangulation on Gallego. (17 RT 1604.)

support for them, I think, to justify their being stated in opening statement. So I'm going to allow these and leave [the prosecutor] to decide whether she wants to make them or not.

(17 RT 1607.)

In context, the prosecutor used the word "drained" (set forth in italics) in her opening statement as follows:

> Much of the evidence is very graphic, is very violent and is very hard to swallow. And I apologize to you, but you need to see it. And you need to know. And you need to know what happened to Patricia Gallego as all of her hopes and dreams and life was [*sic*] *drained* from her by this defendant.

(33 RT 3932-3933.)

> The first thing was that Miss Gallego's body was wet. It was not wet with blood. In fact, there was hardly any blood found in this trash can, and there was hardly any blood in Miss Gallego. [¶] To get her DNA and to use her DNA, they actually used hair from her head. The medical examiner will tell you that's rare. They normally find blood, but, in fact, all of her blood had been *drained* out.

(33 RT 3940.)

> And as you heard, it was very difficult getting any blood from Miss Gallego. Her blood was *drained*.

(33 RT 3943.)

In context, the prosecutor used the word "gagged" (set forth in italics) in her opening statement as follows:

> What we know happened to her is that she was raped. She was *gagged*. She was handcuffed. Her head received a large gash from a blunt object, a hammer-like object, a rock-like object that cracked her skull. It would not have killed her.

(33 RT 3931.)

> This trash can, of which he stuffed her naked body, except for a scarf that was used as a *gag* around her neck – and also he shaved off all of her pubic hairs. And he stuffed her in this, this

> trash can here. That was his feelings of her at that point. Her body is nothing but trash to him.

(33 RT 3931-3932.)

> That's the one direction the defendant wanted to go. And that is what he did to Patricia Gallego over that weekend. He didn't do it without any resistance. He had to handcuff her and *gag* her.

(33 RT 3935-3936.)

> She was wrapped in this plastic. Her body was completely nude, except for the *gag* around her neck. And it was wet.

(33 RT 3940.)

> She had this scarf around her neck, which you will see as – if he pulled it tight and pulled it around the mouth, it would be a *gag*. She had an indentation on her cheek caused by that.

(33 RT 3942.)

In context, the prosecutor used the word "torture" (set forth in italics) during her opening statement as follows: "The defendant raped and inflicted an enormous amount of pain and *torture* upon Miss Gallego." (33 RT 3942.)

B. The Prosecutor's Opening Statement Was Proper

"The purpose of the opening statement is to inform the jury of the evidence the prosecution intends to present, and the manner in which the evidence and reasonable inferences relate to the prosecution's theory of the case." (*People v. Millwee* (1998) 18 Cal.4th 96, 137; see also *Farnam*, *supra*, 28 Cal.4th at p. 168; *People v. Walsh* (1993) 6 Cal.4th 215, 257 ("*Walsh*".) "Nothing prevents the statement from being presented in a story-like manner that holds the attention of lay jurors and ties the facts and governing law together in an understandable way." (*Millwee*, *supra*, 18 Cal.4th at p. 137.)

Remarks made during an opening statement are not impermissible misconduct "unless the evidence referred to by the prosecutor 'was so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted.'" (*People v. Wrest* (1992) 3 Cal.4th 1088, 1108 ("*Wrest*"); see also *People v. Dykes* (2009) 46 Cal.4th 731, 762 ("*Dykes*").) This Court has also explained:

> . . . It is [ ] misconduct for a prosecutor to make remarks in opening statements or closing arguments that refer to evidence determined to be inadmissible in a previous ruling of the trial court . . . . A defendant's conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. [Citation.]

(*People v. Crew* (2003) 31 Cal.4th 822, 839; *People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

Here, in context, the prosecutor used the words "draining," "gag," and "torture" to describe the evidence that she intended to present to the jurors and to prepare them so that they could follow and more readily discern the materiality, force, and effect of the evidence. Given that Gallego's body had no blood on or in it when it was found, it was reasonable for the prosecutor to suggest the inference that blood had been drained from Gallego's body. (34 RT 4169-4170.) Additionally, appellant told Edward Lee in county jail that he drained Gallego's blood in the bathroom. (40 RT 5343.) Given that a scarf had been loosely looped around Gallego's neck and did nothing more than cover a cut on Gallego's neck, it was reasonable for the prosecutor to state the inference that the scarf had been used to gag Gallego. (34 RT 4121, 4189; 37 RT 4729, 4731, 4753.) Additionally, given that Gallego's lower back and wrist had marks that were consistent with handcuffs, it was reasonable for the prosecutor to suggest the inference that Gallego had been tortured in the colloquial sense of the word. (35 RT 4336, 4338; 37 RT 4756-4757, 4760, 4762.) In other words, the

prosecutor's statements were no more than fair comment on what she anticipated the evidence would show the jurors. The prosecutor's opening comments were based upon evidence to be presented at the trial and were within the "broad scope of permissible argument." (*People v. Chatman*, (2006) 38 Cal.4th 344, 387 "*Chatman*").)

In light of the record, the prosecutor's comments were neither deceptive nor reprehensible. (*People v. Earp* (1999) 20 Cal.4th 826, 858.) Nor were they so unfair as to deny appellant due process. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Moreover, even if the prosecutor's opening comments were improper, none of them "was so aggravated that any potential harm could not have been avoided by an admonition." (*People v. Dennis* (1998) 17 Cal.4th 468, 518.) The trial court instructed the jury that statements made by the attorneys during the trial are not evidence. (45 RT 6249; 8 CT 1770.) Also, "[a]ny inconsistency was inconsequential. Appellant was permitted to confront all witnesses and to challenge and rebut all evidence offered against him. Under these circumstances, appellant suffered no conceivable prejudice." (*Wrest*, *supra*, 3 Cal.4th at pp. 1109-1110.) Thus, any error in the admission of the statements at issue in the appellate case, was harmless.

VII. THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTION TO INTRODUCE EVIDENCE OF A SPERM CELL FOUND ON THE INSIDE OF A BANANA PEEL

Appellant contends the trial court erred and violated his constitutional rights by admitting evidence that a single sperm cell was found on the inside of a banana peel in a bag of garbage he tossed into the Petsmart dumpster. (AOB 186-189.) Appellant argues that evidence was irrelevant and its prejudicial effect outweighed any relevance. (AOB 188-189.) He asserts the evidence failed to show that he was the source of that sperm cell or how the sperm cell came to rest on a banana peel. (AOB 187-188.)

Appellant's contention is without merit because the sperm cell was circumstantial evidence that he raped Gallego. Additionally, the probative value of the evidence at issue outweighed its potential for prejudice.

A. Factual Background

On April 30, 2002, before trial commenced, the prosecutor stated she intended to introduce evidence that sperm was found on a banana peel found in the trash. She explained the evidence was relevant because appellant had listed a cucumber on his to-do list. (23 RT 2478-2479.) Defense counsel interposed an objection to the evidence on the grounds that there had been no foundation to connect the sperm to appellant or any of the charged crimes and on Evidence Code section 352. The court asked the prosecutor to find out where the banana peel was found with respect to the rest of the trash. The court reasoned that if other items related to appellant were found near the top of the trash and the banana peel was found near the bottom of the trash, the court would be inclined to exclude the banana peel from evidence. (23 RT 2479-2480.)

On May 20, 2002, the prosecutor informed the trial court that she discovered the banana peel was found in the top of a black plastic bag that was found in one of the dumpsters outside of Petsmart. In that same plastic bag were the to-do list and the "do not disturb" sign in appellant's handwriting. (25 RT 2549-2550.)

The trial court stated it was unaware the banana peel was found in the same plastic bag as the to-do list and that the only reason why it asked the prosecutor to look at the strata that the banana peel had been found was to see if there was some reasonable basis to believe the banana peel was discarded at the same time as something that was connected to appellant. The court found the fact that the banana peel was in the same plastic bag as the to-do list to be a more dramatic connection than any stratification could provide. (25 RT 2550.) Recognizing the defense's still pending relevance

objection, the court commented the banana peel was circumstantial evidence that it had been discarded by appellant with at least one other item that was circumstantially connected to the murder – the cucumber on appellant's to-do list. The court explained in pertinent part:

> As I remember the People's theory, there was a reference to a cucumber on the to-do list, which in – I imagine they expect to argue that the banana was used in connection with the victim in the way the cucumber might have been and that resulted in this.
>
> [¶] . . . [¶]
>
> If it was just a banana peel in a huge dumpster, I wasn't interested, and it wasn't going to come in. But connected more closely, the issue is closer.

(25 RT 2551.)

Defense counsel requested a hearing under Evidence Code section 402 to find out who made the determination of what garbage was relevant and irrelevant and what was done to determine possibilities of transfer from other items that might have had spermatozoa on a banana peel. (25 RT 2551-2553.)

The prosecutor responded that the defense spoke with the person who tested the banana peel, Shawn Montpetit, and had the opportunity to test the banana peel. (25 RT 2554-2555.)

After listening to additional argument by defense counsel, the trial court asked the prosecutor to articulate the proposed evidentiary use of the banana peel. (25 RT 2555-2557.) The prosecutor confirmed she intended to use evidence of the single spermatozoa found on the exterior surface of the banana peel, as defense counsel had suspected. (25 RT 2557-2558.)

The trial court subsequently decided the evidence of the single spermatozoa found on the banana peel would be admissible. In overruling

the defense's relevance and Evidence Code section 352 objections, the court explained as follows:

> Is there a preliminary fact that would be essential to establish relevance?
>
> And it is my view that there is not an additional evidentiary fact necessary to establish relevance.
>
> The fact that there is spermatozoa in the trash at all established some microscopic relevance. And I use that both in terms of size and significance of the issue.
>
> The fact that it's on a banana peel adds somewhat to its weight in an evidentiary way. In light of this – not just the reference to the cucumber, but all the totality of the evidence relevant to intent and planning in this case, the fact that there is a sperm on the banana peel is circumstantial evidence of exactly the sort of thing that [defense counsel] artfully outlined.
>
> Is it very powerful evidence?
>
> Not particularly.
>
> Is there an array of ways to attack the credibility of the evidence?
>
> Absolutely.
>
> But the fact that it's weak doesn't make it irrelevant. So I'll overrule the relevance objection.
>
> That gets me to what I think probably ought to be the heart of it. And that's the 352 issue.
>
> Is it just more trouble than it's worth, basically? More trouble because it is unduly prejudicial? Or it's going to waste way too much time? Or it's going to get confusing?
>
> I don't think it's going to be terribly confusing. I think the things we've talked about are things the jury is going to be able to handle just fine. I don't think you need to be a biochemist to understand the basic concept we're talking about here.

> I don't think it's going to take an inordinate amount of time, either, although, certainly, the defense is going to be given every opportunity they wish to provide the factual basis they want for their ultimate interpretations.
>
> And as to prejudice to the defendant, I mean, it's – what the People, I think, propose to try to prove isn't a pretty picture. And if the jury is persuaded, that's not going to be good for [appellant], but not much the prosecution tries to do in this case is going to be good for the defendant. That's the nature of the adversary system.
>
> And in light of all the other bits of evidence that are virtually uncontested that were a part of this case, frankly, it's just impossible for me to believe that this one is going to jump out and add inordinately to the overall picture.
>
> So viewing it on 352 grounds, also, I will overrule the objection.

(25 RT 2559-2561.)

On direct examination at trial, Shawn Montpetit testified he tested the banana peel that was found by the police.[26] (40 RT 5132-5133.) He identified one sperm cell on the banana peel, but he was not able to conduct DNA testing on the sperm cell because he needed at least 100 sperm cells to get a DNA type. (39 RT 5081-5082.)

On cross-examination by defense counsel, Montpetit testified he did not see any other cellular material on the banana peel, he did not find the presence of blood or semen on the banana peel, he did not notice any epithelial cells on the banana peel, he had no scientific evidence that the

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[26] The police found the banana peel in the black plastic trash bag that also contained such items as: appellant's handwritten "to-do" list; a piece of green wood; two pieces of red wood; a blue shirt; an empty plastic bottle; empty plastic containers; a pair of tweezers; a wet pink washcloth; a glass container labeled "Dazzling Gold Estee Lauder"; an empty plastic bottle labeled "Bath and Body Works Body Splash"; a pair of blue denim pants labeled "Levi's" with an inside tag labeled "Waist 29, Length 34"; and, a Stanley metal hand drill. (37 RT 4717-4718.)

sperm was necessarily appellant's, and he had no scientific evidence that the banana peel came in contact with Gallego's soft tissue such that there would have been a transfer of her epithelial cells to the surface with which she had contact. (40 RT 5158-5159.)

On redirect examination, Montpetit testified that by the time he saw the banana peel, it was black in color and on its way to being mush due to decomposition. He testified that decomposition could affect test results. (40 RT 5169-5170.)

B. The Sperm Cell Found on the Inside of a Banana Peel Was Relevant and Admissible

Evidence Code section 350 specifies that "[n]o evidence is admissible except relevant evidence." Evidence is relevant if it has "any tendency to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "'"Evidence is relevant if it tends '"logically, naturally, and by reasonable inference" to establish material facts . . . .'"'" (*People v. Lopez* (2013) 56 Cal.4th 1028, 1058 ("*Lopez*"), quoting *People v. Clark* (2011) 52 Cal.4th 856, 892, overruled on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192 ("*Rangel*").) The trial court is vested with wide discretion in determining the relevance of evidence. (*Lopez*, *supra*, 56 Cal.4th at p. 1058; *People v. Cash* (2002) 28 Cal.4th 703, 727.)

However, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) This provision "permits the trial judge to strike a careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue consumption," but also "requires that the danger of these evils substantially outweighs the

probative value of the evidence. This balance is particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744; *People v. Tran* (2011) 51 Cal.4th 1040, 1047.)

Here, the trial court properly exercised its discretion in allowing the prosecution to present evidence of the sperm cell found on the banana peel because the evidence was relevant and its probative value outweighed any potential for prejudice. The evidence was relevant because it was found in the same plastic bag that contained appellant's to-do list, which set forth items that appellant used to rape and kill Gallego and things that he did or wanted to do to her. (37 RT 4717-4722, 4725-4726.) Indeed, the to-do list included such items and things as: shaver cord, which likely was used to shave Gallego's pubic area; dish wash gloves, which likely was used to clean the apartment after appellant killed Gallego and drained her body of blood; digi cam scanner; cucumber; software for moving, altering, and enlarging photos; the long black nylon sweats, Adidas jacket, and knit cap, which were found in appellant's room; and, a five-day hiatus for appellant. The list also included such tasks as: closing all windows and locking all doors; "shave + plug a virgin"; "pussy & clenching"; "ass cheeks"; "pound 'em"; "rub your nuts;" burning Gallego's palms, which likely occurred since the palmar surface of her hands were burnt; and, "lubed-up tits & lubed-up asshole!!!". (Exhs. 59 and 60; 34 RT 4129; 35 RT 4333, 4336, 4338, 4759-4760, 4762.) The fact that the banana peel was found in the same plastic bag as the other items belonging to appellant was strong evidence indicating the spermatozoa on the banana peel belonged to appellant. Further, the fact that the banana peel was found in the same bag as the to-do list, which included a similarly-shaped cucumber, tended to suggest the banana was used for whatever sexual purpose that appellant had intended to use the cucumber for; in all likelihood, the sperm cell found on

the banana peel belonged to appellant. Hence, the evidence at issue was relevant and had strong probative value of appellant's intent to rape and kill Gallego.

Conversely, any potential for prejudice stemming from the single spermatozoa found on the banana peel was minimal in comparison to appellant's to-do list and the altered photographs of Gallego, which showed his sexual obsession with her. Likewise, the fact that his semen was found in her vagina and on her mattress carried far more prejudice than the single spermatozoa found on the banana peel. (39 RT 5072-5073, 5083-5084; 40 RT 5123-5128.) And, the admission of the evidence at issue did not necessitate undue consumption of time, confuse the issues, or mislead the jury. Montpetit's testimony regarding the sperm cell on the banana peel comprised two pages of the reporter's transcript. (39 RT 5081-5082.) The jury did not ask any question regarding this evidence. (See 7 CT 1710, 1711, 1713; 8 CT 1756, 1757, 1759, 1760, 1912, 1923, 1924, 1925, 1926, 1928, 1931.)

Based on the foregoing, the trial court did not abuse its discretion by admitting the evidence of the sperm cell found on the banana peel. Even assuming arguendo that the admission of the evidence at issue constituted error, it was harmless. The evidence amply supports appellant's murder conviction and the true findings on the special circumstance allegations. (See Argument II [rape], *supra*; Argument XII [lying in wait]; Argument XIV [financial gain], *infra*; Argument XVIII [murder]; *infra*.) (*Watson*, *supra*, 46 Cal.2d at p. 836.)

VIII. THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTION TO INTRODUCE A PHOTOGRAPH OF GALLEGO AND HER DOG INTO EVIDENCE

Appellant contends the trial court erred and violated his constitutional rights by allowing the prosecutor to present a photograph of Gallego and

her dog during the guilt phase. Appellant argues the photograph was not relevant to any contested issue and that any probative value was outweighed by the prejudicial effect of its appeal to the sentiments of the jurors. (AOB 189-192.) Additionally, appellant claims the prosecutor's allegedly calculated use of the photo to appeal to the jury's passions and prejudices constituted prosecutorial misconduct. (AOB 191-192.) To the contrary, the record shows the trial court properly exercised its discretion in allowing the prosecutor to present the only photograph of Gallego that could be enlarged without being blurry. Moreover, any error in the admission of the photograph was harmless.

A. Factual Background

Before trial, defense counsel Dawnella Gilzean interposed an objection to the use of a photograph of Gallego holding her dog. The trial judge commented, "Nice-looking dog. What happened to the dog?" (32 RT 3876.) The prosecutor indicated that the dog had since passed away in Brazil and that Gallego's mother had sent her the photo from Brazil. (32 RT 3876-3877.)

Defense counsel subsequently clarified the defense position as follows:

> . . . It's not – that [the] photograph should not necessarily be admitted because I think that the – the photograph becomes relevant given other photographs that have been admitted in relationship to morphing, et cetera, relating to photographs of Miss Gallego.
>
> I also know that there are a number of photographs available within the evidence from her passport photographs. There's a very large number, as a matter of fact. Some of those photographs where the subject matter of the morphing that was done. There are other photographs that were taken of Miss Gallego that have been morphed.

> So I – there are photographs of her which actually have relevance because they are sort of the "before" photographs relating to some of the morphing-type pictures that are being admitted. And I believe that it would be appropriate for this court to select one of those as being relevant and admissible because, clearly, it has an evidentiary value to the case.
>
> However, a photograph of Miss Gallego holding her dog, which is – neither one of them have been morphed at any point in time, as depicted in that photograph. In that case, it would not appear to be appropriate. . . .

(32 RT 3877.)

The prosecutor explained that she could not enlarge the photographs that were morphed by appellant without distorting the photographs. The prosecutor further explained that Gallego's mother created some poster boards of photographs and the prosecution wanted to use a prettier photo of Gallego but that they could not enlarge the photo without there being any distortion. The photo of Gallego holding her dog was only one photo out of a series of poster boards that the prosecution enlarged. The prosecutor stated that the photo of Gallego holding her dog was not an "overly-glamorous shot" of Gallego, that it was one photo presented by her family, that what the jury would see throughout the trial was "much [more] dehumanizing" of Gallego, that the photo was not overly inflammatory, and that Gallego was not depicted in the photo with her entire family. The trial court asked the prosecutor if that photo was the only one that the prosecution could enlarge Gallego's face to a reasonable size without distortion, noting the size of Gallego's face in the photo was approximately eight inches by ten inches. The prosecutor explained that she selected three other photos to be enlarged and that the enlargements had big red spots on them. The prosecutor added that the person who enlarged the photo of Gallego holding her dog was not happy with the enlargement itself and indicated the enlargement was the best that he could do. (32 RT 3878.)

Defense counsel inquired whether any attempts were made to enlarge Gallego's passport photographs, which were approximately three inches by four inches. Counsel then proffered that those photographs would be more appropriate than the photograph of Gallego and her dog for admission. (32 RT 3879.)

The trial court ruled the prosecutor could present the photograph of Gallego and her dog to the jury. The court explained its rationale under Evidence Code section 352 as follows:

> There's a level at which a photograph of the victim for this purpose would become so prejudicial I would say you can't do it. I don't see anything particular about that that does that.
>
> There's a dog in there. It's an itty-bitty, cute dog. It's a nice dog. I like dogs. That's why I asked what happened to the dog. But there's nothing about that that does a 352 jump out at me. And I think the People are entitled to present a fair picture, and I don't think they should be required to blow up a relatively small passport picture to the point where it's soft and fuzzy. And so I'll allow that.

(32 RT 3879-3880.)

B. The Photograph Was Relevant and Admissible

This Court has advised trial courts to exercise care when deciding whether to admit during the guilt phase of trial photographs of a capital murder victim while alive, because of the risk such evidence "'will merely generate sympathy for the victim [ ].'" (*People v. Brooks* (2017) 3 Cal.5th 1, 56 ("*Brooks*"), quoting *People v. Harris* (2005) 37 Cal.4th 310, 331 ("*Harris*"); brackets in original.) However, the possibility that a photograph of the victim while alive will elicit sympathy from the jury does not mandate exclusion if it is otherwise relevant. (*Brooks*, *supra*, 3 Cal.5th at p. 56; *Harris*, *supra*, 37 Cal.4th at p. 331.)

Here, as in *Brooks*, *supra*, 3 Cal.5th 1, the photo at issue allowed the witnesses to identify Gallego as the person "'about whom they were testifying.'" (*Id*. at p. 56; see also *People v. Osband* (1996) 13 Cal.4th 622, 677; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1230 [upholding on similar grounds the admission of a photograph of the capital murder victim and his wife while on vacation].) Indeed, the prosecution's first witness, Gallego's father, identified his daughter as the person about whom he was testifying. (33 RT 3976.) Additionally, the photograph of Gallego was particularly relevant in light of all of the altered and sexually graphic images that appellant created of Gallego, as recognized by defense counsel. (32 RT 3877.) Thus, the photograph was relevant.

Conversely, any potential for prejudice was minimal. Notwithstanding the image of Gallego's dog in the photograph, the photograph itself was ordinary and plain. Gallego displayed hardly any emotion. (Exhibit 1.) As the prosecutor explained to the trial court, it was the only photo that could be enlarged without any substantial distortion. (32 RT 3878.)

Under the circumstances, the trial court properly exercised its discretion in permitting the photograph of Gallego holding her dog to be admitted in the guilt phase. Yet, even assuming arguendo that the court's admission of the photograph constituted error, it was harmless in light of the overwhelming evidence against appellant. (See Argument II [rape special circumstance], *supra*; Argument XII [lying-in-wait special circumstance], *infra*; Argument XIV [financial-gain special circumstance], *infra*; Argument XVIII [murder], *infra*.) Also, the altered images of Gallego created by appellant were far more prejudicial against appellant than any sympathy that could have been generated by the single photograph at issue. (See Argument II, *supra*.) (*Watson*, *supra*, 46 Cal.2d at p. 836.)

IX. THE TRIAL COURT PROPERLY LIMITED THE DEFENSE'S IMPEACHMENT OF JAILHOUSE INFORMANT EDWARD LEE'S TESTIMONY

Appellant contends his confinement and sentence are illegal and unconstitutional because the trial court improperly and unreasonably placed limitations on the cross-examination and impeachment evidence that defense counsel proffered regarding the unreliability of Edward Lee. Appellant claims this error deprived him of his rights to due process of law, effective assistance of counsel, confrontation and cross-examination, a fair trial by an unbiased jury, and the Eighth Amendment guarantee of reliability in capital determinations of guilt, death eligibility, and sentencing. (AOB 192-198.) Appellant's contention is without merit because the trial court properly limited the impeachment of Lee's testimony.

A. Factual Background

At the preliminary hearing, Detective Michael Ott testified that he was instructed to talk to Edward Lee, an inmate who was in custody at the county jail for domestic violence and being under the influence of a substance.[27] (Prelim. Hrg. RT 120-121.) Detective Ott testified Lee told him the following information: Lee was in the same jail cell as appellant for a couple of days; appellant "made a bunch of statements" that the reason why he was in jail was because he had killed someone; appellant said he killed the girl for her money; appellant said he was going to marry the girl for citizenship and she was going to pay him a large sum of money to do that; and, appellant said the girl possibly had other money that he was going to be able to transfer out of her bank account and into his bank account. (Prelim. Hrg. RT 121.)

[27] Detective Ott could not recall who gave him the instruction. (Prelim. Hrg. RT 120.)

Detective Ott testified Lee stated appellant also talked about initially trying to burn the girl's fingertips but the smell was too unpleasant even though he wore a mask and used aftershave or deodorant-type stuff and so he ended up cutting the girl's fingertips off with bolt cutters. (Prelim. Hrg. RT 121.)

Detective Ott testified that Lee further stated appellant disclosed the following to him: appellant went ahead and killed Gallego because he wanted all of her money; appellant initially was going to get $2,000 for the citizenship arrangement; when it was mentioned that Gallego might have $11,000 or $12,000 in her savings account, appellant was going to transfer the money; and, appellant was going to kill Gallego to get that money. Lee told Detective Ott that appellant specified: "'Yeah, he was going to get two grand for the citizenship, but he looked at it as though he could get all of it if he just went and killed her.'" (Prelim. Hrg. RT 122.)

Prior to the trial, defense counsel Dawnella Gilzean indicated to the prosecutors that the defense wanted to impeach Lee with his prior criminal history. (38 RT 4933-4934.) Counsel noted that in January of 2002, Lee pled guilty to possession of cocaine and false representation of identification to a peace officer and admitted he had two prior strike convictions for robbery and burglary. (38 RT 4935-4936.) Counsel stated Lee was convicted of the robbery and burglary in August of 2000. Counsel indicated she was seeking to admit Lee's admission of untruthfulness to the peace officer, which was the crime of moral turpitude, and not the conviction itself. (38 RT 4936.)

Additionally, defense counsel informed the trial court that when Detective Ott interviewed Lee in August of 2000, Lee had pled guilty to and was in custody for violation of a restraining order (Pen. Code § 273.6) and being under the influence of a controlled substance (Health & Saf. Code, § 11550). (38 RT 4936-4937.) Counsel explained that Lee's mother,

Annie Lee, confirmed she had the restraining order issued against Lee because Lee had been physically abusive with her and threatened to kill her, which was essentially a violation of Penal Code section 422. Counsel clarified that Lee did not have a Penal Code section 422 conviction but she was arguing his underlying conduct was admissible for impeachment purposes. (38 RT 4937.) Counsel added that she had Annie Lee, as well as the police officer who took statements from Annie Lee, ready to testify at trial in case Lee denied his conduct. (38 RT 4938.)

Defense counsel also noted that Lee had a 1990 felony conviction for possession for sale of narcotics. (38 RT 4938.)

Defense counsel summarized the items that she intended to use for impeachment purposes in the event that Lee testified: robbery conviction (July 27, 1967); burglary conviction (July 27, 1967); possession for sale conviction (May 6, 1990); admission of conduct involving a criminal threat (Pen. Code, § 422) against his mother (as set forth in the February of 2002 probation report); admission regarding the use of rock cocaine from 1975 until January of 2002; admission regarding use of drugs in August of 2000; conduct underlying a misdemeanor conviction for the willful infliction of corporal injury (Pen. Code, § 273.5) (July 16, 1993); and, conduct underlying a conviction for false representation of identification to a peace officer (Pen. Code, § 148.9) (January of 2002). (38 RT 4938-4943.)

The trial court ruled the defense could impeach Lee with his Penal Code section 148.9 conviction (false representation of identification to a peace officer) if he denied the underlying conduct. (38 RT 4946-4947.) The court ruled the defense could also impeach Lee with the conduct underlying his August of 2000 violation of the restraining order against him (Pen. Code, § 273.6), as well as the incident that gave rise to the restraining order (Lee breaking a door, pushing his stepfather, and pouring coffee on his stepfather). (38 RT 4957-4960.) In addition, the court ruled the defense

could impeach Lee with his 1993 Penal Code section 273.5 misdemeanor conviction for the willful infliction of corporal injury and 1990 conviction for the possession for sale of narcotics. (38 RT 4960-4961.)

Defense counsel argued Lee's 1967 robbery and burglary convictions remained relevant because Lee was facing a Three Strikes sentence when he provided information to Detective Ott in August of 2000 and was hoping he could receive some relief from a potential Three Strikes sentence by providing information to Detective Ott. (38 RT 4962-4966.) The trial court concluded the 33 years that had elapsed between the 1967 convictions and Lee's next conviction in 1990 to have been enough time to make the 1967 convictions irrelevant. The court found the 1967 convictions were so old that they were irrelevant. (38 RT 4971-4972.) The court explained:

> If the defense comes up with some basis to legitimately argue that [Lee] was trying to bargain away a Three-Strikes problem, then I'm back with the defense side, probably, because that's a whole independent reason for using this.
>
> It's not going to the fact that he committed these crimes, but it would go to the fact of his current situation, what he would be trying to bargain away. I'm not hearing any basis to conclude that. I'm not going to allow the robbery or the burglary from 1967 at this point.

(38 RT 4971-4972.)

The trial court further stated defense counsel would be permitted to cross-examine Lee about what expectation he might have had and ask him about any drug use at or about the time that appellant made the statements to him. (38 RT 4972-4973.)

At trial, Lee testified on direct examination that, in August of 2000, he met appellant while he was in county jail for being under the influence of drugs. (40 RT 5330-5332.) Lee testified that appellant told him the following: appellant was in custody for killing a girl from Brazil; the girl wanted appellant to marry her for $2,000 so that she could get citizenship;

the girl had about $12,000 to $15,000 in the bank and so appellant figured why get the $2,000 when he could get rid of her and get all of her money; appellant drained the girl's blood in a bathroom; appellant cut the girl's fingers off with bolt cutters to avoid her being identified and bagged them up; and, appellant loaded the girl's body in a truck and tried to dump the body in Carlsbad but he was startled by a light that was turned on. (40 RT 5332-5343.)

On cross examination by defense counsel, Lee testified as follows. He was not certain if he was in custody for violating a restraining order when he spoke with Detective Ott in August of 2000, but he did plead guilty to violating a restraining order on August 22, 2000. (40 RT 5348-5350.) Lee lied to a police officer about his name on January 6, 2002. (40 RT 5353-5354.) The last time that Lee used illegal drugs before he was booked into county jail was the day before he was arrested. (40 RT 5355-5356.) In July of 1990, Lee pled guilty to the possession of rock cocaine for sale. In the summer of 1993, he engaged in conduct constituting battery resulting in an injury upon a cohabitant. He committed an act of spousal abuse in 1993, but he did not hit his girlfriend with a bottle of beer in August of 2000. (40 RT 5357.) He did not threaten his mother or her husband in March or June 2000. (40 RT 5359.)

B. The Court Allowed the Defense to Impeach Lee with All of His Prior Convictions with the Exception of Two That Were So Remote in Time

A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352. (*Clark, supra*, 52 Cal.4th at p. 931; *People v. Wheeler* (1992) 4 Cal.4th 284, 290-296 ("*Wheeler*").) "[T]he admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral

turpitude. Beyond this, the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad." (*Wheeler, supra*, 4 Cal.4th at p. 296, fn. omitted.) "When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effects its admission would have on the defendant's decision to testify." (*Clark, supra*, 52 Cal.4th at p. 931.)

Because the trial court's discretion to admit or exclude impeachment evidence "is as broad as necessary to deal with the great variety of factual situations in which the issue arises" (*People v. Collins* (1986) 42 Cal.3d 378, 389), a reviewing court ordinarily will uphold the trial court's exercise of discretion. (*Id.*; see *People v. Hinton* (2006) 37 Cal.4th 839, 887-888.)

Here, the trial court properly exercised its discretion in precluding the defense from impeaching Lee with his 1967 burglary conviction or his 1967 robbery conviction. Those two prior convictions were too remote in time. Indeed, 33 years separated them from Lee's next conviction. (38 RT 4971-4972.) Moreover, their admission would only have been surplus since the court had already permitted defense counsel to impeach Lee with virtually every other item on his criminal history, as requested by counsel: his 2002 conviction for false representation of identification to a peace officer; his 2000 violation of a restraining order, as well as the incident giving rise to the restraining order; his 1993 conviction for the willful infliction of corporal injury; and, his 1990 conviction for the possession for sale of narcotics. (38 RT 4938-4943, 4946-4961.) Notwithstanding the court's ruling on those two 1967 convictions, the court allowed defense counsel to bring them to the court's attention for reconsideration if counsel found a basis to argue Lee tried to negotiate away a Three Strikes sentence

with those two 1967 convictions. (38 RT 4971-4972.) Thus, the court gave the defense team ample latitude to impeach Lee with his prior convictions. Contrary to appellant's contention, the court neither erred nor violated his constitutional rights in limiting the impeachment of Lee.

Even assuming arguendo that the trial court erred in precluding the defense from impeaching Lee with his two 1967 convictions, the error was harmless because two additional 1967 convictions would not have changed the outcome. Indeed, as discussed above, defense counsel had already examined Lee about his lengthy criminal history. (38 RT 4938-4943, 4946-4961.) Additionally, the evidence against appellant was overwhelming. (See Argument II [rape], *supra*; Argument XII [lying in wait], *infra*; Argument XIV [financial gain], *infra*; Argument XVIII [murder], *infra*.) Thus, any error was harmless. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

X. THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTION TO SHOW A WITNESS A PHOTOGRAPH THAT WAS TAKEN DURING THE TOOL MARK EXPERT'S EXAMINATION OF GALLEGO'S BODY

Appellant contends the trial court erred and violated his constitutional rights by permitting the prosecution to show witness Marilyn Powell a photograph that was taken during tool mark expert Dr. Norman Sperber's examination of Gallego's body. The purpose of showing Powell the photograph was to see if she recognized the handcuffs that she had seen appellant use before. (AOB 198-201.) Appellant alleges the photograph was highly inflammatory and used to inflame the witness and jurors. (AOB 199.) The trial court properly exercised its discretion in allowing the prosecution to show Powell the photograph at issue.

A. Factual Background

Prior to Powell's testimony, defense counsel Richard Gates indicated to the trial court that the prosecutor intended to show Powell an autopsy

photograph of Gallego with handcuffs on her, a photograph that was taken during Dr. Sperber's examination of Gallego's body. (41 RT 5402.) Counsel objected to the use of the photograph on the grounds of relevance and Evidence Code section 352, arguing that appellant never handcuffed Powell, Powell never observed appellant with handcuffs, and there was no relationship to any issue that Powell could testify vis-à-vis the photograph. (41 RT 5402-5403.)

The prosecutor responded that Powell had described appellant's handcuffs to her because Powell saw them numerous times on appellant's bike. According to Powell, appellant used the handcuffs to lock his bike outside of her house or he kept them in his backpack if he brought his bike inside her house. (41 RT 5403.) The prosecutor proffered that Powell would describe the handcuffs, specifically that they were made of heavy metal and had a chain. (41 RT 5404.)

After listening to additional argument presented by defense counsel (41 RT 5404-5407), the trial court ruled the photograph of the handcuffs on Gallego's body, as taken during Dr. Sperber's examination of Gallego's body, could be shown to Powell. (41 RT 5408-5409.) The court reasoned as follows:

> The People have evidence that provides a legitimate basis for them to argue – and they will argue – that she was handcuffed.
>
> The defense has responded to that . . . completely appropriately, but the appropriate response has focused on a couple of things, one, emphasizing that no one knows what the handcuffs actually looked like and that these were sort of random handcuffs and they had no basis to imagine that these were like the handcuffs that were used and, separately, by raising the legitimate question whether defendant ever actually had handcuffs and have asked a number of people, "Did you ever see handcuffs? Did you ever see the bike and the bike locked by handcuffs?"

> Those issues are all raised. We now apparently have a witness who's actually seen the handcuffs, that is going to testify to having seen handcuffs connected with Calvin Parker, having seen them on multiple occasions and is the first one who – that I'm aware of in the case, first witness who's in a position to look at the disputed handcuffs that were used in the experiment and say, "Yeah, those look like the ones he had."
>
> One of the variations we heard discussed was whether there was a hinge or chain between the cuffs. And she could testify to that. That certainly would make a difference as to how the cuffs orient and how they would lay.
>
> I think that's all relevant. And on the question of whether we ought to use one of my bailiffs' handcuffs or use the picture, what's in dispute centrally here is whether the demonstration or the experiment that happened at the medical examiner's office is legitimate.
>
> And the handcuffs in the picture are the ones that were – were used in that experiment.
>
> And so I think the real central question is do those handcuffs that were actually used and seemed to fall on the marks on the victim's body – do those look like the handcuffs that were actually attributed to the defendant?
>
> So I think it's legitimate to use the photograph. The photograph's already been displayed to the jury.

(41 RT 5407-5409.)

To avoid undue shock to Powell, the trial court agreed with the prosecutor that it would be prudent for the prosecutor to show Powell the photo in advance of Powell's testimony. (41 RT 5409.)

During the trial, Powell testified she saw appellant use handcuffs two to three times a week, whenever he went to her house from April to August of 1998. Appellant used the handcuffs to lock his bicycle outside of her house; and, when he brought his bicycle inside her house, he kept the handcuffs inside his backpack. (41 RT 5459.) Powell described appellant's handcuffs as similar to those used by the police – "big, heavy,

strong, silver, heavy ones." Powell testified appellant's handcuffs also had a chain in between them. (41 RT 5460.) When the prosecutor showed Powell the autopsy photograph that was taken during Dr. Sperber's examination of Gallego's body, People's Exhibit 62, Powell recognized the handcuffs depicted in the photograph and testified the handcuffs appeared to be similar to the type of handcuffs that appellant had. (41 RT 5460-5461.)

B. The Photograph Was Relevant and Admissible

As discussed above in Argument V, *supra*, a trial court has broad discretion to admit photographs under Evidence Code section 352. The court's decision to admit photographs will be upheld on appeal unless the prejudicial effect of the photographs clearly outweighs their probative value. (*Duffy*, *supra*, 58 Cal.4th at p. 557; see also *Burney*, *supra*, 47 Cal.4th at p. 243; *Riel*, *supra*, 22 Cal.4th at p. 1193; *Ochoa*, *supra*, 19 Cal.4th at p. 415.) A court abuses its discretion only when its ruling exceeds the bounds of reason. (*Kipp*, *supra*, 18 Cal.4th at p. 371.)

Here, the trial court properly exercised its discretion in allowing the prosecutor to show Powell the photograph of the handcuffs on Gallego's body since appellant's defense was that he did not handcuff Gallego. (See 46 RT 6349.) The probative value of the photograph at issue was high because the handcuffs depicted in the photograph lined up with the injuries and marks on Gallego's lower back and wrist. (35 RT 4333, 4336, 4338; 37 RT 4756-4760, 4762.) Additionally, as Powell testified, the handcuffs shown in the photograph at issue were very similar to the handcuffs owned by appellant. (41 RT 5460-5461.) Conversely, any potential for prejudice was minimal. The jury had already seen the photograph at issue. (37 RT 4758; 41 RT 5409.) Because the probative value outweighed any potential for prejudice, the photograph was admissible under Evidence Code section

352. Thus, the trial court did not err or abuse its discretion in allowing the prosecution to show the photograph to Powell.

Even if the trial court had not allowed the prosecution to show the photograph to Powell, it would not have made a difference in Powell's testimony because Powell knew about appellant's relationship with Gallego, Powell knew Gallego was dead, and Powell had described appellant's handcuffs. (41 RT 5459-5460, 5464-5466.) Additionally, the evidence amply supports appellant's murder conviction and the true findings on the special circumstance allegations. (See Argument II [rape], *supra*; Argument XII [lying in wait], *infra*; Argument XIV [financial gain], *infra*; Argument XVIII [murder], *infra*.) Thus, any error committed by the court in allowing the prosecution to show the photograph at issue to Powell was harmless. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

XI. THE TRIAL COURT PROPERLY PRECLUDED THE DEFENSE FROM EXAMINING A POLICE DETECTIVE ABOUT HIS ALLEGED DEVIATIONS FROM STANDARD POLICE PRACTICES IN OTHER CRIMINAL MATTERS

Appellant contends the trial court erred and violated his constitutional rights by precluding defense counsel from examining Detective Michael Ott about his three alleged instances of deviations from standard police practices in three other matters. (AOB 202-208.) Those three other matters were: *People v. David Westerfield* (San Diego Court No. SCD 165805), a criminal matter that was being tried in the same courthouse at the time; the Reginald Curry matter, a matter in which an arrest warrant affidavit prepared by Detective Ott purportedly overplayed the certainty of the alleged eyewitness identification; and, the Zavala matter, a matter in which a suspect interview purportedly was not videotaped in its entirety but Detective Ott's police report said it was. (AOB 202-203.) Appellant's contention is without merit. As discussed below, the examination of such alleged deviations from standard police practices in other criminal matters

would have only led to irrelevant and inadmissible evidence. Additionally, such examination would have resulted in a substantial danger of undue prejudice, confused the issues, and misled the jury.

A. Factual Background

During the presentation of the defense case in the guilt phase, defense counsel Richard Gates told the trial court that the defense intended to examine Detective Ott about his alleged deviations from standard police practices in the following matters: the Westerfield case, wherein Detective Ott purportedly attempted to interview a represented individual who was in custody for a homicide; the Reginald Curry case, wherein an arrest warrant affidavit allegedly overplayed the certainty of the eyewitness identification; and, the Zavala case, wherein Detective Ott stated he videotaped the entire interview of a suspect but the beginning of the videotaped interview was missing. (42 RT 5735-5737.) Counsel alleged Detective Ott knew the facts of the instant case, briefed Edward Lee about this case, and then took a statement from Lee. Counsel added that even though Detective Ott's entire interview of Lee was audiotaped, Detective Ott controlled the recording and Detective Ott was alone with Lee. (42 RT 5737-5738.)

The trial court inquired whether defense counsel had a substantive basis for the allegations that they intended to make. Counsel stated appellant denied making the statements that Lee said appellant made to him while they were in custody. The court asked whether Detective Ott was going to testify that he did not brief Lee on the facts of this case. Counsel responded that would be a reasonable assumption. Counsel stated the defense did not have any other witness who would testify that Detective Ott briefed Lee on the facts of this case. (42 RT 5738.)

When the trial court asked if there was any gap in the audiotape recording of Lee's interview, defense counsel stated there was none. The

court noted that the Zavala matter was distinguishable because the recording in the Zavala matter had a detectable gap. (42 RT 5738.)

Defense counsel then commented that there was a detectable gap in the videotape of Detective Ott's interview of appellant. (42 RT 5739.) When the trial court inquired what counsel proposed to do, counsel stated he intended to call Detective Ott to testify that Detective Ott and Detective Tomsovic interviewed appellant and that Detective Ott later visited Lee by himself and obtained statements from Lee. (42 RT 5739-5741.) Counsel further stated he planned to confront Detective Ott with Detective Ott's alleged deviations from established police practices to show Detective Ott's alleged dishonesty. (42 RT 5741.)

The trial court sought more details about Detective Ott's involvement in the Reginald Curry case. Defense counsel recalled that Detective Keyser handled a lineup and informed Detective Ott that a witness had made a tentative identification from the lineup but Detective Ott told Detective Keyser to say that a positive identification had been made by the witness. Counsel added that when Detective Ott was confronted with the difference between what he was told and what appeared on the arrest warrant, Detective Ott said something to the effect that they would say they got a positive identification when they got a tentative identification, that he would have done the same thing if he had to do it all over again, and that this was his practice. (42 RT 5741-5743.)

When the trial court inquired about the Zavala case and whether there was an offered explanation for the gap in the taped recording, defense counsel stated there was no offered explanation because the case was settled on the day of the trial. (42 RT 5744-5745.)

Addressing the videotaping of appellant's statement, the prosecutor indicated she was not planning to introduce appellant's statement into evidence in the guilt phase. (42 RT 5745.) The prosecutor noted there was

an audiotape of the interview but that Detective Tomsovic, and not Detective Ott, was the person who was controlling the tape recorder during the interview. (42 RT 5747.) The prosecutor argued the proffered evidence was irrelevant because there was nothing to indicate there was any discussion between Lee and Detective Ott. In addition, the prosecutor stated the three other alleged instances of deviations from police practices would create a separate sideshow of Detective Ott talking about his interview of Lee since Lee said he did not have any information ahead of time and that when Lee told Ott everything he knew, the interview was audiotaped. (42 RT 5748-5749.) The prosecutor also reminded the court that it had previously reviewed Detective Ott's file and found nothing that needed to be turned over in discovery. (42 RT 5751-5752.)

When the trial court asked the prosecutor if she had talked to Detective Ott about this matter, she stated that Detective Ott made clear he did not tell Lee anything about this case. (42 RT 5752.) The prosecutor added that Detective Ott stated he turned on the tape recorder, waited for Lee to walk into the interview room, and identified himself to Lee. (42 RT 5752-5753.) The prosecutor argued there needed to be affirmative evidence of misconduct by Detective Ott in the instant case before the defense could introduce character evidence to show Detective Ott was the type of person who might engage in such conduct. (42 RT 5753-5754.) The prosecutor objected to the defense's proffered evidence on the grounds of relevance and Evidence Code section 352. (42 RT 5753.)

The trial court indicated there needed to be some type of misconduct or impropriety in the instant case before the defense could bring in character evidence to suggest the likelihood of misconduct by Detective Ott

in the instant case. (42 RT 5761.)[28] The court questioned the propriety of calling Detective Ott as a witness merely for the purpose of presenting character evidence to suggest the likelihood of misconduct by him. (42 RT 5762-5763.)[29]

After listening to additional comments by defense counsel, the trial court asked counsel whether counsel was agreeing there must be evidence of misconduct by Detective Ott in the instant case but counsel thought he had such evidence. Counsel responded affirmatively. (42 RT 5763-5767.)

The trial court asked the prosecutor whether there was any evidence of Detective Ott providing information to Lee. The prosecutor, Ms. Daly, said she did not have any evidence. (42 RT 5767-5768.) Her colleague,

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[28] The trial court stated in pertinent part:

> And that is, it's my sense that either as a result of some independent legal rule that I'm unaware of or more probably as an application of principles of relevance or 352, which is argument from the People, there needs to be some indication of the misconduct, the target misconduct in this case, before you ought to be able to bring in character evidence to sort of bolster the likelihood that that misconduct occurred.

(42 RT 5761.)

[29] The trial court inquired:

> And I guess what I'm asking here – what I've been trying to ask is, unless you have some independent basis to believe that something bad happened here, something improper happened here, is it legitimate to impeach [Detective Ott], when you're putting him on just for the purpose, essentially, of establishing that this is kind of a bad guy?
>
> And if he says anything, Ladies and Gentlemen, you ought to believe probably the opposite is what really happened. And, in fact, we, the defense, want you to believe the opposite.

(42 RT 5762-5763.)

Mr. Bowman, informed the trial court that he spoke with Lee and that he did not recall Lee saying Detective Ott provided Lee with any information about the case. (42 RT 5768-5770.) Mr. Bowman added that Lee testified to the jury that he had not heard anything about this case and that the defense had every opportunity to question Lee about what Detective Ott told him about the case. (42 RT 5770.)

After both parties submitted, the trial court sustained the prosecution's objection to the defense's examination of Detective Ott about alleged deviations from standard police practices. The court reasoned that unless there was some independent evidence of misbehavior that took place in the instant case, it would be irrational to allow a jury to speculate and base a conclusion on what appeared to be nothing more than character evidence. (42 RT 5776.) The court explained, "[I]t seems to me that it is speculative then to use character evidence to show that misconduct occurred if there is no independent evidence of misconduct occurring." (42 RT 5777.) The court continued to explain:

> I would think that the character – I'm actually not confident enough to say that it is irrelevant. I'm not sure enough of the legal analysis there, but I think that's a rational conclusion, to say that it's irrelevant, irrelevant enough to show that his character is consistent with misbehavior where there's no actual evidence of misbehavior.
>
> I'm more confident to say that, even if you can find some relevance, it is so speculative – that is, to invite the jury to draw a conclusion about current behavior based solely, completely, entirely on prior behavior – that I think 352 would and should bar it.
>
> So it comes back to the question where there is some evidence from which we can draw a conclusion that there was some misbehavior here. I'm hearing that may be yes and may be no in this tape.

> And maybe you folks ought to go back and listen to the tape again, but at this point I don't have that tape in front of me. And I don't have any evidence or any offer of evidence that would seem to independently suggest some misbehavior as to the issue you focused on, which is Lee.
>
> I'm hearing an offer of evidence – offer of a gap as to another interview with the defendant, but that is best seen, I think, as further evidence, further character evidence for other prior behavior by – by Detective Ott.
>
> And the target evidence here is the question of whether Ott spilled the beans to Lee so that Lee could then put the words in the defendant's mouth.
>
> So I'm mindful of this being important to the defense, but it's my view that, without some actual evidence of the misbehavior, I should not allow this evidence of prior misbehavior just to show that, well, he's the kind of guy that would do it. And, therefore, even though we don't know whether it happened here, it probably did, because if his hands are on it, something bad must have happened.
>
> I think that would be improper evidence. Based on this evidence, I'll sustain the objection to it.
>
> I'm not closing the door if you find some evidence.

(42 RT 5777-5778.)

B. The Detective's Alleged Deviations from Standard Police Practices Were Irrelevant

Evidence must be relevant to be admissible, and all relevant evidence is admissible unless otherwise excluded. (Evid. Code, §§ 350 and 351; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1095 ("*McCurdy*"); see *People v. Loy* (2011) 52 Cal.4th 46, 62.) However, pursuant to Evidence Code section 352, a trial court may exclude otherwise relevant evidence if its probative value is substantially outweighed by the probability that its admission will be unduly prejudicial.

"The general public policy on character or propensity evidence is that it is not admissible to prove conduct on a given occasion." (*People v. Cottone* (2013) 57 Cal.4th 269, 285; accord, *People v. Falsetta* (1999) 21 Cal.4th 903, 911.) Thus, under Evidence Code section 1101, subdivision (a), "[c]haracter evidence, sometimes described as evidence of propensity or disposition to engage in a specific conduct, is generally inadmissible to prove a person's conduct on a specified occasion." (*McCurdy*, *supra*, 59 Cal.4th at p. 1095.)

On appeal, a reviewing court presumes the trial court's evidentiary ruling was correct and the defendant bears the burden of demonstrating error. (*People v. Giordano* (2007) 42 Cal.4th 644, 666.) Trial courts have broad discretion in determining the admissibility of evidence and the reviewing court reviews challenges to the admission of evidence for abuse of discretion. (*People v. Jackson* (2016) 1 Cal.5th 269, 320-321 ("*Jackson*"); accord, *People v. Cordova* (2015) 62 Cal.4th 104, 132.) Under this standard, the court's ruling "'"will not be disturbed, and reversal is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]'" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286; accord, *Jackson*, *supra*, 1 Cal.5th at p. 321; *Merriman*, *supra*, 60 Cal.4th at p. 74.)

Here, the trial court properly sustained the prosecution's relevance and Evidence Code section 352 objections to any defense examination of Detective Ott about his purported deviations from standard police practices. First, the defense had no tangible evidence that Detective Ott engaged in any misconduct or impropriety in the instant case. (See 42 RT 5735-5775.) Hence, any examination about Detective Ott's purported deviation from standard police practices would have only led to irrelevant and inadmissible evidence. Second, the admission of such evidence would have created a

substantial danger of undue prejudice, confused the issues, and misled the jury when there was no evidence whatsoever of any misconduct or impropriety by Detective Ott in the instant case. (See Evid. Code, § 352.) The admission of the evidence at issue would have invited the jury to speculate that Detective Ott engaged in some type of misconduct in the instant case based solely on allegations of prior misconduct even though there was no evidence of any misconduct. The fact that the court left the door open for defense counsel to find evidence in the instant case to re-raise the issue leaves little doubt that the court did not abuse its broad evidentiary discretion in sustaining the prosecution's objection to the defense's examination of Detective Ott about alleged deviations from standard police practices. (42 RT 5777-5778.)

Based on the foregoing, the trial court neither abused its discretion nor violated appellant's constitutional rights in precluding the defense from examining Detective Ott about the three instances of his alleged deviations from standard police practices.

Even assuming arguendo that the trial court erred in precluding the defense from asking Detective Ott about his alleged deviations from standard police practices, the error was harmless because substantial evidence supports appellant's conviction and the true findings on the special circumstance allegations. (See Argument II [rape], *supra*; Argument XII [lying in wait], *infra*; Argument XIV [financial gain], *infra*; Argument XVIII [murder], *infra*.) (*Watson*, *supra*, 46 Cal.2d at p. 836.)

XII. SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S FIRST DEGREE MURDER CONVICTION BASED ON LYING IN WAIT AND THE TRUE FINDING ON THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE

Appellant contends the evidence is insufficient to support the lying-in-wait murder conviction and the true finding on the lying-in-wait special circumstance. He further contends that special circumstance is

unconstitutionally vague and overbroad. (AOB 208-216.) Appellant argues the evidence that he requested time off from work did not show that he used the time off to wait and watch with the intent to kill Gallego, there was a substantial interruption in the alleged period of watching and waiting as Gallego continued to come and go from their apartment and worked through the evening of August 10, 2000, and he later undertook to conceal the crime, does not show a concealment of purpose beforehand. (AOB 211.) Contrary to appellant's argument, substantial evidence supports his conviction for murder based on the theory of lying in wait and the lying-in-wait special circumstance.

A. Substantial Evidence Supports the Murder Conviction and the True Finding on the Special Circumstance

A reviewing court deciding a claim of insufficient evidence determines whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The reviewing court examines the record to determine whether it shows evidence that is reasonable, credible, and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. Further, the reviewing court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Moon* (2005) 37 Cal.4th 1, 22 ("*Moon*"), quoting *People v. Catlin* (2001) 26 Cal.4th 81, 139.) The same standard applies when examining the sufficiency of the evidence supporting a special circumstance finding. (*People v. Brooks* (2017) 3 Cal.5th 1, 57 ("*Brooks*").)

The requirements of lying in wait for first degree murder under Penal Code section 189 are slightly different from the lying-in-wait special

circumstance under Penal Code section 190.2, subdivision (a)(15). This Court focuses on the special circumstance because it contains the more stringent requirements. If the evidence supports the special circumstance, it necessarily supports the first degree murder. (*Moon*, *supra*, 37 Cal.4th at p. 22.)

The lying-in-wait special circumstance requires proof of "'an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.'" (*People v. Nelson* (2016) 1 Cal.5th 513, 549 ("*Nelson*"), quoting *People v. Morales* (1989) 48 Cal.3d 527, 557; *Moon*, *supra*, 37 Cal.4th at p. 22.)

This Court has explained the three elements of the lying-in-wait special circumstance as follows. "'The element of concealment is satisfied by a showing "'that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim.'"'" (*Nelson*, *supra*, 1 Cal.5th at pp. 549-550, quoting *People v. Sims* (1993) 5 Cal.4th 405, 432-433; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1073 ("*Mendoza*"), quoting *Moon*, *supra*, 37 Cal.4th at p. 22.) With respect to the watching and waiting element, "the purpose of this requirement 'is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse. [Citation.] This period need not continue for any particular length "'of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.'" [Citation.]'" (*Mendoza*, *supra*, 52 Cal.4th at p. 1073, quoting *People v. Stevens* (2007) 41 Cal.4th 182, 202 ("*Stevens*"); brackets in original.) "'The factors of concealing murderous intent, and striking from a position of advantage and surprise, "are the hallmark of a murder by lying in wait." [Citation.]'" (*Mendoza*,

supra, 52 Cal.4th at p. 1073, quoting *Stevens*, *supra*, 41 Cal.4th at p. 202; brackets in original.)

Here, the evidence amply shows appellant concealed his purpose, engaged in a substantial period of watching and waiting for the opportune time to act, and then immediately thereafter, surprised Gallego. The record shows he had been planning a surprise attack on Gallego. He had been sexually obsessed with her for a period of time, as manifested by the altered images he created of her. He had been stealing her photographs and either cutting and pasting her heads and super-imposing them on nude images or cutting and pasting nude body parts and super-imposing them on to her photographs. (Exhs. 76, 77, 78, and 79.) He had even prepared a list of the sexual acts that he planned to do to her, the things he needed to do to surprise and attack her, and the items he needed to dispose of her body. (Exhs. 59 and 60.)

Additionally, appellant had planned to take all of Gallego's money after he killed her. He admitted this to Edward Lee in county jail. (40 RT 5334-5335.) He began checking the balance on her bank accounts as early as June 20, 2000, and collecting all of her personal information so he could transfer the money in her accounts to his account. (40 RT 5198-5201; Exhs. 67 and 68.)

Around July 23, 2000, appellant asked his LensCrafters manager for time off from work under the ruse that his mother was dying of cancer and that she had only a few days left to live. (35 RT 4459-4462, 4465, 4478-4479.) As he had requested, his manager gave him the days of August 7, 2000, to August 12, 2000, off. (35 RT 4466-4468.) Appellant even noted needing a "5-day hiatus" for himself in his to-do list. (Exhs. 59 and 60.)

Then, on or about the night of August 10, 2000, after Gallego had returned home from work, appellant locked all of the apartment doors and closed all of the windows just as he noted on his to-do list. (See Exhs. 59

and 60.) He waited until she was in her bed before he took her by surprise. He put handcuffs on her, gagged her by tying a scarf around her mouth, and shaved her pubic region. He raped her. He hit her over the head with an object, cracking her skull. And, he slit her throat several times, down to the bone. (34 RT 4121, 4189; 37 RT 4729, 4731, 4753.) His semen was found inside her and on her mattress. (37 RT 5072-5073.) Her blood was found all over her mattress, her bed frame, the carpet in her bedroom, and throughout her bathroom. (33 RT 3990, 3998, 4001-4002; 39 RT 5093-5096, 5098-5099, 5103, 5105.) The medical examiner testified that Gallego had no defensive wound on her body. (34 RT 4149.)

Simply stated, appellant concealed his purpose from everyone – his employer, his neighbors and family, and Gallego. He engaged in a substantial period of watching and waiting for the opportune time to act and, when the time was right for him to take Gallego by surprise, he attacked her. He attacked her when she was least suspecting – when she was in bed and vulnerable. In short, the evidence amply supports appellant's murder conviction under the theory of lying in wait and the true finding on the lying-in-wait special circumstance.

B. The Lying-In-Wait Special Circumstance Is Not Unconstitutionally Vague or Overbroad

Appellant contends the lying-in-wait special circumstance set forth in former California Penal Code section 190.2, subdivision (a)(15), violates the federal and state Constitutions because it fails to adequately narrow the class of persons eligible for the death penalty or provide a meaningful basis for distinguishing between those who are subject to the death penalty and those who are not. (AOB 211-215.) This Court has rejected the merits of this contention. In *People v. Casares* (2016) 62 Cal.4th 808 ("*Casares*"), this Court explained:

> As we said in *People v. Carasi* (2008) 44 Cal.4th 1263, 1310 . . . (*Carasi*), "[T]he lying-in-wait special circumstance . . . is limited to intentional murders that involve a concealment of purpose and a meaningful period of watching and waiting for an opportune time to attack, followed by a surprise lethal attack on an unsuspecting victim from a position of advantage." (See [*People v.*] *Morales* [(1989)] 48 Cal.3d [527,] 557 . . . .) Defendant acknowledges we have differentiated between the lying-in-wait special circumstance and lying in wait as a theory of first degree murder on the bases that the special circumstance requires an intent to kill (unlike first degree murder by lying in wait, which requires only a wanton and reckless intent to inflict injury likely to cause death) and requires that the murder be committed "while" lying in wait, that is, within a continuous flow of events after the concealment and watching and waiting end. ([*People v.*] *Michaels* [(2002)] 28 Cal.4th [486,] 517 . . . ; *Morales*, *supra*, at p. 558 . . . .) Contrary to defendant's argument, the lying-in-wait special circumstance is not coextensive with either theory of first degree murder; it does not apply to all murders and is not constitutionally infirm. (*Streeter*, *supra*, 54 Cal.4th at p. 253 . . . ; see *People v. Johnson* (2016) 62 Cal.4th 600, 635-637 . . . .) We reject defendant's contentions that the lying-in-wait special circumstance fails to meaningfully distinguish death-eligible defendants from those not death-eligible and is overbroad as applied to this case.

(*Casares*, *supra*, 62 Cal.4th at p. 849.)

Contrary to appellant's claim, the lying-in-wait special circumstance is not unconstitutionally vague or overbroad.

XIII. NEITHER THE JURY INSTRUCTIONS NOR THE PROSECUTION'S CLOSING ARGUMENT MISLED THE JURY ON LYING IN WAIT

Appellant contends the jury was misled as to lying in wait by the instructions and the prosecutor's argument because Proposition 18 essentially removed any meaningful difference between the lying in wait theory of murder and the lying in wait special circumstance. (AOB 216-222.) Appellant claims the application of lying in wait murder theory and

special circumstance to him amounts to strict liability for being present prior to the offense in the apartment that he shared with the victim – that the lying in wait theory of murder is supposed to be a substitute for and equivalent to premeditation and deliberation and yet extending it to all individuals who reside with the deceased victim in no way demonstrates something akin to that mental state. (AOB 220.) He alleges the application of a lying in wait theory of murder, augmented by the lying in wait special circumstance allegations, gave the prosecution "a gift" in the form of permitting the jury to bypass the requisite mental state for first degree murder. (AOB 222.) This Court has previously found the use of similar application of lying in wait murder theory and special circumstance instructions to be appropriate.

A. Factual Background

1. Motion for Judgment of Acquittal (Penal Code Section 1118.1)

Before the presentation of closing arguments, defense counsel made a motion for judgment of acquittal under Penal Code section 1118.1 to dismiss the lying-in-wait special circumstance allegation (Pen. Code, § 190.2, subd. (a)(15)), and alternatively the murder charge (Pen. Code, § 189), on the ground that the prosecution chose to use the lying-in-wait theory twice to elevate the murder to first degree and as a special circumstance allegation. (44 RT 6052-6053.) Counsel argued the prosecution failed to present sufficient evidence to support first degree murder under the lying-in-wait theory or the lying-in-wait special circumstance. (44 RT 6053.) In addition, counsel argued the temporal difference which previously existed between the lying-in-wait theory of first degree murder and the lying-in-wait special circumstance allegation was eliminated by Proposition 18, which modified the language of the

special circumstance allegation from "while lying in wait" to "by means of lying in wait." (44 RT 6053-6055.)

With respect to the premeditation for murder and lying-in-wait, defense counsel claimed the language of the jury instructions was vague on the elements of the lying-in-wait special circumstance allegation. (44 RT 6060-6061.) Counsel argued the fact that appellant lived with Gallego could result in both a finding of premeditation and a finding of the special circumstance allegation that he killed her by means of lying in wait. The trial court commented that counsel's argument sounded more like an argument that lying-in-wait was unconstitutionally vague. Counsel agreed. The court noted that the matter had been settled. (44 RT 6061.)

The trial court asked defense counsel whether the constitutionality of the lying-in-wait special circumstance allegation following Proposition 18 was the proper subject of a motion for judgment of acquittal under Penal Code section 1118.1. (44 RT 6064-6065.) Counsel argued the court was never precluded from ruling on the constitutionality of a statute at any time. (44 RT 6065.)

The prosecutor noted that the matter had already been litigated in this case in a motion to set aside the information under Penal Code section 995. (44 RT 6066.) The prosecutor then summarized the evidence demonstrating appellant killed Gallego by means of lying in wait. (44 RT 6067-6069.)

Defense counsel concluded his argument by restating his objection that the lying-in-wait theory for first degree murder was arbitrary, capricious, and overbroad. (44 RT 6069.) Counsel further stated that his objection was being asserted under federal and state constitutional grounds. (44 RT 6070.)

After taking a short recess to review the issues raised under the motion to set aside the information (Pen. Code, § 995), the trial court

commented that the constitutional argument about the lying-in-wait theory for first degree murder presented by defense counsel at the motion for judgment of acquittal (Pen. Code, § 1118.1) had not been raised previously in the motion to set aside the information. (44 RT 6072.) The court rejected defense counsel's argument that the lying-in-wait special circumstance allegation was constitutionally infirm and found there was ample evidence from which a jury could find lying-in-wait under a theory to elevate murder to first degree and find a lying-in-wait special circumstance. (44 RT 6078.) In pertinent part, the court explained its ruling as follows:

> So this is – appears, to me, to be an issue of first impression in this case. Let me deal first with the purely legal issue.
>
> And if I understand it correctly, and I think I do, it is that there is insufficient difference between lying in wait as it exists as a theory of first degree murder and lying in wait as it exists as a special circumstance to justify it becoming a special circumstance; that it defines no principled cases of cases worthy of the death penalty and those not.
>
> People vs. Edelbacher, E-d-e-l-b-a-c-h-e-r, 47 Cal.3d 983 at page 1023, expressly rejects the notion as it expressly focuses on the special circumstance. Doesn't so much compare the theory of first degree murder with the special circumstance, but it finds that lying in wait is historically dealt with as a more heinous kind of murder.
>
> It points out the fact that it – the special circumstance requires an intentional killing, thereby eliminating felony murder as a theory, and rejects the notion that it, under Furman, insufficiently distinguishes the murder at hand from first degree murders in general.
>
> Counsel cites Ceja, C-e-j-a, 4 Cal.4th 1134 and particularly Justice Kennard's dissent, which is what got me back to Edelbacher. And she grumbles about the concerns, but – that are expressed here but, essentially, relying on precedent stare decisis, votes with the majority in what is not a capital case.

Ceja is not a capital case. It's simply an examination of the concept as it exists in theory of first degree murder.

So it looks to me like I've got an issue of first impression here. I don't believe – I should have said this at the outset. I don't believe this is a proper subject for an 1118.1 motion, which I think is purely factual basis. It's designed to test the sufficiency of the People's evidence, not the sufficiency of the statutory drafting. But – and I would say that that is an independent basis to deny the 1118.1 motion on the constitutional theory.

But it seems to me that a constitutionally in-firm [*sic*] statute is constitutionally firm whenever you complain about it or whenever you address the issue. And so as an independent matter, especially since it was not raised, it seems to me at the 995, I think it's prudent to do it here and I'm going to do that.

The – as I see the issue raised here and addressed in the cases, it boils down, as I suspected earlier, to the original Furman concern. Is there any real way that is principled for us to point out to determine who is going to be subject to the death penalty and who is not?

The fact that one particular brand of first degree murder may always be a special circumstance doesn't violate that rule? If the rule became that, that all first degree murders were special circumstances cases, obviously you would have that.

But what we've got here, I believe, is three alternative ways to get to first degree murder, and the one that is being argued here is one that is historically treated as particularly heinous. That's recognized and documented in Edelbacher. And the fact that particular kind of special circumstance – or that particular kind of special murder qualifies as a special circumstance doesn't violate Furman.

It's important, I think, to note that it doesn't result in the death penalty. This is not a situation where a finding of that factor results in a death judgment. The finding of that special circumstance simply puts us into the penalty phase where the main protections required by Furman, Gregg are implemented.

We get into that penalty phase, and then there's a whole separate set of principled bases to distinguish those who get life and those who get death, and those are the 190.3 factors.

So were this a proper basis for an 1118.1 motion, I would deny it on the merits. And dealing with it as a, whether timely or untimely, motion to dismiss under constitutional compulsion, I also deny it.

Counsel also addressed an issue of there not being sufficient controls of checks and balances on the executive function. And three is not much in the way of statutory controls on the executive function here, it's true. That is so in a number of areas of the death penalty.

The decision whether to file special circumstances in the first place is a matter of discretion in the executive branch. Having filed special circumstances, the decision to seek death or not seek death is something that is given to the executive branch to decide.

I don't find any constitutional difficulty with that. If a pattern was demonstrated that was capricious or discriminatory, I think a court would have to take a look at the evidence and make decisions based on that. But I don't see any evidence either here in court or just from my general connection with the system that that is so. So there would be no basis to make a ruling based on that.

[¶] . . . [¶]

So the distinctions talked about in Ceja . . .

[¶] , , , [¶]

. . . as to lying in wait still exist as to the felony murder circumstance.

[¶] . . . [¶]

. . . It seems to me that it's constitutionally incorrect to read Furman to bar the – even the felony murder special circumstance or the lying in wait special circumstance on the theory that even if it was so as to both, that they are no different than the theory of first degree murder because the reason

underlying Furman's concern addressed the totality of the case and looked at the end result of a pool of death penalty cases and non-death cases and said, "We can't tell the difference here."

The procedures that were designed to deal with that were a combination of having to first find first degree murder and then find the special circumstance, at least in this one instance, of lying in wait. There may not be much difference between this theory of first degree murder and the special circumstance, but the machinery also includes the guided discretion of 190.3.

And that was the heart of Furman, that there must – and Gregg ultimately, that there must be both guidance and discretion, and 190.3 is at the core of that. And nothing in the similarities we've talked about here between theories of first degree murder and special circumstances undermine the power and importance of the 190.3 factors which provide separate, independent bases for distinguishing between death and life cases.

So with all of that said, the constitutional theory is overruled.

As to the facts, there are a number of the, but the requesting time off well in advance under a ruse – it wasn't just wanted a vacation. He clearly designed a ruse to get that time off. The to-do list, which may be subject to argument as to when it was written but is subject to a significant – significantly reasonable interpretation that it was written in advance, suggesting both advanced thought, planning, a significant period of waiting. The injuries suggest both concealment of purpose and surprise.

I think there's ample evidence from which a jury could find lying in wait under either theory. That is, the first degree murder theory or the special circumstance.

The motion is denied on the factual bases, as well.

(44 RT 6072-6078.)

2. Jury instructions

The trial court instructed the jury on a lying in wait theory of first degree murder with a modified version of CALJIC No. 8.25 ["Murder By Means Of Lying In Wait (Pen. Code, 189)"] as follows:

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

(45 RT 6275; 8 CT 1813.)

> The trial court instructed the jury on the special circumstance of lying in wait with a modified version of CALJIC No. 8.81.15.1 ["Special Circumstances – Murder By Lying In Wait (Pen. Code, § 190.2, subd. (a)(15))"] as follows:
>
> To find that the special circumstance referred to in these instructions as murder by means of lying in wait is true, each of the following facts must be proved:
>
> [¶] . . . [¶]
>
> One, the defendant intentionally killed the victim;
>
> And, two, the murder was committed by means of lying in wait.

> Murder which is immediately preceded by lying in wait is a murder committed by means of lying in wait.
>
> And the term "lying in wait" is defined as awaiting and watching for an opportune time to act, together with a concealment by ambush or some other secret design to take the other person by surprise, even though the victim's aware of the murderer's presence.
>
> The lying in wait need not continue for any particular period of time, provided that its duration is such as to show a state of mind equivalent to premeditation and deliberation.
>
> The words "premeditation" and "deliberation" have been defined for you previously.

(45 RT 6286-6287; 8 CT 1833.)

3. Prosecutor's closing argument

During her closing argument, the prosecutor argued the jurors could find appellant committed first degree murder in several different ways. She argued in pertinent part:

> Now, as I just told you, murder can be done in different ways. In this case the defendant committed first degree murder in three different ways.
>
> He committed it with willful premeditation and deliberation. He committed it by lying in wait, and he committed it in the commission or attempted commission of rape.
>
> As I've told you, deliberate and premeditated murder is first degree murder, and that's what we're talking here. This is a first degree murder case.
>
> "Willful" means "intentional."
>
> Did he have the intent kill?
>
> Yes.
>
> Did he manifest it in many ways?

Yes.

Did it come from careful thought?

Yes. We saw all of his planning. We saw that.

And did he consider it?

Absolutely. He not only considered how he was going to kill her but what he was going to do afterwards. He planned this whole thing out.

He began it with his LensCrafters letter. He had his to-do list, the financial information sheet. He knew exactly when would be a good time to plan that out with LensCrafters. The to-do list, the dates match up. The financial information sheet matches up for the money.

He needed two weapons to kill her. The first one wasn't good enough. The blow to the head was not good enough. It got her to stop struggling, probably. It probably knocked her out, but then he needed something to slit her throat down to the bone.

And felony murder is if you're committing a felony and you kill someone in the course of that felony. It doesn't require any premeditation or deliberation, doesn't even require malice, because you can accidentally or unintentionally kill someone.

We know this is neither an accident nor unintentional killing. But if someone's purpose is to rape someone and, during the course of that rape, maybe the person has a heart attack, then they're also guilty of felony murder.

But if you intentionally kill someone in the course of that rape, which is what he did – his intent was to rape her and kill her – that's felony murder, and it's first degree murder.

[¶] . . . [¶]

You know she had semen in her vagina. You know the semen was soaked through to the mattress. You know that it was mixed in with blood. And you've seen the pornography. And you will see it, and you will have it back there with you.

And you know that was his intent. You saw the to-do list. There's ample evidence of rape, and there's no evidence of consent.

Why would you handcuff someone? Why would you gag them?

You know that there was absolutely no interest. Patricia had zero interest in the defendant, none, whatsoever.

They were just friends. They led their separate lives. In fact, she worked. She worked two jobs. She went home and went into her room. As he told Marilyn Powell, that's what she did.

She'd come home. It's 10:00 o'clock at night. She'd go to her room. She'd go to bed. Of course, that wasn't acceptable to the defendant. Because she did that, she was a fucking bitch.

And we also know from him that there was nothing.

He tells Marilyn Powell, "there's nothing between us."

He tells Leilani. There's no indication, whatsoever, that Patricia would ever consent.

[¶] . . . [¶]

Lying in wait is very similar to premeditation and deliberation. It goes a little bit further, in that there's a waiting and watching for an opportune period to act.

And in this case the waiting and watching was when he took those times off, that he had the time taken off. And he waited sometime between the 7th and 12th to act.

And he did act. And he planned it.

And was there a design to take her by surprise? And did he take her by surprise?

Yes. She can be aware that he's there. That doesn't make a difference. That they're roommates makes no difference, whatsoever, to lying in wait.

> And it need not continue for any length of time. It's just a matter that there was a plan that shows that he had premeditation or deliberation, was what I just told you.
>
> Again, the LensCrafters letter tells you the times that he's going to wait. She didn't have defensive wounds. So we know she was taken by surprise. She didn't have the ability to fight it off, to run or anything. She was taken by surprise.
>
> And it looks most likely like she was taken by surprise in her own bed. And that's when he came upon her. She's in her own bed.
>
> His to-do list tells you that he was planning on doing this. And she suffered a severe blow to her head that would have knocked her unconscious. It wouldn't have killed her. It would have just knocked her unconscious, and we don't know how
>
> long. We don't know if she woke up from it. For her sake, you hope she didn't.

(45 RT 6320-6325.)

The prosecutor argued about the lying-in-wait special circumstance as follows:

> Lying in wait is extremely similar. There was an intentional killing of the victim. It was committed by lying in wait.
>
> And, again, it's the waiting and watching for an opportune time to act. It was concealment by ambush or some other secret design or surprise. We know that and trust that you know that. And even though the victim is aware.
>
> It's very similar to first degree murder, is the special circumstance of lying in wait.

(45 RT 6326.)

B. The Instructions Correctly Informed the Jury on Lying In Wait

Murder which is perpetrated by means of lying in wait is first degree murder. (Pen. Code, § 189; *People v. Ceja* (1993) 4 Cal.4th 1134, 1139

("*Ceja*"). "Lying-in-wait murder consists of three elements: '"'(1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage . . .' [Citations.]"'" (*People v. Russell* (2010) 50 Cal.4th 1228, 1244 ("*Russell*"), quoting *People v. Cruz* (2008) 44 Cal.4th 636, 679 [footnote omitted].) This Court has "repeatedly held that CALJIC No. 8.25 adequately conveys to a jury the elements of lying-in-wait murder." (*Russell*, *supra*, 50 Cal.4th at p. 1244; *Moon*, *supra*, 37 Cal.4th at p. 23, *Ceja*, *supra*, 4 Cal.4th at p. 1139.)

"Lying in wait does not require that a defendant launch a surprise attack at the first available opportune time. [Citation.] Rather, the defendant 'may wait to maximize his position of advantage before taking his victim by surprise' . . ." (*People v. Lewis* (2008) 43 Cal.4th 415, 510, citing *People v. Hillhouse* (2002) 27 Cal.4th 469, 501.) The "surprise attack from a position of advantage" requirement does not mean that the victim must be unaware of the defendant's presence.

In *People v. Combs* (2004) 34 Cal.4th 821 ("*Combs*"), this Court found the evidence "amply" supported the lying-in-wait special circumstance finding where the defendant devised a ruse about needing a ride to trick the victim into driving him to the desert. Defendant sat in the backseat behind the victim with cords that he had obtained earlier, waiting for an opportune time to kill her. After the victim parked the car, the defendant surprised her by placing an extension cord over her head and strangling her. While the victim struggled with the defendant, his accomplice tied the victim's hands to the steering wheel, hit her in the head with a flashlight until the flashlight broke, and eventually hit her in the face with her own jacket wrapped around rocks until the accomplice determined the victim was dead. (*Id*. at pp. 830-832, 853-854.)

Likewise, in *People v. Morales* (1989) 48 Cal.3d 527 ("*Morales*"), this Court found sufficient evidence of lying in wait where the defendant lured the victim into a car, sat behind the victim in the car, waited until the car reached a more isolated location, strangled the victim with a belt, and then beat the victim's head repeatedly with a hammer. (*Id*. at pp. 554-555.) The instructions told the jury that: the lying-in-wait special circumstance required proof of an intentional murder committed while lying in wait; lying in wait required the elements of waiting, watching, and concealment; the element of concealment could manifest itself either by an ambush or by the creation of a situation where the victim was taken unawares even though the victim saw his or her murderer; and, while concealment was an element, it was only a concealment which put the defendant in a position of advantage from which it could be inferred that lying in wait was part of the defendant's plan to take his victim by surprise. (*Id*. at p. 554.) The defendant argued there was insufficient evidence of his concealment from the victim and that the lying-in-wait instructions improperly permitted the jury to predicate a lying-in-wait finding upon a mere concealment of the defendant's purpose rather than actual concealment of his person. (*Id*. at p. 554.)

After noting the record was clear that the victim was aware that the defendant was seated behind her during the ride, this Court in *Morales, supra*, 48 Cal.3d 527, observed that cases, contrary to the defendant's position, have indicated that physical concealment from, or an actual ambush of, the victim is not a necessary element of the offense of lying-in-wait murder. (*Id*. at p. 554-555, citing *People v. Sutic* (1953) 41 Cal.2d 483, 492 [concealment in ambush unnecessary], *People v. Tuthill* (1947) 31 Cal.2d 92, 100-101 [victim aware of defendant's physical presence prior to attack], *People v. Byrd* (1954) 42 Cal.2d 200, 208-209 [defendant waited four hours in front of his former wife's home, entered it, conversed with

her, and shot her], *People v. Sassounian* (1986) 182 Cal.App.3d 361, 407 ("*Sassounian*") [concealment of defendant's purpose is sufficient], *People v. Hyde* (1985) 166 Cal.App.3d 463, 475-476 [concealment of identity, defendant being disguised as policeman], *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1007 [secret design to take victim by surprise], *People v. Ward* (1972) 27 Cal.App.3d 218, 230 [same].) This Court explained that the concealment that is required is that which puts the defendant in a position of advantage, from which the factfinder can infer that lying-in-wait was part of the defendant's plan to take the victim by surprise, and that it is sufficient that a defendant's true intent and purpose were concealed by his actions or conduct. This Court added that it is not required that the defendant be literally concealed from view before he attacks the victim. (*Morales*, *supra*, 48 Cal.3d at p. 555, quoting *Sassounian*, *supra*, 182 Cal.App.3d at pp. 406-407.)

Similar to the defendants in *Combs*, *supra*, 34 Cal.4th 421, and *Morales*, *supra*, 48 Cal.3d 527, appellant patiently waited for the perfect moment to take Gallego by surprise. He waited until she was in bed on or about August 10, 2000 – after having worked a long day and not thinking that she was going to be raped or killed by her own roommate – before he entered her room and attacked her, handcuffed her, gagged her, raped her, and killed her. (See 34 RT 4157, 4159-4160, 4162-4164, 4166-4168 [Gallego's neck wounds]; 34 RT 4171 [Gallego's cause of death was blood loss from her injuries]; 37 RT 5072 [appellant's semen was found in Gallego's vagina]; 40 RT 5123-5124 [Gallego's mattress was soaked with her blood; appellant's semen was on Gallego's mattress].) The fact that appellant and Gallego lived in the same apartment was inconsequential because appellant – like the defendants who had been sitting in the same cars as their victims and waited for the opportune moment to attack their

victims in *Combs* and *Morales* – waited for his most advantageous moment to take Gallego by surprise.

The instruction given in the instant case on the lying in wait theory of murder and the lying-in-wait special circumstance were essentially identical to those set forth in the instructions given in *Morales*, *supra*, 48 Cal.3d at p. 554-555. (45 RT 6275, 6286-6287; 8 CT 1813, 1833.) Also, the prosecutor's lying-in-wait argument with which appellant takes issue (i.e., that "lying in wait is waiting and watching for an opportune time to act, together with concealment by ambush or other design to take the person by surprise, even though the victim is aware of the murderer's presence") was not incorrect or erroneous. (See AOB 220, 45 RT 6320-6325; *Morales*, *supra*, 48 Cal.3d at pp. 554-555.)

Contrary to appellant's arguments, the jury was not misled on the lying-in-wait theory of murder or the lying-in-wait special circumstance. Appellant has not presented a persuasive reason why this Court should conclude that the lying-in-wait instructions given in the instant case were incorrect or why this Court should now require the victim to be unaware of the murderer's presence for the application of the lying in wait principles.

XIV. THE TRIAL COURT PROPERLY ALLOWED THE JURY TO CONSIDER THE FINANCIAL-GAIN SPECIAL CIRCUMSTANCE

Appellant contends the trial court violated his constitutional rights and erred by permitting the jury to consider the special circumstance of intentional murder carried out for financial gain (Pen. Code, § 190.2, subdivision (a)(1)) because the evidence was insufficient to support the special circumstance. (AOB 223-225.) Appellant accedes he obtained identity and banking information belonging to Gallego, cashed one check and attempted to cash another, and submitted credit card applications using variations of Gallego's name. (AOB 223.) He alleges the underlying crime in this case was essentially theft or identity theft, and not murder for life

insurance proceeds or murder for hire, where the homicide was essential to gain access to a financial reward. He claims there was nothing to preclude him from taking these actions while Gallego was alive. (AOB 224.) Because substantial evidence supports the financial gain special circumstance, the trial court properly allowed the jury to consider it.

As discussed above in Argument XII, *supra*, a reviewing court deciding a claim of insufficient evidence determines whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The reviewing court examines the record to determine whether it shows evidence that is reasonable, credible, and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. Additionally, the reviewing court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the judgment. (*Moon, supra,* 37 Cal.4th at p. 22; *Catlin, supra,* 26 Cal.4th at p. 139.) The same standard applies when examining the sufficiency of the evidence supporting a special circumstance finding. (*Brooks, supra*, 3 Cal.5th at p. 57.)

With respect to the financial gain special circumstance, this Court has previously explained:

> . . .financial gain need not have been a "'dominant,' 'substantial,' or 'significant' motive for the murder." [Citation.] "'[T]he relevant inquiry is whether the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain.'" [Citation.] Proof that the defendant derived pecuniary benefit from the murder is unnecessary. [Citation.] "Defendant either had an expectation of financial benefit at the time of the killing or he did not. It was for the jury to make that determination, applying a common sense, nontechnical understanding of 'financial gain.'" [Citation.]

(*People v. Sapp* (2003) 31 Cal.4th 240, 282.)

Here, the evidence amply demonstrates appellant had financial gain in mind when he planned to kill Gallego. Appellant wanted money. He told his cellmate in county jail, Edward Lee, that Gallego wanted him to marry her for $2,000 so that she could obtain United States citizenship but she had $12,000 to $15,000 in the bank and so he figured why marry her for $2,000 when he could get rid of her and obtain all of her money. (40 RT 5334-5335.) Appellant told Marilyn Powell that he had agreed to a "marriage deal" with Gallego because of the money. (41 RT 5466.) He similarly gave Charles Ijames the impression that a "marriage" with Gallego would have been a business transaction. (35 RT 4311-4312.)

Appellant even created a personal information sheet on Gallego, which included: Gallego's identification information (California driver's license number, date of birth, height and weight, and social security number); her employers and their contact information; her work hours; attorneys and their contact information; her friends and their contact information; her bank accounts and ATM card number; the addresses of her bank branches; her credit card numbers; her vehicle information and license plate information; and, her auto insurance policy number. (Exhibit 67.) On that same personal information sheet, appellant noted Gallego's bank account balances on June 20, 2000, June 28, 2000, and July 18, 2000. (40 RT 5198-5201; Exhs. 67 and 68.) On August 12, 2000, appellant tried to cash one of Gallego's checks made payable to him at a Wells Fargo Bank. (36 RT 4591-4601.) On August 14, 2000, he tried to cash another one of Gallego's checks made payable to him. (36 RT 4568-4577, 4581.) On August 15, 2000, the same day of her autopsy, appellant transferred the entire remaining balance of her savings account ($4,670.02) to her checking account, presumably so that he could cash out the account. (40 RT 5196-5197; 40 RT 5252.) Appellant also tried to take her money by getting credit cards under her name. (40 RT 5282-5289.)

In short, the record amply demonstrates appellant had an expectation of financial gain when he killed Gallego. Hence, the trial court did not err in allowing the jury to consider the financial gain special circumstance allegation.

Even assuming arguendo that the trial court erred in allowing the jury to consider the financial gain special circumstance allegation, the error was harmless because two other special circumstances – specifically, the rape and lying-in-wait special circumstances – were alleged. Furthermore, substantial evidence supports the true findings on the rape and lying-in-wait special circumstance allegations. (See Argument II [rape], *supra*; Argument XII [lying in wait], *supra*.) (*Watson*, *supra*, 46 Cal.2d at p. 836.)

XV. THE JURY INSTRUCTIONS DID NOT RELIEVE THE PROSECUTION OF ITS BURDEN TO PROVE ALL CHARGES BEYOND A REASONABLE DOUBT

Appellant contends that four standard jury instructions given at his trial, in combination with CALJIC No. 2.90 ["Presumption of Innocence – Reasonable Doubt – Burden of Proof"], relieved the prosecution of its burden to prove all charges beyond a reasonable doubt. He takes issue with the four instructions that discuss the relationship between circumstantial evidence and reasonable doubt: CALJIC No. 2.01 ["Sufficiency of Circumstantial Evidence – Generally"]; CALJIC No. 2.02 ["Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State"]; CALJIC No. 8.83 ["Special Circumstances – Sufficiency of Circumstantial Evidence – Generally"]; and, CALJIC No. 8.83.1 ["Special Circumstances – Sufficiency of Circumstantial Evidence to Prove Required Mental State"]. Appellant asserts that these four jury instructions all stated that if one interpretation of the evidence "appears to be reasonable" and another interpretation unreasonable, the jury's duty would be to accept the reasonable. Appellant argues the prosecution was aided by these repeated

instructions requiring the jury to accept as true the more "reasonable" interpretation of the facts, a standard that was purportedly below the proof beyond a reasonable doubt. In addition, appellant alleges these four jury instructions deprived him of his right to due process and a fair trial, right to be convicted only upon proof beyond a reasonable doubt of every element of the charges, right to have the prosecution carry the burden of proof, right to adequate assistance of counsel, and right to reliable and non-arbitrary determinations of guilt, death eligibility, and sentence. (AOB 229-232.)

This Court has previously rejected these claims and declined to reconsider its holdings in other decisions. (*People v. Nelson* (2016) 1 Cal.5th 513, 553-554; *People v. Capistrano* (2014) 59 Cal.4th 830, 875; *People v Jurado* (2006) 38 Cal.4th 72, 126-127; *People v. Nakahara* (2003) 30 Cal.4th 705, 714.) Appellant has not given this Court any new or persuasive reason why it should reconsider those previous holdings or rulings.

XVI. THE TRIAL COURT PROPERLY DENIED THE DEFENSE REQUEST FOR AN INSTRUCTION THAT THE PROSECUTION HAS THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT THE EVIDENCE WAS NEITHER TAMPERED WITH NOR CONTAMINATED

Appellant contends the trial court improperly denied the defense request for an instruction to the jury that the prosecution bears the burden of proving beyond a reasonable doubt that the evidence was not tampered with or contaminated. (AOB 233-235.) Appellant alleges the evidence was contaminated because medical examiner Christopher Swalwell testified he did not find any sperm on the vaginal swabs while criminalist Shawn Montpetit testified he found a sperm cell on one of the vaginal swabs. (AOB 234.) The trial court properly denied the defense request for the instruction that the prosecution has the burden of proving beyond a reasonable doubt that the evidence was neither tampered with nor

contaminated because the instruction was an incorrect statement of the law and was argumentative.

A. Factual Background

The defense requested that the trial court give the following "Chain of Custody" instruction to the jury:

> The prosecution has the burden of proving to you beyond a reasonable doubt that none of the evidence they have presented was tampered with or contaminated. You may consider any breaks in the chain of custody of any of the evidence collected, transported and thereafter evaluated in determining whether the prosecution has met their burden.

(7 CT 1748; see also 44 RT 6098.)

When the trial court asked defense counsel the reason for the proposed chain-of-custody instruction, defense attorney Dawnella Gilzean responded that criminalist Shawn Montpetit was unable to describe in detail how several items of physical evidence, including the banana peel on which he found a sperm cell and the scarf that was tied around Gallego's neck, went from one point to another. (44 RT 6098.) Defense attorney Richard Gates said the chain of custody was broken between evidence technician Tom Washington and criminalist Montpetit. (44 RT 6099.)

When the trial court asked defense counsel whether there was any authority for the proposition that the prosecution needed to show a lack of tampering or contamination beyond a reasonable doubt, defense attorney Gilzean proffered that it would be appropriate to eliminate the language of "to you beyond a reasonable doubt" in the first sentence of the proposed instruction. (44 RT 6101.) Ms. Gilzean further proffered that it would be appropriate to change the last six words of the second sentence to the effect of "in evaluating the evidence offered." (44 RT 6101-6102.)

The trial court asked the prosecutor if it was known where the vaginal swabs went between their being taken at the morgue and their being tested

by the criminalist. The prosecutor stated the testimony was that the swabs were placed in the property room. The prosecutor believed Detective Hergenroeather testified he was present when evidence technician Washington collected the evidence. (44 RT 6102-6103.) Defense attorney Gates stated he also thought the testimony was that the criminalists obtained the swabs from the property room. (44 RT 6103.) Mr. Gates subsequently stated medical examiner Swalwell found no spermatozoa on the smear but criminalist Montpetit found a usable quantity of appellant's DNA on a swab created from that same smear. (44 RT 6103.)

The trial court asked if the defense would be arguing whether there was sexual contact between appellant and Gallego. (44 RT 6103.) Defense attorney Gates thought there was testimony indicating such contact for up to a week prior to Gallego's death. (44 RT 6103-6104.) Mr. Gates added that Gallego's mattress indicated there had been such contact long before then. (44 RT 6104.) Mr. Gates acknowledged, however, that neither of those facts implicated the chain of custody issue. Nevertheless, Mr. Gates argued it was "just an interesting note" that a non-police department scientist did not observe spermatozoa when he examined the vaginal swab but a police department scientist observed spermatozoa when he observed the swab at a later date, and that it was "something that the jury should consider." (44 RT 6104.) Mr. Gates stated the prosecutor did not give the experts an opportunity to explain how different findings could be obtained from the same swab. (44 RT 6104-6105.)

After the parties submitted the matter, the trial court refused to give the requested chain-of-custody instruction. The court explained that the issue was a legitimate matter for argument but not a matter that required a jury instruction as it was not a central defense theory of the case. (44 RT 6105.)

B. The Defense's Requested Instruction Did Not Concern a Defense Theory of the Case and Was an Incorrect Statement of the Law; Additionally, the Prosecution's Burden of Proof Pertains to the Elements of a Charged Crime and Not to the Chain of Custody of Evidence

"'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.'" (*People v. Najera* (2008) 43 Cal.4th 1132, 1136 ("*Najera*").) While a trial court need not go beyond these general instructions in the absence of a request, a defendant is entitled to an instruction that pinpoints his theory of the case, if he so requests. (*People v. Gurule* (2002) 28 Cal.4th 557, 660 ("*Gurule*"). A proposed instruction may be refused, however, if it is an incorrect statement of the law or is argumentative or duplicative. (*Id*. at p. 659.) Moreover, an instruction that might confuse the jury should be refused. (*Id*.)

Here, appellant's chain-of-custody instruction did not concern a defense theory of the case. Instead, the proposed instruction focused on a piece of physical evidence, the swab test performed by Montpetit. The defense is not entitled to have specific evidence highlighted in the jury instructions. (*People v. Wright* (1988) 45 Cal.3d 1126, 1137.)

Additionally, the proposed instruction was an incorrect statement of the law. The prosecution does not bear the burden of proving to the jury beyond a reasonable doubt that evidence had not been tampered with or contaminated. The prosecution's burden of proof pertains to the elements of a charged crime and not to the chain of custody of evidence. (*Catlin*, *supra*, 26 Cal.4th at p. 134.)

Further, the requested instruction was duplicative of another jury instruction given to the jury, CALJIC No. 2.80 ["Expert Testimony—Qualifications of Expert"]. CALJIC No. 2.80 informed the jurors that: an expert opinion was only as good as the facts and reasons on which it was based; that if they found any fact had not been proved or had been disproved, they must consider that in determining the value of the opinion; that they must consider the strengths and weaknesses of the reasons on which it was based; that they should give each opinion the weight they found it deserved; and, that they could disregard any opinion if they found it to be unreasonable. (8 CT 1794; 45 RT 6263.) To the extent appellant's requested chain-of-custody instruction would have told the jury to disregard an expert opinion associated with any physical evidence that the prosecution failed to prove beyond a reasonable doubt had not been tampered with or contaminated, it was duplicative of CALJIC No. 2.80. (*People v. Lucas* (2014) 60 Cal.4th 153, 285; *Gurule*, *supra*, 28 Cal.4th at p. 659.)

In short, appellant's proposed chain-of-custody instruction was an incorrect statement of the law and was argumentative and duplicative. Thus, the trial court properly rejected the requested instruction.

Even assuming arguendo that the trial court's refusal to give a chain-of-custody instruction constituted error, it was harmless because substantial evidence supports appellant's conviction and the true findings on the special circumstance allegations. (See Argument II [rape], *supra*; Argument XII [lying in wait], *supra*; Argument XIV [financial gain], *supra*; Argument XVIII [murder], *infra*.) (*Watson*, *supra*, 46 Cal.2d at p. 836.)

XVII. THE TRIAL COURT PROPERLY REFUSED TO MODIFY CALJIC NO. 2.70

Appellant contends the trial court erred and violated his constitutional rights by refusing to modify CALJIC No. 2.70 "Confession and Admission—Defined"] to eliminate references to "confession" in a case where there was no confession. Appellant claims this alleged error suggested to jurors that they could regard statements that he made to Edward Lee in county jail as a confession. (AOB 235-238.) The gist of those statements was that there had been a contract for appellant to marry Gallego, that appellant thought he could get more money if Gallego died, and that appellant discussed matters occurring after her death with Lee. Appellant argues that those statements he made to Lee were only admissions. (AOB 236.) Appellant's contention is without merit. Because the statements that appellant made to Lee in county jail were confessions, the trial court properly refused the defense request to modify CALJIC No. 2.70.

A. Factual Background

During the conference on jury instructions, defense attorney Dawnella Gilzean suggested the first paragraph of CALJIC No. 2.70, defining a confession, be deleted. Ms. Gilzean commented that a confession acknowledged guilt whereas an admission did not acknowledge guilt. (44 RT 6124.)

The trial court asked defense attorney Gilzean which one of appellant's statements that was reported by Lee at trial fell short of an acknowledgment of guilt. Ms. Gilzean responded that question was an issue to be decided by the jury. The court commented that if the issue was one to be decided by the jury, then the court should give the jury guidance on how to decide the issue. The court explained:

> But if it's for the jury to decide, then we have to tell them how to decide it. You would leave it in if it's a legitimate inference for the jury to draw. I think it's really for me to decide whether it's something you can really call a confession.

(44 RT 6125.)

After looking at the use note for CALJIC No. 2.70, the trial court commented that it appeared the defense was objecting to the instruction on the grounds that appellant's statements to Lee were not a confession but merely an admission. The court told defense counsel that if there was a basis to make a ruling that the statements were not a confession, then the court would like to know that basis. (44 RT 6125.) After commenting that the trial court viewed appellant's statements as a confession but the defense did not view them as such, defense attorney Gilzean stated, "We'll just let it end there." (44 RT 6125.)

When defense attorney Gates requested again that references to "confession" be deleted from CALJIC No. 2.70, the trial court explained:

> And if I had some basis to conclude that this wasn't a confession, I would agree with you. And the question I've asked and haven't gotten an answer to is, "What's missing in the way of elements of the crime?" I haven't got anything on that.
>
> If you could help me out, I would be happy to rule specifically. But it looks like he pretty much confessed to everything. Homicide, planning, motive, intent.

(44 RT 6126.)

The trial court asked defense counsel if they wanted to submit on the basis of what it had just explained. Defense attorney Gates responded affirmatively, and the court stated it would give an unmodified version of CALJIC No. 2.70. (44 RT 6126.)

B. The Reference to "Confessions" In CALJIC No. 2.70 Was Appropriate Because Appellant's Statements to Jailhouse Informant Edward Lee Were Confessions

As discussed above, a trial court is required to instruct on the general principles of law relevant to the issues raised by the evidence. (*Najera*, *supra*, 43 Cal.4th at p. 1136.) The general principles of law governing the case are those principles which are closely and openly connected with the facts before the court and which are necessary for the jury's understanding of the case. (*Id*.)

While appellant was in county jail, he told Lee that he was in custody for killing a girl. He also told Lee that the girl was from Brazil, that the girl wanted him to marry her for $2,000 so that she could obtain United States citizenship, that the girl had about $12,000 to $15,000 in the bank, and that he figured why would he marry her for $2,000 when he could get rid of her and obtain all of her money. (40 RT 5332-5335.) Appellant also disclosed to Lee that after he killed the girl, he tried to hide her identity by using bolt cutters to cut the girl's fingers off but her skin was tough and he had to jerk the bolt cutters around to get her fingers to pop off, he figured that nobody would know anything about the girl since she came from another country, that he could dispose of her body and nobody would know the difference, that he bagged up her fingers after he cut them off, he tried to get rid of her body by putting her body in a truck and driving it up to Carlsbad but a bright light startled him when he tried to dump her body and he ultimately drove away, and he drained the girl's blood in the bathroom. (40 RT 5335-5343.)

In short, appellant told Lee that he killed Gallego, the reason why he killed her, and the manner in which he disposed of her body after he killed her. His statements acknowledged the commission of the charged crimes and his guilt of the crimes. Simply stated, his statements constituted a

confession. Thus, the trial court properly instructed the jury with the unmodified version of CALJIC No. 2.70. Appellant has not provided a legal basis or any case authority which would suggest that the court erred or violated his constitutional right in refusing to delete any reference to "confession" from the standard jury instruction.

Even assuming arguendo that the trial court's refusal to modify CALJIC No. 2.70 constituted error, it was harmless because substantial evidence supports appellant's conviction and the true findings on the special circumstance allegations. (See Argument II [rape], *supra*; Argument XII [lying in wait], *supra*; Argument XIV [financial gain]; *supra*; Argument XVIII [murder], *infra*.) (*Watson*, *supra*, 46 Cal.2d at p. 836.)

XVIII. ANY ERROR IN INSTRUCTING THE JURY WITH CALJIC NO. 2.15 WAS HARMLESS

Appellant contends the trial court erred and violated his constitutional rights by instructing the jury with CALJIC No. 2.15 ["Possession of Stolen Property"] at the prosecution's request. (AOB 238-239.) Appellant argues the erroneous instruction requires reversal because the jury was given a fundamentally incorrect theory of culpability as to the murder charge and it is impossible to determine if the jury relied on that theory in convicting him. (AOB 240-241.) Appellant adds that the erroneous instruction also permitted the jury to infer the elements of first degree murder solely from proof that he possessed stolen property along with slight corroboration, undercut the presumption of innocence, and lightened the prosecution's burden of proof. (AOB 246-249.) As discussed below, any error in giving the instruction was harmless.

At the prosecution's request and without any defense objection, the trial court instructed the jury with a modified version of CALJIC No. 2.15 as follows:

> If you find that a defendant was in possession of recently-stolen property, the fact of that possession is not, by itself, sufficient to permit an inference that the defendant is guilty of the crime of murder.
>
> Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight and need not, by itself, be sufficient to warrant an inference of guilt.
>
> As corroboration, you may consider the attributes of possession, time, place and manner, that the defendant had an opportunity to commit the crime charged, the defendant's conduct and his false statements, if any, and any other evidence which tends to connect the defendant with the crime charged.

(45 RT 6254-6255; 8 CT 1778; see also 44 RT 6106.)

CALJIC No. 2.15 permits an inference of guilt of a theft-related offense based on a defendant's possession of recently stolen property when the theft-related offense is corroborated by other evidence. (*People v. Montes* (2014) 58 Cal.4th 809, 875 ("*Montes*").) In 2003, following the trial in the instant case, this Court held it is error for a trial court to instruct a jury with CALJIC No. 2.15 for nontheft offenses. (*People v. Prieto* (2003) 30 Cal.4th 226, 249 ("*Prieto*"); *Montes, supra,* 58 Cal.4th at p. 876; *People v. Moore* (2011) 51 Cal.4th 1104, 1130 ("*Moore*"); *People v. Gamache* (2010) 48 Cal.4th 347, 375; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 101.) Contrary to appellant's arguments that the error is one of federal constitutional magnitude, this Court has consistently explained the error is one of state law only, subject to the miscarriage of justice test under *Watson, supra,* 46 Cal.2d at p. 836, i.e., whether the defendant has established a reasonable probability that he would have obtained a more favorable result had the error not occurred. (*Moore, supra,* 51 Cal.4th at p. 1130.)

In *Moore, supra*, 51 Cal.4th 1104, this Court rejected the defendant's three arguments that the error of instructing a jury that it could infer the defendant's guilt of murder based on his possession of recently stolen property with other slight corroboration of guilt was of federal constitutional magnitude. This Court stated that "informing the jury that it may infer defendant's guilt of murder in these circumstances did not allow [the jury] to convict defendant based on a 'fundamentally incorrect theory of culpability.'" (*Id*. at p. 1131.) This Court explained that CALJIC No. 2.15 did not alter the trial court's proper instructions concerning the elements of murder that the prosecution was required to prove beyond a reasonable doubt and that the jury was instructed it could draw merely an inference of guilt from the fact of possession with slight corroboration, which any rational juror would understand meant he or she could consider this inference in deciding whether the prosecution had established the elements of murder (and the other offenses) defined elsewhere in the trial court's instructions. (*Id*.) This Court clarified that CALJIC No. 2.15 "purported to explain to the jury its proper consideration of a particular item of circumstantial evidence in reaching a verdict on the charges; it did not alter the defining elements of those charges." (*Id*.)

Further, this Court stated in *Moore, supra*, 51 Cal.4th 1104, that even though CALJIC No. 2.15 was erroneous in applying the slight corroboration rule to the murder charge, it did not create an improper permissive inference under the federal Constitution. This Court explained:

> . . . The federal due process clause "prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." [Citation.] Because permissive inferences, as opposed to mandatory inferences, do not *require* that the jury reach a certain finding based on a predicate fact, the prosecution's

burden of persuasion is improperly diminished only if the permissive inference is irrational. [Citation.]

Although we concluded in *Prieto* that the connection between a defendant's guilt of nontheft offenses and his or her possession of property stolen in the crime is not sufficiently strong to warrant application of the slight corroboration rule, this does not mean that drawing a connection between possession and guilt is irrational. Indeed, the United States Supreme Court has acknowledged explicitly the logical connection between possession of the fruits of a crime and the possessor's guilt of that crime, even when the crime at issue is a nontheft offense. In *Wilson v. United States* (1896) 162 U.S. 613, 619-620, 16 S.Ct. 895, 40 L.Ed. 1090, the high court stated: "Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight, unless explained by the circumstances or accounted for in some way consistent with innocence. [Citation.] [A prior case] held that, on an indictment for arson, proof that property was in the house at the time it was burned, and was soon afterwards found in the possession of the prisoner, raises a probable presumption that he was present and concerned in the offence; and [another case held] that there is a like presumption in the case of murder accompanied by robbery. Proof that defendant had in his possession, soon after, articles apparently taken from the deceased at the time of his death is always admissible, and the fact, with its legitimate inference, is to be considered by the jury along with the other facts in the case in arriving at their verdict." (See also *State v. Joyner* (1980) 301 N.C. 18, 269 S.E.2d 125, 132 [defendant's recent possession of stolen property is circumstance tending to show defendant was present in the victim's apartment at the time the rape occurred, and a circumstance the jury could consider on question of defendant's guilt of larceny and rape]; *People v. Peete* (1921) 54 Cal.App. 3333, 346, 202 P. 51 [defendant's possession, shortly after a homicidal death, of articles known to have belonged to decedent, under circumstances that would justify inference of larceny, is sufficient to establish defendant's guilt, especially when coupled with defendant's false statements as to the whereabouts of missing person (decedent)].)

> We cannot say, therefore, that it would have been *irrational* for the jury here to draw an inference of defendant's guilt of the Crumb murders from his possessing their property soon after the murders when there was other slight corroboration of guilt, especially when it is likely the same person or persons who killed the victims also took their belongings. [Citations.]

(*Moore*, *supra*, 51 Cal.4th at pp. 1132-1133.)

Further, this Court explained that CALJIC No. 2.15's reference to slight corroboration did not unconstitutionally lower the prosecution's burden of proving each element of the crimes beyond a reasonable doubt because the instruction neither directly nor indirectly addressed the burden of proof and because nothing in the instruction absolved the prosecution of its burden of establishing guilt beyond a reasonable doubt. (*Moore*, *supra*, 51 Cal.4th at p. 1133, quoting *Prieto*, *supra*, 30 Cal.4th at p. 248.) "Other instructions also properly informed the jury of its duty to weigh the evidence, what evidence it may consider, how to weigh that evidence, and the burden of proof." (*Moore*, *supra*, 51 Cal.4th at p. 1133.)

Here, instructing the jury with CALJIC No. 2.15 was harmless error. As previously discussed, overwhelming evidence demonstrates appellant committed first degree murder. Indeed, appellant had a plan to kill Gallego. He began collecting all of her personal information and checking on the balance of her banking account. (40 RT 5198-5201; Exh. 67.) Then, he created a to-do list of all the items he needed to carry out his sexual fantasies with Gallego, to kill her, and to dispose of her body afterwards. (Exhs. 59 and 60.) In addition to his to-do list, appellant's altered photos manifested his obsession with Gallego. (Exhs. 76, 77, 78, 79, and 84.)

Appellant subsequently implemented his plan. Indeed, he made arrangements with his employer to take August 7, 2000, to August 12, 2000, from work. Appellant lied to his manager about needing the time off

because his mother was dying of cancer and had only a few days left to live. (35 RT 4459-4462, 4465, 4478-4479.)

Then, on or about August 10, 2000, appellant closed all of the windows in his apartment and locked the doors. (See Exhs. 59 and 60.) He waited for Gallego to return home late from work that night and go to bed, when she was unsuspecting and most vulnerable. He then entered her room and took her by surprise. He hit her on the head with a blunt object, handcuffed her, gagged her, and shaved her pubic area. He also raped her and slit her throat down to the bone. He subsequently drained her body of blood, tried to burn the palms of her hands to hide her identity, and eventually cut off her fingertips because the smell of burning flesh was too unpleasant. (See 34 RT 4121, 4128-4131, 4135-4139, 4134-4144, 4155-4160, 4162-4164, 4166-4169, 4177-4178, 4189; 35 RT 4333, 4336, 4338; 37 RT 4729, 4731, 4753, 4756-4757, 4759-4760, 4762, 4771.)

Afterwards, appellant disposed of Gallego's body by sealing it in a plastic bag, stuffing it inside a trash can, and dumping it in Carlsbad. Two women walking in a residential neighborhood in Carlsbad found the trash can with Gallego's body. (33 RT 4026-4028, 4024-4030, 4102-4104.)

Appellant also scattered Gallego's fingertips in a dumpster in the Midway area of San Diego. Ilana Ivascu saw appellant back up a U-Haul truck, park it in front of the dumpster in the parking lot of the Petsmart on Rosecrans, flick an object, later discovered to be Gallego's thumb, into a side area of the trees, throw two garbage bags into the dumpster, and then drive away in the U-Haul truck. (33 RT 4074-4076.) Landscaper Steve Gomez found one of the trash bags inside one of those dumpsters. (33 RT 4004, 4018-4019.) Inside the trash bag, he found four burnt fingertips. (33 RT 4010-4012, 4022.)

When the police and evidence technician searched the dumpster, they found rubber gloves with red stains, pieces of duct tape wrapper, wet paper

towels, finger tips that had been burned, cigarettes with brown stains that appeared to have been lit but not smoked, empty white plastic bottle labeled "Tile Action," a Home Depot plastic bag containing a clear plastic shower cap, a plastic package labeled "Dust and Protective Nuisance Masks," 18-inch bolt cutters, a plastic bag with red plastic pull tabs containing two pieces of a banana peel, a piece of green wood incense burned on one end, a pair of tweezers, two empty plastic containers, a plastic file, two pieces of redwood incense that were both burned on one end, a wet washcloth, a glass labeled "Dazzling Gold Estee Lauder," an eight ounce empty plastic bottle labeled "Bath and Body Works Body Splash" in the Freesia scent, a piece of note paper that read "Please do not disturb. Sleeping. Thanx [*sic*]," appellant's to-do list, and cologne. (37 RT 4697-4698, 4704-4715, 4717-4722, 4725-4726.)

Appellant also discarded Gallego's bloodstained mattress in Bonita. Two young girls found the mattress lying alongside the street in Bonita. (33 RT 3986-3987, 3990-3992, 3996, 3998-3999, 4001-4002.)

In the meantime, appellant continued to weave his web of lies to stave off any suspicion of Gallego's disappearance. He initiated contact with Gallego's employers, Anna Ching (the owner of the Yakimono restaurants) and Loic Vacher (the manager of Café Chloe), by calling them and lying to them about Gallego's whereabouts. He told Ching that Gallego returned home to Brazil because Gallego's mother had an accident. He asked Ching not to fire Gallego because Gallego needed her job. (36 RT 4659.) He similarly told Vacher that Gallego went home to Brazil because one of Gallego's parents was in the hospital. He even told Vacher that Gallego would be back in San Diego and that Gallego did not quit her job. (36 RT 4653-4654.)

Additionally, appellant confessed to Edward Lee in county jail that he killed Gallego. Appellant disclosed to Lee the reason why he killed

Gallego and how he disposed of her body afterwards. Appellant told Lee that a girl from Brazil wanted him to marry her for $2,000 so that she could obtain United States citizenship. (40 RT 5334.) He further told Lee that the girl had about $12,000 to $15,000 in the bank and so he thought to himself why marry her for $2,000 when he could get rid of her and obtain all of her money. (40 RT 5334-5335.) He also told Lee that after he killed the girl, he tried to hide her identity by using bolt cutters to cut the girl's fingers off but her skin was tough and he had to jerk the bolt cutters around to get her fingers to pop off. He even told Lee that that he figured nobody would know anything about the girl since she came from another country and he could dispose of her body and nobody would know the difference. (40 RT 5335-5337.) He said he bagged up the girl's fingers after he cut them off. He added that he tried to get rid of her body by putting her body in a truck and driving it up to Carlsbad. Appellant did not tell Lee where he ultimately dumped the girl's body; appellant disclosed only that he got a truck to put stuff in a dumpster and that an old lady was watching him while he was at the dumpster but he put the stuff in the dumpster anyway. (40 RT 5341-5343.)

In short, the evidence against appellant firmly establishes he committed the first degree murder of Gallego.

During her closing argument, the prosecutor focused on the aforementioned evidence showing appellant killed Gallego because of greed and sex – i.e., appellant wanted Gallego's money and appellant wanted to fulfill his sexually-sadistic fantasies of Gallego. (45 RT 6294, 6296, 6299; 46 RT 6327.) The prosecutor never argued that the jury could find appellant guilty of murder based on Gallego's mere possession of stolen property and slight corroboration of evidence. (45 RT 6293-6330; 46 RT 6442-6489.)

Furthermore, other instructions properly informed the jury of its duty to weigh the evidence, what evidence it might consider, how to weigh that evidence, and the burden of proof. (8 CT 1767-1768, 1773-1775, 1777, 1779-1789, 1791, 1794-1807, 1813, 1830-1839; 45 RT 6247-6249, 6252-6261, 6263-6272, 6275, 6284-6291.)

In view of the overwhelming evidence of appellant's guilt and the panoply of other instructions that correctly guided the jury's consideration of the evidence, there is no reasonable likelihood that appellant would have obtained a more favorable result had the trial court not instructed the jury with CALJIC No. 2.15 or limited the instruction to theft offenses.

XIX. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON VOLUNTARY MANSLAUGHTER

Appellant claims the trial court erred and violated his constitutional rights by giving CALJIC instructions on voluntary manslaughter that suggested certain mental states could "reduce" a murder to manslaughter and "excuse" malice. (AOB 249-253.) He specifically takes issue with CALJIC No. 8.40 (2001 Revision) ["Voluntary Manslaughter – Defined (Pen. Code, § 192, subd. (a))"] and CALJIC No. 8.42 (2001 Revision) ["Sudden Quarrel Or Heat Of Passion And Provocation Explained (Pen. Code, § 192, subd. (a))"]. He alleges those two jury instructions implied that murder was the default crime and that the defense had the burden of producing evidence of a lesser crime. Appellant further alleges these errors violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corollary provisions of the California Constitution by undermining his rights to due process of law, a fair trial, confrontation and cross-examination, effective assistance of counsel, and reliable and non-arbitrary determinations of guilt, capital eligibility, and sentence, and by lightening the prosecution's burden of proof. (AOB 249-253.)

Preliminarily, respondent notes that appellant failed to object to these manslaughter instructions in the trial court on the same grounds that he raises on appeal. In any event, the two standard jury instructions on manslaughter correctly stated the law and there was no risk that they confused or misled the jury.

A. Factual Background

During the discussion on jury instructions, the defense neither challenged nor requested modification of the jury instructions on manslaughter to eliminate reference to the word "reduce." (44 RT 6168-6189.)

The trial court instructed the jury with a modified version of CALJIC No. 8.40 as follows:

> A lesser included offense to Count 1 is the crime of voluntary manslaughter, a violation of section 192, subdivision (a) of the Penal Code.
>
> Every person who unlawfully kills another human being without malice aforethought but either with an intent to kill, or in conscious disregard for human life is guilty of voluntary manslaughter in violation of Penal Code section 192, subdivision (a).
>
> There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion.
>
> "Conscious disregard for life," as used in this instruction, means that a killing results from the doing of an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life.
>
> In order to prove this crime, each of the following elements must be proved:
>
> 1. A human being was killed;
>
> 2. The killing was unlawful; and

3. The perpetrator of the killing either intended to kill the alleged victim or acted in conscious disregard for life; and

4. The perpetrator's conduct resulted in the unlawful killing.

(8 CT 1820-1821; 44 RT 6278-6279.)

The trial court also instructed the jury with CALJIC No. 8.42 as follows:

To reduce an unlawful killing from murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.

The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted him were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. Legally adequate provocation may occur in a short, or over a considerable, period of time.

The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment.

If there was provocation, whether of short or long duration, but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return, and if an unlawful killing of a human being followed the provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter.

(8 CT 1822-1823; 44 RT 6279-6280.)

Regarding manslaughter, the trial court also instructed the jury with CALJIC No. 8.43 ["Murder Or Manslaughter – Cooling Period"], CALJIC No. 8.44 ["No Specific Emotion Alone Constitutes Heat Of Passion"], CALJIC No. 8.50 ["Murder And Manslaughter Distinguished"], CALJIC No. 8.72 ["Doubt Whether Murder Or Manslaughter"], and CALJIC No. 8.74 ["Unanimous Agreement As To Offense – First Or Second Degree Murder Or Manslaughter"]. (8 CT 1824-1828; 44 RT 6280-6283.)

B. The Standard Jury Instructions Correctly Informed the Jury on Voluntary Manslaughter

Appellant alleges the language of CALJIC Nos. 8.40 and 8.42 created a presumption that a killing is murder unless the defendant proved otherwise. With respect to CALJIC No. 8.42, appellant appears to take issue with the repeated use of the word "reduce." (See AOB 251-252.)

While appellant takes issue with the language of these two pattern instructions, he did not request modification of them in the trial court. "'A party may not complain on appeal that an instruction that is correct in the law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'" (*People v. Hart* (2002) 20 Cal.4th 546, 622; see also *Catlin, supra,* 26 Cal.4th at p.149; *Bolin, supra,* 18 Cal.4th at p. 328.)

Appellant has not cited any persuasive authority that these two pattern jury instructions are defective for the reasons that they purportedly made murder "the default level of offense, unless the defendant proved he did not commit murder," that they referred to the "reduction" of the offense of murder to manslaughter, or that they somehow lessened the prosecution's burden of proof. To the contrary, the standard jury instructions on manslaughter given in this case correctly stated the law. (*People v. Gutierrez* (2002) 28 Cal.4th 81, 1083, 1144; CALJIC Nos. 8.40, 8.42, 8.43,

8.44, and 8.50.) The challenged language has been employed by this Court when discussing these offenses. (See, e.g., *People v. Lee* (1999) 20 Cal.4th 47, 59 [". . . an intentional killing is reduced to voluntary manslaughter if other evidence negates malice"]; *People v. Rios*, (2000) 23 Cal.4th 450, 460-461 [sudden quarrel or heat of passion or killing in unreasonable self-defense reduces an intentional, unlawful killing from murder to voluntary manslaughter]; *People v. Lasko* (2000) 23 Cal.4th 101,108 [certain facts reduce an intentional killing from murder to manslaughter].) There was no risk that CALJIC No. 8.40 or CALJIC No. 8.42 confused or misled the jury.

Moreover, appellant's argument ignores the rule that jury instructions should be read together and not in isolation from each other. "It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.]" (*People v. Burgener (*1986) 41 Cal.3d 505, 538, disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 756.) On appeal, the issue is whether the jury understood the instructions in an erroneous way, given the entirety of the instructions and all other relevant circumstances.

This Court should also reject appellant's claim on federal constitutional grounds since it does not appear beyond a reasonable doubt that the error complained of infected the entire trial. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.) Contrary to appellant's assertion, the jury was not told that murder was the presumptive offense absent the defense's ability to prove the contrary. The trial court instructed that the burden was on the prosecution to prove the killing was murder rather than manslaughter, including proof beyond a reasonable doubt that the act which caused the death was not committed in the heat of passion or upon a sudden quarrel (CALJIC No. 8.50). (8 CT 1826; 45 RT 6282.) Further, the jury was

instructed to consider the instructions as a whole. (8 CT 1769; 45 RT 6249.) Jurors are presumed to have followed the trial court's instructions. (*People v. Waidla* (2000) 22 Cal.4th 690, 725; *People v. Mickey* (1991) 54 Cal.3d 612 689, fn.17 ["The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions"].) Considering the instructions as a whole and the trial record, appellant's arguments regarding the use of the word "reduce" in the voluntary manslaughter instructions are without merit. (See *McGuire, supra*, 502 U.S. at p. 72.)

The trial court instructed the jury, in addition to the challenged instructions, with CALJIC No. 8.50, setting forth the distinction between murder and manslaughter. That instruction also emphasized the burden on the prosecution "to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel." (8 CT 1826; 45 RT 6282.) The court further instructed the jury under CALJIC No. 8.72 that the jury must give the defendant the benefit of any doubt as to whether the crime was manslaughter or murder. (8 CT 1827; 45 RT 6282.) Finally, the trial court instructed the jury under CALJIC No. 8.74, that it had to agree unanimously as to whether any unlawful killing was murder of the first or second degree or manslaughter. (8 CT 1828; 45 RT 6282-6283.)

In light of all the instructions that were given, it is not reasonably likely that the jury construed CALJIC Nos. 8.40 and 8.42 as creating a presumption that a homicide is murder and thereby lessening the prosecution's burden of proof. The trial court neither erred nor violated appellant's constitutional rights by instructing the jury with CALJIC No. 8.40 or CALJIC No. 8.42, which correctly stated the law.

XX. THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING THE GUILT PHASE

Appellant contends the prosecutor committed numerous instances of prosecutorial error throughout the guilt phase, rendering his trial unconstitutional. Specifically, appellant accuses the prosecutor of committing the following errors: arguing during her opening statement; introducing a large quantity of pornographic material into evidence; calling Dr. Norman Sperber as a tool mark expert to testify about marks on Gallego's back and wrists; introducing photographs showing a pair of handcuffs that matched the marks on Gallego's wrists and back; presenting evidence of a single sperm cell found on a banana peel that was in a trash bag found in the garbage; referring to facts that were not in evidence to suggest more evidence existed than was presented to the jury; showing the jury a photograph of Gallego alive with her dog, a photograph of Gallego that had nothing to do with her death, and a photograph of a matter that had nothing to do with the charges; introducing the testimony of Edward Lee and insisting on limitations of the impeachment of Lee; insisting on not disclosing to the jury reasons to mistrust Detective Ott; showing Marilyn Powell photographs of Gallego with handcuffs on her; misleading the jury on lying-in-wait principles; pressing that murder was the default finding; and pressing the wrong themes during closing argument. (AOB 253-275.)

The standards governing review of prosecutorial misconduct claims are well settled. "'A prosecutor's conduct violates the federal Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.]'" (*People v. Hinton* (2006) 37 Cal.4th 839, 862 ("*Hinton*"); *People v. Morales* (2001) 25 Cal.4th 34, 44.) In such a case, reversal of the judgment is required unless the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

"'"Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under [California] law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." [Citation.]'" (*Hinton*, *supra*, 37 Cal.4th at p. 863.) A defendant's conviction will not be reversed under California law unless it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of that prosecutorial error. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

To preserve a claim of prosecutorial misconduct for appeal, a defendant must assert a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument. A failure to timely object and request an admonition will be excused if doing either would have been futile or if an admonition would not have cured the harm. (*People v. Adams* (2014) 60 Cal.4th 541, 569 ("*Adams*"); *People v. Tully* (2012) 54 Cal.4th 952, 1011 ("*Tully*").)

As discussed in detail below, appellant's claims of prosecutorial error are without merit. The prosecutor did not err, much less engage in conduct that rendered the trial so fundamentally unfair as to render the trial unfair or the conviction a denial of due process.

A. The Prosecutor Did Not Engage in Improper Conduct During Her Opening Statement

Appellant claims the prosecutor argued facts that could not be proven during her opening statement at the guilt phase. (AOB 257-259.) He complains that she argued Gallego was struck by a hammer-like or rock-like object that cracked her skull when the evidence showed only that the trauma was caused by a blunt instrument. (AOB 258; 33 RT 3931.) He complains that the prosecutor argued that Gallego was handcuffed and gagged and that he disposed of the handcuffs when there was lack of evidence as to either point. (AOB 258; 33 RT 3931, 3941, 3944.) He

further complains that the prosecutor argued Gallego's blood was drained even though there was no evidence of "intentional draining." (AOB 259; 33 RT 3943.) Last, he complains that the prosecutor argued the pornography in his home – the vast majority of which had no connection to Gallego – was evidence of his planning her murder. (AOB 259; 33 RT 3947-3948.)

As discussed above in Argument VI, *supra*, "[th]e purpose of the opening statement is to inform the jury of the evidence the prosecution intends to present, and the manner in which the evidence and reasonable inferences relate to the prosecution's theory of the case." (*Millwee*, *supra*, 18 Cal.4th at p. 137; see also *Farnam*, *supra*, 28 Cal.4th at p. 168; *Walsh*, *supra*, 6 Cal.4th at p. 257.) "Nothing prevents the statement from being presented in a story-like manner that holds the attention of lay jurors and ties the facts and governing law together in an understandable way." (*Millwee*, *supra*, 18 Cal.4th at p. 137.)

Remarks made during an opening statement are not impermissible misconduct "unless the evidence referred to by the prosecutor 'was "so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted."'" (*Wrest*, *supra*, 3 Cal.4th at p. 1108; see also *Dykes*, *supra*, 46 Cal.4th at p. 762.) A defendant's conviction will not be reversed for prosecutorial misconduct unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. (*Crew*, *supra*, 31 Cal.4th at p. 839; *Barnett*, *supra*, 17 Cal.4th at p. 1133.)

Appellant's trial counsel filed a motion in limine to preclude the prosecution from arguing in her opening statement that appellant drained Gallego's blood, gagged her by looping a scarf around her neck, and tortured her. (4 CT 797-800.) The trial court denied the motion, concluding there was no basis to preclude the prosecution from making the

comments at issue. (17 RT 1607.) The court indicated it was not aware of any authority that conclusions could not be addressed in the opening statement. The court stated "the case law has expressly said if what the D.A. says is a rational conclusion from the evidence that's going to be offered, that's okay." (17 RT 1601.) The court explained that all of the prosecutor's conclusions were conclusions that could reasonably be drawn from the evidence and that there was enough support to justify them being presented in the opening statement. (17 RT 1607.)

Here, appellant claims again that the prosecutor acted improperly by arguing during her opening statement. Contrary to appellant's claims, the prosecutor gave a proper opening statement. She told her opening statement in a story-like manner. The prosecutor told the jurors about Patricia Gallego, a hardworking young woman who shared an apartment with appellant and who initially agreed to marry him in hopes of gaining United States citizenship but eventually ended the arrangement because she was uncomfortable with it. (See *Millwee, supra,* 18 Cal.4th at p. 137.)

In her opening statement, the prosecutor did not attempt to refer to evidence that was determined to be inadmissible. In describing how appellant killed his unsuspecting roommate, the prosecutor stated Gallego was struck in the head with a "hammer-like" or "rock-like" object because the evidence indicated the injury was caused by a blunt object that reflected a point with three lines to it. While a hammer might not have been the likely cause of the injury unless it had a square head, a rock or something with a similar configuration could have caused the injury. (34 RT 4155-4156.) Also, the evidence showed Gallego had handcuff marks on her wrists and back and that the scarf tied around her neck could have been used as a gag around her mouth. (35 RT 4333-4344; 37 RT 4753.) Additionally, the evidence showed Gallego had no blood in her when her body was found and that the trash can also had no blood inside it. (34 RT

4169-4170.) Based on the evidence, the prosecutor was merely informing the jury of the evidence that she intended to present and stating the reasonable inferences related to her theory of the case. (See *Farnam, supra*, 28 Cal.4th at p. 168; *Millwee, supra*, 18 Cal.4th at p. 137; *Walsh, supra*, 6 Cal.4th at p. 257.)

In short, the prosecutor did not engage in improper conduct during her opening statement.

B. The Prosecutor Did Not Introduce Sexually Graphic Images to Inflame or Prejudice the Jurors

Appellant alleges the prosecutor introduced a large quantity of pornography that was irrelevant to the charges to inflame and prejudice the jurors. (AOB 259-260.) He claims the prosecutor introduced graphic materials of a sexual nature, repeatedly referred to them as "porn" or "pornography," and suggested they sufficed as proof of premeditation and deliberation and intent to commit rape. He claims this evidence was irrelevant to the issues and was inflammatory and prejudicial.

As discussed above in Argument II, *supra*, the sexually graphic images at issue were relevant because they were probative of appellant's intent to kill and rape Gallego, and their probative value substantially outweighed their prejudice. Thus, they were properly admitted into evidence. Because the evidence was relevant and admissible, the prosecutor did not commit misconduct. (See *People v. Hawthorne* (2009) 46 Cal.4th 67, 98 ["'Although it is misconduct for a prosecutor *intentionally* to elicit inadmissible testimony [citation], merely eliciting evidence is not misconduct.'"], quoting *Chatman, supra*, 38 Cal.4th at p. 344.) Nothing in the record suggests the prosecutor sought to present evidence that she knew was inadmissible. To the contrary, the record reflects the prosecutor presented evidence that she knew was relevant and

admissible. Thus, the prosecutor did not err by presenting the sexually graphic images that were admitted at trial.

C. The Prosecutor Did Not Introduce "Junk" Evidence of a Forensic Dentist

Appellant claims the prosecutor committed misconduct by introducing the "junk" evidence of a forensic dentist, Dr. Norman Sperber, regarding the use of handcuffs. Appellant complains that no handcuffs were found, an investigator selected a random pair of handcuffs from the police's evidence room, Dr. Sperber was recruited to perform his examination of Gallego after the autopsy, the forensic discipline of bite mark identification has been debunked and rejected by the scientific community, and Dr. Sperber's technique in identifying "tool marks" on the body is even less reliable and was introduced only to shore up the prosecution's otherwise unsupported theory that handcuffs might have been used to restrain Gallego. Appellant argues the "use of such thoroughly unreliable evidence – from a thoroughly unqualified 'expert' who was retained after the medical examiner declined to support the prosecutor's theory – is prosecution misconduct." (AOB 260-261.)

As discussed above in Argument III, *supra*, Dr. Sperber was qualified to testify as an expert on tool marks analysis. Additionally, while the National Academy of Sciences may have discussed some of the weaknesses of tool marks analysis in its 2008 report ("Strengthening Forensic Science in the United States"), the Academy did not invalidate the field of tool marks analysis. Contrary to appellant's allegation, Dr. Sperber's testimony was not "junk" evidence.

Because Dr. Sperber qualified as a tool marks expert and his testimony was relevant to explain some of the marks on Gallego's wrists and back, which were consistent with the components of handcuffs, the prosecutor did not err in calling Dr. Sperber as a witness or presenting his

expert opinion that handcuffs likely caused the marks on Gallego's wrists and back. A prosecutor does not commit misconduct by introducing or commenting on admissible evidence. (*People v. Foster* (2010) 50 Cal.4th 1301, 1350 ("*Foster*"); see also *Smithey, supra*, 20 Cal.4th at p. 961 [prosecutor's attempt to elicit inadmissible opinion evidence from an expert witness "did not amount to an egregious pattern of conduct that rendered the trial fundamentally unfair in denial of defendant's federal constitutional right to due process of law"].) Here, the prosecutor introduced admissible evidence. Also, the prosecutor did not use deceptive or reprehensible methods to attempt to persuade the jury. (See *People v. Harrison* (2005) 35 Cal.4th 208, 242.) And, she did not elicit testimony that so infected the trial with unfairness as to make the resulting conviction a denial of due process. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070.) Thus, she did not commit prosecutorial error.

D. The Prosecutor Did Not Endeavor to Sway the Public or Potential Jurors by Agreeing to Participate in a Television Program About Prosecutors

Appellant claims the prosecutor "egregiously endeavored to sway the public – and potential jurors – by agreeing to participate in a 'reality show' about this very case, demonstrating her devotion to win by any means." (AOB 261.) Appellant alleges the prosecutor's agreement to work on this television program "demonstrates a deep lack of respect for the need for fairness in criminal proceedings." (AOB 261-262.) Appellant adds "the prosecutor's aim for fame illustrates a distinct lack of devotion to dignity and constitutional fairness, before and during his capital trial." (AOB 262.) Appellant concludes that "this Court must clarify that such conduct on the part of prosecutors is unacceptable, and afford [him] the opportunity to review these tapes (which are part of the trial court's file) and file claims based upon their contents." (AOB 262.)

Respondent submits that appellant's prosecutorial misconduct claim is baseless. First, the television program "Crime and Punishment" was not a reality show about appellant's case. The television program was a documentary series that was filmed by Trial & Error Productions Inc. for NBC television and which gave viewers a behind-the-scenes look at deputy district attorneys as they prepared for and tried criminal cases. The television program aired on NBC from June 2002 through July 2004; however, no episode depicting appellant's case ever aired and all of the videotaped footage at issue remained unpublished. Contrary to appellant's allegations, the television program "Crime and Punishment" was not a show that was focused solely on appellant's case. (42 Supp. CT 9350.)

Second, as discussed above in Argument IV, *supra*, appellant failed to meet the threshold showing required under *Delaney*, *supra*, 50 Cal.3d 785, for access to the three sealed videotapes at issue. Specifically, appellant failed to make the requisite showing of a reasonable possibility that those three videotapes would materially assist his defense. (*Delaney*, *supra*, 50 Cal.3d at p. 808.) Thus, appellant was not entitled to the release of those three sealed videotapes.

Contrary to appellant's claims, the prosecutor did not endeavor to sway the public or potential jurors by agreeing to participate in a television program about prosecutors. The prosecutor neither erred nor engaged in misconduct.

E. The Prosecutor Did Not Err in Introducing "Gruesome" Photographs or in Arguing That They Demonstrated Appellant's Trial Defense Was Untrue

Appellant alleges the prosecutor introduced "gruesome" photographs that were not required for the jury to decide the underlying facts (including the photographs taken by Dr. Norman Sperber when he examined Gallego's body to determine whether the marks on her lower back and wrists were

caused by handcuffs) and then improperly argued they demonstrated appellant's heat of passion defense was untrue. (AOB 262-263.) However, as appellant notes in his opening brief, the trial court allowed the photos to be admitted into evidence. (AOB 263.) Hence, the prosecutor could not have erred by relying on them at trial. As previously discussed, a prosecutor does not commit misconduct by introducing or commenting on admissible evidence. (*Foster, supra*, 50 Cal.4th at p. 1350; see also *People v. Edwards* (2013) 57 Cal.4th 658, 740 [a prosecutor possesses wide latitude to vigorously argue his case and to make fair comment upon the evidence].)

F. The Prosecutor Did Not Err by Presenting Evidence of a Single Sperm Cell Found on a Banana Peel

Appellant alleges the prosecutor erred by using the evidence of a single sperm cell found on a banana peel in the trash to suggest he committed rape with the object and then ate the object. Appellant asserts there was no evidence that he was the source of the solitary sperm or of how it came to rest on a banana peel. (AOB 263-264.) As discussed above in Argument VII, *supra*, the evidence at issue was relevant because it was found in the same plastic bag that contained appellant's to-do list, which included a cucumber, and a "do not disturb" sign in appellant's handwriting. The to-do list was circumstantial evidence of appellant's intent to rape and kill Gallego. Hence, the evidence at issue was relevant and had strong probative value.

Further, as previously discussed, a prosecutor does not commit misconduct by introducing or commenting on admissible evidence. (*Foster*, *supra*, 50 Cal.4th at p. 1350; see also *Edwards*, *supra*, 57 Cal.4th at p. 740.) Thus, the prosecutor did not commit misconduct by using the evidence of a single sperm cell found on a banana peel to suggest appellant committed rape with the banana and then ate the banana.

G. The Prosecutor's Question to Detective Hergenroeather About Gallego Being Gagged Was Brief and Corrected by the Trial Court

Appellant argues the prosecutor improperly referred to facts not in evidence to suggest more evidence existed than was presented to the jury. Specifically, appellant complains that the prosecutor elicited Detective Hergenroeather's opinion that Gallego was gagged and handcuffed. (See AOB 264-266; 39 RT 5022.)

The record shows the prosecutor did not act in defiance of a court order or that she intentionally elicited inadmissible testimony. In a sidebar discussion after the defense objected, the trial court inquired about the prosecutor's question about the detective's opinion as to whether Gallego was gagged. After reminding the prosecutor that it had previously sustained an objection on the grounds that it did not think the opinion was proper, the court asked the prosecutor why she asked the detective for the opinion when it had previously sustained the objection. (39 RT 5024.) The prosecutor answered the reason why was because the detective had been cross-examined on the issue of why he did not write down his observations if he had thought that Gallego was gagged and handcuffed. The court asked the prosecutor if it was her memory that defense counsel had asked the detective about his opinion as to whether Gallego was gagged. The prosecutor responded affirmatively. (39 RT 5025.) Defense counsel said he did not ask the detective for that opinion. The court also did not remember defense counsel asking for that opinion and commented that it had previously ruled the opinion that Gallego was gagged would not be a proper subject of expert testimony. (39 RT 5025-5026.) The prosecutor apologized for her mistaken recollection. (39 RT 5027-5028.) Thus, the record shows the prosecutor's question to Detective Hergenroeather about whether Gallego was gagged, was unintentional. Thus, she did not commit

misconduct. (See *Chatman, supra*, 38 Cal.4th at p. 382 ["'It is misconduct for a prosecutor intentionally to elicit inadmissible testimony [citations]'"; *People v. Smithey* (1999) 20 Cal.4th 936, 960).)

While appellant argues on appeal that the trial court's admonition was insufficient and did not un-ring the bell (AOB 264), the court instructed the jurors to disregard Detective Hergenroeather's answer at the defense's request. (39 RT 5043-5044.) Jurors are presumed to have followed the court's instructions. (*Waidla, supra*, 22 Cal.4th at p. 725; *Mickey, supra*, 54 Cal.3d at p. 689, fn. 17 ["The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions"].)

H. The Prosecutor Did Not Err by Introducing into Evidence a Photograph of Gallego and Her Dog

Appellant claims the prosecutor erred by showing the jurors a photograph of Gallego in life with her dog because the prosecutor used the photograph to gain their sympathy. (AOB 266-267.) Appellant asserts the prosecutor even admitted that she selected this particular photograph "in order to humanize the victim." (AOB 267.) Respondent disagrees.

As discussed above in Argument VIII, *supra*, the prosecutor explained to the trial court that the prosecution wanted to show the jury a photograph of Gallego because the jury was going to see a significant amount of dehumanizing of Gallego throughout the trial and this photograph was the only one that the prosecution could enlarge without substantial distortion. The prosecutor explained to the court in pertinent part:

> And I'll tell you this right now: the ones that were morphed we cannot blow up to – without a distortion or without something funky. Her mother sent us – her mother had done some poster boards. We looked at them.
>
> Quite honestly, I wanted to use one where even she was prettier. We could not blow that one up without a distortion.

> This was one out of the series of boards that was the – I took and had an enlargement of an 8-by-11.
>
> And I don't feel – there's two issues on this: one is it's, obviously, not an overly-glamorous shot of her. It is – what the jury is going to see is much dehumanizing of this woman. It is one picture that we're asking for that her family has presented and, under case law, I believe we are allowed to do that.
>
> It's not overly inflammatory. She's not with her whole family. She's not, you know –
>
> [¶] . . . [¶]
>
> In all the ones we looked at—I'll tell you what: I picked out three others, and they couldn't be done. A lot of them have big red spots on the photos. This is the one that he said, "This is the one I can do my best with." He wasn't happy with that.

(32 RT 3877-3878.)

Further, as discussed above in Argument VIII, *supra*, the possibility that a photograph of a victim while alive will elicit sympathy from the jury does not require exclusion if it is otherwise relevant. (*Brooks*, *supra*, 3 Cal.5th at p. 56; *Harris*, *supra*, 37 Cal.4th at p. 331.) The photo of Gallego at issue was otherwise relevant as it allowed the witnesses to identify Gallego as the person about whom they were testifying. (*Brooks*, *supra*, 3 Cal.5th at p. 56; see also *Osband*, *supra*, 13 Cal.4th at p. 677; *DeSantis*, *supra*, 2 Cal.4th at p. 1230.) Furthermore, the trial court ruled the photograph was relevant and admissible. Because the prosecutor was not attempting to elicit inadmissible evidence, she did not err by showing it to the jury. (See *People v. Hawthorne* (2009) 46 Cal.4th 67, 98.)

I. The Prosecutor Did Not Err by Presenting the Testimony of Edward Lee

Appellant claims the prosecutor erred by presenting the purportedly unreliable testimony of Edward Lee and then insisting on limiting the impeachment of Lee even though she allegedly knew there were reasons to

doubt the accuracy of his statements. (AOB 267-268.) Appellant alleges that Lee, whose testimony was critical to the prosecution's case, had a motive to testify and curry favor in the sentencing of his own offenses and had an opportunity to learn details about appellant's case from sources other than appellant. Appellant further alleges that Detective Ott, the detective who interviewed Lee, deviated from standard practice in order to "tilt the scales in favor of conviction." (AOB 267-268.)

As appellant recognizes in his opening brief, Lee's testimony was relevant. (AOB 267.) Indeed, the prosecutor introduced relevant evidence. Because the prosecutor did not use any deceptive or reprehensible method to attempt to persuade the jury, the prosecutor did not err by introducing Lee's testimony.

Furthermore, as discussed above in Argument IX, *supra*, the trial court allowed the defense to impeach Lee with virtually every item on his criminal history, as requested by defense counsel, with the exception of his two 33-year old prior convictions – a 1967 burglary conviction and a 1967 robbery conviction. In effect, the defense was permitted to impeach Lee with his 2002 conviction for false representation of identification to a peace officer, 2000 violation of a restraining order as well as the incident giving rise to the restraining order, 1993 conviction for the willful infliction of corporal injury, and 1990 conviction for the possession for sale of narcotics. Notwithstanding its ruling on those two 1967 convictions, the court permitted defense counsel to bring them to the court's attention for reconsideration if counsel found a basis to argue Lee tried to negotiate away a Three Strikes sentence with those two 1967 convictions. Thus, the court gave the defense team ample latitude to impeach Lee with his prior convictions. (38 RT 4938-4943, 4946-4961.) Contrary to appellant's allegations, the prosecutor did not insist on limiting the impeachment of

Lee despite purportedly knowing there were reasons to doubt the accuracy of his statements. (See AOB 267.)

Based on the foregoing, the prosecutor did not engage in conduct that infected the trial with such unfairness as to make appellant's conviction a denial of due process. (See *Hinton, supra*, 37 Cal.4th at p. 862.) Nor did the prosecutor engage in conduct rendering a criminal trial fundamentally unfair by involving the use of deceptive or reprehensible methods to attempt to persuade the jury. (*Id*. at p. 863.)

J. The Prosecutor Did Not Err by Objecting to the Defense's Request to Examine Detective Ott About His Alleged Deviations from Standard Police Practices on Grounds of Relevance

Appellant claims the prosecutor erred by objecting to the defense's request to examine Detective Ott about his alleged deviations from standard police practices in three other matters on grounds of relevance. He alleges the prosecutor's objection "tilted the scales of justice improperly toward conviction, and lightened the prosecution[']s constitutional burden of proof." (AOB 269.)

The record reflects Detective Ott's alleged deviations were irrelevant to the instant case. As discussed in Argument XI, *supra*, the trial court properly sustained the prosecution's relevance and Evidence Code section 352 objections to any defense examination of Detective Ott about his purported deviations from standard police practices. First, the defense had no tangible evidence that Detective Ott engaged in any misconduct or impropriety in the instant case. (See 42 RT 5738 [counsel did not have any witness who would testify that Detective Ott briefed Edward Lee about the facts of this case]; 42 RT 5748-5749 [prosecutor told the court that Detective Ott made clear he did not tell Edward Lee anything about this case].) Hence, any examination about Detective Ott's alleged deviation from standard police practice would have been irrelevant and inadmissible

evidence. Furthermore, the admission of such evidence would have necessitated an undue consumption of time and would have created a substantial danger of undue prejudice, of confusing the issues, and of misleading the jury when there was no evidence whatsoever of any misconduct or impropriety by Detective Ott in the instant case. Hence, the prosecutor's objections to defense counsel's request to examine Detective Ott's alleged deviations were not unjustified.

Based on the foregoing, the prosecutor did not infect the trial with such unfairness as to make the conviction a denial of due process. Nor did the prosecutor use deceptive or reprehensible methods to persuade the jury. Accordingly, the prosecutor did not commit misconduct. (*Hinton*, *supra*, 37 Cal.4th at pp. 862-863.)

K. The Prosecutor Did Not Inflame the Jurors During the Examination of Marilyn Powell by Showing Them Photographs of Random Handcuffs Placed on Gallego's Body

Appellant claims the prosecutor committed prosecutorial error by presenting Marilyn Powell to testify that he used handcuffs to lock his bicycle when they dated in 1998 and that they looked like both the handcuffs that were used by the police and the handcuffs that were placed on Gallego's body in Dr. Norman Sperber's experiment, as depicted in the photograph that was shown to Powell. (AOB 269-270.) Appellant alleges the prosecutor's only purpose for showing Powell the photograph of Gallego's dead body with the random set of handcuffs was to horrify Powell and the jurors. (AOB 270.) Appellant's allegation is baseless.

The record shows the prosecutor's purpose for showing Powell the photograph was to establish that appellant had handcuffs that were similar, if not identical, to the handcuffs that were used to match up to the marks that were left on Gallego's wrists and back in Dr. Sperber's examination of Gallego's body. The trial court agreed with the prosecutor, found Powell's

testimony would be relevant, and found the photograph of the handcuffs on Gallego's body would be legitimate to use. (See 41 RT 5403-5404, 5408-5409.)

Based on the foregoing, the prosecutor did not infect the trial with such unfairness as to make the conviction a denial of due process. Nor did the prosecutor use deceptive or reprehensible methods to persuade the jury. Simply stated, the prosecutor did not commit misconduct. (*Hinton*, *supra*, 37 Cal.4th at pp. 862-863.)

L. The Prosecutor Did Not Mislead the Jury On Lying-In-Wait Principles

Appellant claims the prosecutor misled the jury on lying-in-wait principles by arguing, in her opening statement, that appellant was not only guilty of murder, but of methodically planning to take Gallego by surprise, which was lying in wait, and that he did it to rape her and get all of her money. (AOB 271; 33 RT 3953.) Appellant adds the prosecutor, during closing argument, argued that lying in wait was "waiting and watching for an opportune time to act, together with concealment by ambush or other design to take the person by surprise, even though the victim is aware of murderer's presence" and that the "lying in wait need not continue for any particular length of time." (AOB 271; 45 RT 6275.) (See AOB 270-272.)

As discussed above in Argument VI, *supra*, the purpose of opening statement is to inform the jury of the evidence the prosecution intends to present, and the manner in which the evidence and reasonable inferences relate to the prosecution's theory of the case. (*Millwee*, *supra*, 18 Cal.4th at p. 137; see also *Farnam*, *supra*, 28 Cal.4th at p. 168; *Walsh*, *supra*, 6 Cal.4th at p. 257.) Additionally, nothing precludes the statement from being told in a story-like manner that holds the attention of the jurors and ties the facts and governing law together in an understandable way. (*Millwee*, *supra*, 18 Cal.4th at p. 137.) Last, remarks made during an

opening statement are not impermissible misconduct unless the evidence referred to by the prosecutor was so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted. (*Wrest*, *supra*, 3 Cal.4th at p. 1108; *Dykes*, *supra*, 46 Cal.4th at p. 762.)

As previously mentioned in Arguments VI and XX (A), *supra*, appellant's trial counsel filed a motion in limine to preclude the prosecution from arguing in her opening statement. (4 CT 797-800.) The trial court denied the motion, concluding there was no basis to preclude the prosecution from commenting that appellant drained Gallego's blood, gagged her by looping a scarf around her neck, and tortured her. The court explained in pertinent part that all of the prosecutor's conclusions were conclusions that could reasonably be drawn from the evidence and that there was enough support to justify them being presented in the opening statement. (17 RT 1607.)

Indeed, the prosecutor's comments in her opening statement were drawn from the evidence. Based on the evidence indicating that appellant had a sexual obsession with Gallego, that appellant planned to take Gallego by surprise so that he could rape her and kill her, and that appellant planned to kill Gallego because he wanted her money, the prosecutor did not mislead the jury in stating the comments at issue. The prosecutor merely informed the jury of the evidence and the reasonable inferences relating to the prosecution's theory of the case. (*Farnam*, *supra*, 28 Cal.4th at p. 168; *Dykes*, *supra*, 46 Cal.4th at p. 762; *Millwee*, *supra*, 18 Cal.4th at p. 137; *Walsh*, *supra*, 6 Cal.4th at p. 257; *Wrest*, *supra*, 3 Cal.4th at p. 1108.) Contrary to appellant's claim, the prosecutor did not mislead the jury on lying-in-wait principles in her opening statement.

As discussed above in Argument XII, *supra*, the requirements for lying in wait for first degree murder under Penal Code section 189 are slightly different from the lying-in-wait special circumstance under Penal

Code section 190.2, subdivision (a)(15). This Court focuses on the special circumstance because it contains the more stringent requirements. If the evidence supports the special circumstance, it necessarily supports the first degree murder. (*Moon*, *supra*, 37 Cal.4th at p. 22.) The lying-in-wait special circumstance requires proof of "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (*Nelson*, *supra*, 1 Cal.5th at p. 549; *Moon*, *supra*, 37 Cal.4th at p. 22.)

Here, as discussed in Argument XIII, *supra*, the trial court instructed the jury with CALJIC No. 8.25 ["Murder By Means Of Lying In Wait (Pen. Code, § 189)"] and CALJIC NO. 8.81.15.1 ["Special Circumstances – Murder By Lying In Wait (Pen. Code, § 190.2, subd. (a)(15))"], which defined lying in wait as awaiting and watching for an opportune time to act, together with a concealment by ambush or some other secret design to take the other person by surprise even though the victim's aware of the murderer's presence. (45 RT 6275, 6286-6287; 8 CT 1813, 1833.)

In *Combs*, *supra*, 34 Cal.4th 821, this Court found ample evidence supporting the lying-in-wait special circumstance finding where the defendant devised a ruse about needing a ride to trick the victim into driving him to the desert. The defendant sat in the backseat behind the victim with cords he obtained earlier, waiting for an opportune time to kill the victim. After the victim parked the car, the defendant surprised her by placing the cord over her head and strangling her. (*Id*. at pp. 853-854.)

In *Morales*, *supra*, 48 Cal.3d 527, this Court found sufficient evidence of lying in wait where the defendant sat behind the victim in a car, waited until the car was in a more deserted location, and then killed her. (*Id*. at pp. 554-555.)

Similar to *Combs* and *Morales*, appellant waited until Gallego was in bed and unsuspecting of him before he entered her room and attacked her. In her closing argument, the prosecutor explained that lying in wait was waiting and watching for an opportune time to act, together with concealment by ambush or other design to take the person by surprise, even though the victim is aware of the murderer's presence. (See AOB 271; 45 RT 6320-6326.) Thus, the prosecutor's closing argument was correct.

In short, the prosecutor did not mislead the jury on the lying in wait principles. The prosecutor did not infect the trial with such unfairness as to make the conviction a denial of due process. Nor did she use deceptive or reprehensible methods to persuade the jury. The prosecutor did not commit misconduct. (*Hinton*, *supra*, 37 Cal.4th at pp. 862-863.)

M. The Prosecutor Did Not Urge the Jury to Relieve the Prosecution of Its Burden of Proof

Referring to and incorporating the allegations of his argument on the allegedly improper framing of voluntary manslaughter as a "reduction" from the murder charge, appellant contends the prosecutor improperly urged the jury to relieve the prosecution of its burden of proof and to place a burden of proof upon the defendant to "reduce" the murder charge to manslaughter. (AOB 272.) As discussed above in Argument XIX, *supra*, the two standard jury instructions on manslaughter, CALJIC No. 8.40 and CALJIC No. 8.42, correctly stated the law. It is not reasonably likely that the jury construed either instruction as creating a presumption that a homicide is murder and thereby lessening the prosecution's burden of proof.

Based on the foregoing, the prosecutor did not infect the trial with such unfairness as to make the conviction a denial of due process. Nor did the prosecutor use deceptive or reprehensible methods to persuade the jury.

Simply stated, the prosecutor did not commit misconduct. (*Hinton*, *supra*, 37 Cal.4th at pp. 862-863.)

N. The Prosecutor Did Not Commit Misconduct During Her Closing Argument

Appellant claims the prosecutor committed prosecutorial error in her closing argument when she stressed the "porn" (i.e., the cut-and-paste images that he created), discussed sexual fantasies attributed to him, urged that Gallego's murder was a brutal and sadistic murder committed for sexual pleasure, stressed her allegedly unproven theory that Gallego had been handcuffed, gagged, and raped, argued the jurors did not need more than common sense to accept Dr. Norman Sperber's testimony, argued the fact that appellant previously used handcuffs to lock his bicycle was proof that he used them with Gallego, argued appellant drained Gallego's body of blood, asked jurors to place themselves in the position of the victim and repeated the argument after the court sustained an objection to the argument, argued against a manslaughter verdict, and argued the jury need not agree on the underlying theory of first degree murder. (AOB 272-274.)

In closing arguments, "prosecutors have wide latitude to discuss and draw inferences from the evidence presented at trial. '"Whether the inferences the prosecutor draws are reasonable is for the jury to decide."'" (*People v. Thornton* (2007) 41 Cal.4th 391, 454.) Further, "[c]losing argument may be vigorous and may include opprobrious epithets when they are reasonably warranted by the evidence." (*People v. Sandoval* (1992) 4 Cal.4th 155, 180.)

Here, the prosecutor characterized the evidence and made inferences in favor of appellant's guilt, as she was permitted to do. She was permitted to fully state her views regarding what the evidence established and to urge whatever conclusions she deemed proper. The prosecutor emphasized the sexually graphic images that appellant created of Gallego to highlight his

obsession and sexually sadistic fantasies with Gallego. (45 RT 6297-6299, 6303-6304.) Based on the evidence adduced at trial, the prosecutor argued that appellant handcuffed, gagged, raped, and killed Gallego. (45 RT 6307-6312.) And, the prosecutor argued the evidence proved appellant committed first degree murder, not manslaughter. (45 RT 6317-6330.) The prosecutor's statements in closing argument were a fair comment on the evidence and inferences from that evidence. There was no prosecutorial error or misconduct.

While appellant complains that the prosecutor told the jurors that they did not need to agree on the underlying theory of first degree murder (AOB 274; 45 RT 6325), the prosecutor was not wrong. To convict a defendant of first degree murder, the jury must unanimously agree on guilt of a specific murder, but need not agree on a theory of premeditation or felony murder. (See *People v. Russo* (2001) 25 Cal.4th 1124, 1132-1133.) Hence, the prosecutor did not misstate the law or err in her closing argument.

Even assuming the prosecutor had acted improperly, appellant did not object to the remarks that he takes issue with on appeal. (See 45 RT 6293-6330; 46 RT 6442-6489.) Therefore, he forfeited his claim of prosecutorial error based on her closing argument remarks. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000.)

XXI. THE DEATH PENALTY IS NOT ARBITRARILY OR CAPRICIOUSLY IMPOSED

Appellant contends the death penalty in California violates equal protection because it is arbitrarily and capriciously imposed depending on the county in which a defendant is prosecuted. (AOB 275-277.) This Court has consistently rejected substantially similar claims, concluding that "'"prosecutorial discretion to select those eligible cases in which the death penalty will actually be sought does not . . . offend principles of equal protection, due process, or cruel and/or unusual punishment."'" (*People v.*

Homick (2012) 55 Cal.4th 816, 903-904, quoting *People v. Vines* (2011) 51 Cal.4th 830, 889-890.) Appellant requests that this Court reexamines its decisions in prior cases in light of the United States Supreme Court's voting rights decision in *Bush v. Gore* (2000) 531 U.S. 98, which he asserts requires uniformity among the counties for prosecutorial standards for seeking the death penalty. (AOB 276.) But, as the United States Supreme Court explained, "'its consideration of the equal protection challenge to Florida's voting recount process was limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." [Citation.] That case, therefore, does not warrant our revisiting our prior holdings on the instant issue. [Citation.]' (*People v. Vines* (2011) 51 Cal.4th 830, 889-890, 124 Cal.Rptr.3d 830, 251 P. 3d 943.)"

XXII. THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING THE PENALTY PHASE

Appellant claims there was carryover and cumulative prosecutorial error from the guilt phase. He refers to and incorporates all of the errors raised in his opening brief and, in particular, the alleged prosecutorial misconduct from the guilt phase. He further claims the prosecutor erred or otherwise committed misconduct during the penalty phase by improperly arguing non-statutory factors in aggravation, improperly arguing that jurors "shall" impose the death penalty, and improperly urging a lack of remorse as an aggravating factor. (AOB 278-288.) As discussed below, appellant's penalty phase claims are without merit.

As set forth above in Argument XX, *supra*, the standards governing review of prosecutorial misconduct claims are clear. A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. (*Hinton, supra*, 37 Cal.4th at p. 862; *People v.*

Morales (2001) 25 Cal.4th 34, 44.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under California law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. (*Hinton*, *supra*, 37 Cal.4th at p. 863.) The same standards apply to alleged misconduct at the penalty phase. (*People v. Adams* (2014) 60 Cal.4th 541, 573 ("*Adams*").)

Additionally, as previously stated, to preserve a claim of prosecutorial misconduct for appeal, a defendant must assert a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument. A failure to timely object and request an admonition will be excused if doing either would have been futile or if an admonition would not have cured the harm. (*Adams*, *supra*, 60 Cal.4th at p. 569; *Tully*, *supra*, 54 Cal.4th at p. 1011.)

As discussed in detail below, appellant's claims of prosecutorial error are without merit. The prosecutor neither erred nor engaged in conduct that rendered the trial so fundamentally unfair as to render the trial unfair or the conviction a denial of due process.

A. The Prosecutor Did Not Commit Misconduct During the Guilt Phase

Appellant refers to and incorporates all of the errors raised in his opening brief and in particular, the alleged prosecutorial misconduct during the guilt phase. (AOB 281.) As discussed above in Argument XX, *supra*, the prosecutor did not commit misconduct during the guilt phase.[30]

[30] Respondent notes that the prosecutor who presented the closing argument during the guilt phase was Deputy District Attorney Brenda Daly and the prosecutor who presented the closing argument during the penalty phase was Deputy District Attorney Blaine Bowman.

Moreover, if any prosecutorial misconduct occurred, it was harmless. Therefore, appellant's claim of prosecutorial misconduct is without merit.

B. The Prosecutor Did Not Commit Misconduct as Argued in the Motion for New Penalty Phase Trial

Incorporating the alleged errors noted in the motion for new penalty phase trial, as raised in Argument 26 of his opening brief, appellant claims the prosecutor erred in pursuing those matters during the penalty phase. (AOB 281.) As discussed below in Argument XXVI, *infra*, the trial court properly exercised its discretion when it denied the motion for a new penalty phase trial on the grounds asserted therein. The photographs of Gallego taken while she was alive, the autopsy photographs of Gallego's face and mutilated hands, the testimony of Kristina Stepanof and Gallego's thank you note to Stepanof, the rebuttal testimony of Brenda Chamberlain and appellant's altered photographs of her, were all relevant and admissible. In light of the admissibility and relevance of the evidence, the prosecutor did not commit misconduct in seeking to admit the evidence at trial.

C. The Prosecutor Did Not Argue Non-Statutory Factors in Aggravation During His Closing Argument

Appellant claims the prosecutor argued several non-statutory factors in aggravation. Appellant cites various examples of the prosecutor's allegedly improper argument. (See AOB 281-286.) However, appellant did not object at trial to these allegedly improper comments by the prosecutor, and nothing suggests an objection would have been futile or an admonition inadequate to cure any harm. (See AOB 281-286; 54 RT 7607-7674.) Thus, appellant's claims of prosecutorial error during the penalty phase closing argument are forfeited. (*Adams*, *supra*, 60 Cal.4th at p. 569; *Tully*, *supra*, 54 Cal.4th at p. 1011.)

In any case, appellant's claims of prosecutorial error are without merit because the prosecutor has wide latitude in closing argument. (*Gamache*, *supra*, 48 Cal.4th at p. 390.) As discussed below, the comments at issue were not improper.

Appellant complains that the prosecutor argued the facts of the case made everyone feel bad, that a consequence of appellant's case was that the jurors themselves had to come to court, listen to evidence, look at autopsy photos, and hear the pain of Gallego's family, and that this argument cast the jurors themselves as victims in the case. (See AOB 282; 54 RT 7609). In context, the prosecutor was simply describing the sensitive nature of a capital case, ***not*** appellant's case per se.[31] (54 RT 7609-7610.) The

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[31] The prosecutor argued:

> And I want you to understand something: that this decision that you are about to make is going to be one of the most difficult decisions you will ever face. It's not easy.
>
> And when I say it's not easy and I say it's difficult, it's not because the facts of this case don't cry out for justice; because the circumstances of this murder, what Calvin Parker did to Patricia Gallego when he took her life, cries out for the death penalty.
>
> Even in clear-cut cases where there's no mitigating factors and an abundance of aggravating factors, it is a difficult decision for jurors to make. And why is that? It's because of the nature of the decision. It's not because of the answer, but because of the nature of the decision.
>
> It's a capital case. This is a capital murder case, and it makes us feel bad. It makes you feel bad that you have to come into court, listen to evidence, look at autopsy photos, hear the pain of the victim's family as they cry over the loss of their daughter.

prosecutor's comments were well within his broad scope of closing argument. (*Gamache*, *supra*, 48 Cal.4th at p. 390.)

Appellant next complains the prosecutor improperly argued that the jurors have a heart, that they cared about other humans, that they cared about humanity, that appellant did not have those feelings or compassion, that they were only called upon because of what he did, that he deserved death, that he caused all of this suffering, and that they were called upon to deliver the death penalty because of him. (See AOB 282-283; 54 RT 7610.) In context, the prosecutor was simply arguing that appellant deserved the death penalty for killing Gallego in the manner that he did and stating the obvious that the reason why the jurors were present in court was because appellant killed Gallego.[32] (54 RT 7610.) A prosecutor has wide latitude in closing argument. (*Gamache*, *supra*, 48 Cal.4th at p. 390.)

> That makes us feel bad. You don't want to be here. But you have a duty, as a juror, to see this through.

(54 RT 7609-7610.)

[32] The prosecutor argued:

> You feel bad and we all feel bad. You feel bad because you have warmth. You have a heart and you have a soul and you care. You care about other human beings, even people you've never met before. You care about humanity.
>
> Yet, as shown by the defendant's actions in this case and what he did to Patricia Gallego, those are things that the defendant lacks. He lacks feeling. He lacks compassion. And that's evidenced by what he did to Patricia.
>
> He doesn't have that voice that you all have, the voice that's in the back of your head that says, "I'm concerned about invoking the ultimate punishment. I'm concerned about invoking the death penalty."

Appellant complains that the prosecutor reinforced the idea that jurors had a duty to impose a death judgment by naming citizen witnesses and police officers who performed their duties. (See AOB 283; 54 RT 7611.) In context, the prosecutor was reminding the jurors that they took an oath to serve as jurors and arguing that appellant deserved the death penalty for killing Gallego in the manner that he did.[33] The prosecutor did not exceed

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> You know he deserves it. And you also know that someone who murders an innocent victim like Patricia deserves the ultimate punishment. You know that. But, of course, you feel bad because you care.

(54 RT 7610.)

[33] The prosecutor argued:

> Mr. Parker is the reason we are here today. Don't feel bad because you were called upon as jurors to come forward and do your duty. We talked about this in voir dire. You know, we talk about the death penalty around the water cooler at work. We discuss the death penalty with friends, maybe, sometimes. And, you know, people can say, "Yeah. I'm in favor of the death penalty."
>
> Well, now, you are called upon to deliver that penalty in this case. Not because you agreed to be a juror on this case. It's because of what Calvin Parker did to Patricia Gallego.
>
> He wrote the script. It is what he did that caused witnesses to come in here and testify to what happened to Patricia, that caused the witnesses to come in here and talk about the fingers that they found in the dumpster.
>
> Steve Gomez found those fingers in the dumpster. And what did he do? Did he turn away and walk away and say, "Gosh, I don't even want to deal with that. I don't want to call the police"? No. He did his duty as a citizen.

counsel's wide latitude in closing argument by merely inviting the jurors to render an appropriate verdict in light of the facts and the law. As this Court has previously recognized, jurors are the conscience of the community. (See *Gamache*, *supra*, 48 Cal.4th at p. 389.)

Appellant also complains that the prosecutor urged a sentence of life without possibility of parole would amount to failure and analogized delivering complete justice to climbing Mount Everest. Appellant asserts the prosecutor stressed to the jurors that they had to reach a death verdict to serve society, the community and to express their denouncement of crime. (See AOB 283; 54 RT 7613.) In context, the prosecutor was merely pointing out the difficult trek of deliberations in a capital case; the prosecutor was *not* suggesting that rendering a death judgment was the equivalent of reaching the summit of Mount Everest. (54 RT 7612-7614.) Additionally, as previously mentioned, jurors are the conscience of the

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> The two women who were walking along up in Carlsbad. They saw the trash can. They thought it was suspicious. They could have kept walking. But they investigated.
>
> They thought something was a little odd. They looked in the trash can and found Patricia Gallego's body in there. Did they walk away from it? No. They did their duty as citizens to call the police so the police could come out and investigate.
>
> The police officers did their duty in this case. They went out and investigated this case. All the citizens that were involved in this case suffered some inconvenience to come in here and testify and be cross-examined and be subjected to the process. But they did their duty.
>
> And that's where you, as jurors, are today. You also have a duty to fulfill. You must fulfill that oath that you took when you were sworn in.

(54 RT 7610-7612.)

community. (*Gamache, supra*, 48 Cal.4th at p. 389.) "'[A] jury that must choose between life imprisonment and capital punishment can do little more – and must do nothing less – than express the conscience of the community on the ultimate question of life or death.' [Citation.] It is not error to tell them so in closing argument." (*Gamache, supra*, 48 Cal.4th at p. 389; brackets in original.) In effect, asking the jury to render an appropriate verdict for the community is not improper argument. Furthermore, while the prosecutor argued in favor of the death penalty, he also told the jury to consider all of the aggravating and mitigating factors in deciding the appropriate sentence for appellant.[34] (54 RT 7613-7614.)

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[34] The prosecutor argued:

> And you might think to yourself, "Well, gosh, [prosecutor]. We – we've already found him guilty of first degree murder and we found true the three special circumstances. Isn't that enough? Haven't we done enough in this case?
>
> "We've gone through all the autopsy photos. We've sifted through the evidence. We've spent a considerable amount of time in deliberations to render a just and proper verdict. Isn't that enough? Can't we just go home and forget about this case and get on with our lives, go back to our jobs, our family?"
>
> You might feel like you're tired and you're tired of this case. But it's not enough. You have to go forward.
>
> I want you to think about Mt. Everest. It's the highest point in the world. Many people have attempted to climb Mt. Everest. Some have succeeded. Some have failed.
>
> Many have failed when they've climbed towards the summit and the summit is within striking distance. They can see it. They might only be 100 yards away, but they're too tired. It's too much of a struggle. It's too painful, too difficult, too

gut-wrenching to move forward and continue on towards that summit.

I want you to think about that summit of Mt. Everest in this case as delivering complete justice. Justice without compromise. Justice that's not approximate, but justice that is whole.

You've climbed towards the summit, and we are within striking distance. And, yes, it's a struggle. You have to go back in that jury room.

And I'm going to talk to you during this argument about the facts of this case and how you're going to be called upon to immerse yourself, once again, in the horrible murder of Patricia Gallego. It's easy to turn your back on it and say, "I don't want to do it. I've done enough." But you have to see this case through.

You have to see this case through to the end because punishment is the way we, as a society, the people in our community, express our denouncement of crime. We look at a crime and society wants to denounce it.

Some crimes are so outrageous and so brutal and so callous and lack humanity that there's only one punishment that expresses the moral outrage, the moral outrage of the community, for what a person has done. Only one punishment can do that in this case for what Mr. Parker has done, and that is the death penalty.

The judge has read several factors to you. There are 11 factors for you to consider. And you will become very familiar with these factors by the time you come back into this courtroom and render a verdict. These are factors that the court has given to you to give you some guidance as t what to consider the appropriate punishment should be.

There will be, what are called, aggravating factors and mitigating factors. They guide your decision. And as you might understand by the terms, aggravating factors are bad things. Mitigating factors are good things for the defendant.

Appellant alleges the prosecutor improperly urged the jurors to put themselves in the place of the victim and visualize what she went through in her final moments. Appellant asserts the prosecutor's argument can only be characterized as appealing to emotions over reason and requiring jurors to speculate about the details of what happened and how. (See AOB 283; 54 RT 7626-7631.) As previously stated, counsel has wide latitude in closing argument. (See *Gamache*, *supra*, 48 Cal.4th at p. 390.) In full context, the prosecutor was asking the jury to review ***all of the evidence*** in deciding the appropriate punishment. (54 RT 7626-7631.) Contrary to appellant's assertion, the prosecutor was *not* asking the jury to speculate about the details of the crime.

Appellant asserts the prosecutor improperly argued his efforts to hide Gallego's body were legitimate sentencing factors to consider because the offered a peek into his soul. He argues these "post-crime" actions were not a statutory sentencing factor. (See AOB 284; 54 RT 7632.) However, everything that appellant did to Gallego after she was dead was all part of his crimes.[35] Thus, the prosecutor's comments were proper argument. (See *Gamache*, *supra*, 48 Cal.4th at p. 390.)

> You were read 11 of them. And some apply. Some do not. But it's ultimately your decision as to which factors apply and which ones do not.

(54 RT 7612-7614.)

[35] In context, the prosecutor argued:

> Now, in this penalty phase, unlike the guilt phase, I don't get a chance to address you after I sit down. I don't get any rebuttal. And so I thought, well, I want to review the transcripts from the defense opening and closing and try to anticipate what they might argue.
>
> And I read one part that really stuck out in my mind, and it said that, "the strength, the strength of the People's case, lies in

Appellant alleges the prosecutor improperly argued that jurors should count the aggravating factors alleged to arrive at a death verdict. (See AOB 284; 54 RT 7638.) In context, the prosecutor was referring to the number of special circumstances. Defense counsel objected on the ground that the prosecutor's comments appeared to be placing an arbitrary weight, and the trial court immediately explained that no arbitrary or "magical" weight was assigned to any of the factors for consideration. Following the court's explanation, the prosecutor subsequently clarified his comments and invited the jury to give greater consideration to the special circumstances. At no point did the prosecutor ask the jury to count the aggravating factors.[36] (54 RT 7638-7639.)

> what Mr. Parker did to Patricia after she was dead. The cutting of the fingers, the throwing of the fingers away in the dumpster, the sticking her in a trash can, dumping her up in Carlsbad, renting the U-Haul truck, cleaning her blood out of the carpet of the apartment."
>
> Now, there can be some disagreement as to that. But I think what you have to do is consider his actions after she was dead so you can get a peek into his soul. Why? The way we treat the dead tells us a lot about us as individuals.

(54 RT 7632.)

[36] The following colloquy transpired:

> [Prosecutor]: And it's important to understand that you only need to – you only need one special circumstance to get to this phase of the trial. Okay? All you need is one. For example, financial gain. If that's all we had, you would be here today, deciding what the appropriate punishment should be.
>
> If you have two, that's twice as many. If you have three, that's three times as many special circumstances that society has said –

Appellant appears to suggest the prosecutor erred or committed misconduct by referring to Gallego and her dog in his argument. He asserts the prosecutor "went so far with victim impact as to include the fact that the victim had a beloved dog." (See AOB 284; 54 RT 7642.) He argues canine fellowship is not a statutory factor in aggravation and that this was mentioned solely for the purpose of inflaming passions. (AOB 284.) In

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> [Def. Counsel]: Your Honor, I'm going to object. That seems to be placing an arbitrary weight. It's up to the jury to decide.
>
> The Court: Let me address that, and I have in the instructions. [The prosecutor] and [def. counsel] have both done so already in their comments.
>
> There is no magical weight assigned to any factor, no arbitrary weight. These are, as [def. counsel] says – these are for you to decide. You're to look at the factors, decide which ones are applicable and decide what the weight is to be assigned to any of them and all of them.
>
> Go ahead, [Prosecutor].
>
> [Prosecutor]: Thank you.
>
> The Court: I think both sides are correct in this regard.
>
> [Prosecutor]: And just to be clear, under Factor (A), you are to consider the circumstances found to be true. You can consider those special circumstances. That's what the judge has said in this instruction to you.
>
> Consider those special circumstances. And what I'm suggesting to you is that you should assign these special circumstances not some arbitrary weight but considerable weight based on what they represent as to how this crime was committed.

(54 RT 7638-7639.)

context, the prosecutor commented that appellant "presumably knew [Gallego] had a dog named Julie. That was her password." (54 RT 7642.) Before making that comment, the prosecutor had been discussing the financial gain special circumstance and how appellant did not kill a stranger, but rather "his roommate, a woman who he presumably knew so much about." (54 RT 7642.) In effect, the prosecutor did not mention Gallego's dog for the purpose of "inflaming passions" but for the purpose of making an argument on Factor (A). The prosecutor's comment was within the scope of counsel's wide latitude of argument. (See *Gamache*, *supra*, 48 Cal.4th at p. 390.)

Appellant complains the prosecutor improperly argued that the mitigation evidence presented about his early childhood amounted to "reverse victimization," calling himself a victim and robbing Gallego of the emotional response that was rightfully hers. (See AOB 284; 54 RT 7649.) The mere fact that the prosecutor argued against the defense's mitigating evidence does not mean the prosecutor erred or committed misconduct. The prosecutor was merely responding to the defense argument. "[I]t is not misconduct to argue that 'the evidence lacked the mitigating force the defendant claimed for it . . . .'" (*People v. Hajek* (2014) 58 Cal.4th 1144, 1239 ("*Hajek*"); quoting *People v. Raley* (1992) 2 Cal.4th 870, 917 ("*Raley*") [where defendant claimed his confession showed remorse, "the prosecutor was entitled to point out that he had denied culpability until he found out that one of his victims had survived and 'he's not going anywhere'"].)

Appellant asserts the prosecutor wrongly urged jurors to use his lack of a prior criminal record as aggravation, arguing that his brain could not have been affected since he graduated high school, flourished, and had no history of misconduct before this crime. (See AOB 284-285; 54 RT 7657.) He asserts this evidence is mitigating only. (AOB 285.) Again, a

prosecutor does not commit misconduct to argue evidence lacked the mitigating force for which a defendant claimed it to have. (*Hajek*, *supra*, 58 Cal.4th at p. 1239; *Raley*, *supra*, 2 Cal.4th at p. 917.)

Appellant complains that the prosecutor urged the evidence of his child abuse should be discarded because there were 80,000 child abuse reports in one year in San Diego and that jurors should not give all of those who reported the abuse an excuse for murder. (See AOB 285; 54 RT 7659.) In context, the prosecutor merely *asked* the jurors whether all of those individuals should be let "off the hook" for murder. The prosecutor did not advocate one way or the other.[37] The prosecutor did not commit misconduct.

Last, appellant alleges the prosecutor wrongly urged the fact that Gallego did not get due process – a jury and judge, an attorney, witnesses to testify before she was killed – weighed against a life sentence. Appellant argues his exercise of his constitutional rights cannot be used as aggravation. (See AOB 285; 54 RT 7673.) In context, the prosecutor was merely arguing that Gallego did not deserve to die, that she did not have anyone to argue for her life or on her behalf in her apartment before

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[37] In context, the prosecutor argued:

> And according to Dr. Kaufhold, there are 80,000 reported cases of child abuse per year in San Diego County alone. That's staggering. Staggering. Now, do all of these people then have an excuse if, God forbid, sometime later they should commit murder and be subject to the death penalty?
>
> Does that mean they all get off the hook? Say, "Wait a minute. I had that report of child abuse some time ago. I should not be subjected to the death penalty?"

(54 RT 7659.)

appellant killed her. The prosecutor neither argued nor suggested appellant's exercise of his constitutional rights was a factor for imposing death.[38] (54 RT 7672-7673.) The prosecutor's remarks were not improper.

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[38] The prosecutor argued:

> For what he did to Patricia and the pain it's caused her parents, he does not deserve to feel that relief. He does not deserve to feel that joy, that sense of winning.
>
> As you approach the point of judgment in this case, you've heard a lot of words. Thousands of words, lots of witnesses, lots of voices. There's one voice you have not heard, and you won't. It's the voice of Patricia.
>
> Her voice has not been heard in this courtroom. It will never be heard again by her mother. Patricia's voice will never be heard again by her father, her friends.
>
> She cannot speak for herself. I do not presume to speak for Patricia. But she was a human being. Her life had value. Her life had meaning. She had a heart. She had a soul. She had a wonderful spirit.
>
> And more than anything else, she wanted to be one of us. She wanted what most people take for granted. She wanted to be a United States citizen. She would have been proud.
>
> She did not deserve to die. She was killed. There was no jury for her. There was no judge in that apartment on Benicia Street. There was no bailiff to maintain order. She did not have an attorney go in there and argue for her life to Calvin Parker. She was unable to call witnesses to come in and testify to Calvin Parker before he killed her.
>
> There was just Calvin Parker. Not in a courtroom. Just Calvin Parker and Patricia Gallego in that apartment. Calvin Parker, a person, who chose to extinguish her life, to take her last breath away from her for money, for sex.

D. The Prosecutor's Argument That Jurors "Shall" Impose The Death Penalty Was Not Improper

Appellant claims the prosecutor improperly used the "shall" language during the closing argument and that any juror who did not feel bound by that language was not following the law. (AOB 286-287; 54 RT 7660-7671.)

During his closing argument, the prosecutor argued in pertinent part:

> Now, there's another portion of the instruction that I read to you that has some language in it that is very important. It's a portion of CALJIC 8.88. And what does it say?
>
> It says, "If you conclude that the aggravating factors are so substantial in comparison to the mitigating factors that they warrant death instead of life without parole, you shall return a judgment of death. However, if you are unable to come to this conclusion, you shall bring back a judgment of life without parole."
>
> "Shall." You shall return a judgment of death if you conclude the aggravating circumstances are so substantial in comparison to the mitigating circumstances.
>
> What does that mean? Well, during jury selection, you were asked a number of questions; some of which sparks controversy, sparks discussion. And one of those questions was, "Which one do you think is worse? Life without the possibility of parole or the death penalty? There were answers that varied all across the board.
>
> And why is this "shall" language so important? Well, the "shall" language is important because you can't go back into that jury room and think, "Well, gosh, if we really want to punish him, if we really want to punish, we'll just sentence him to life without the possibility of parole even though we find that

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> When Calvin Parker was given a decision about death, he made the decision to kill. To murder Patricia Gallego. That was his decision.

(54 RT 7672-7673.)

the aggravating factors are so substantial in comparison to the mitigating factors."

Because you can't – you can't replace your values, your judgments, with that of the law. You have to accept the law as the judge gives it to you.

So if you find that the aggravating factors are so substantial in comparison to the mitigating factors, you shall return a verdict of death even if, in your own mind, you think to yourself, "Well, gosh, I think life without the possibility of parole is worse."

[¶] . . . [¶]

"Shall." So there should be no debate back in that jury room about which punishment is worse. The law says – the law says – and you've taken an oath to uphold the law. The law says that death is worse. And if you find those factors weigh accordingly, then you shall return that verdict of death.

So this is not going to erupt into a debate back in the jury room about which one is worse. It's a simple weighing, regardless of which one you think is worse. That's what that language means. "Shall."

And if anybody back in that jury room says, "Well, I do believe the aggravating factors outweigh – substantially outweigh the mitigating factors outweigh – substantially outweigh the mitigating factors but I want him to sit in jail and think about it for the rest of his life," you have to point to this instruction and say, "If you do that, you're not following the law."

(54 RT 7669-7671.)

In context, the prosecutor was merely explaining CALJIC No. 8.88. (54 RT 7669-7671.) The prosecutor did not err or otherwise commit misconduct.

E. The Prosecutor Did Not Commit Misconduct by Arguing Lack of Remorse as a Factor in Aggravation

Appellant claims the prosecutor improperly urged lack of remorse as a factor in aggravation. (AOB 287; 54 RT 7667.)

The record reflects the prosecutor argued as follows:

> What the defense is asking you to do in this case is not to explain the behavior but to mitigate it. And I was struck by something that was said in the opening statement by defense counsel in the penalty phase. I'll quote it.
>
> "For 30 years, Calvin Parker lived with the damage inflicted upon him as a baby and as a toddler. Now, for the rest of his life, Calvin Parker is going to live with the added pain that he has caused the family of Patricia Gallego, the pain and suffering he has caused them," end quote.
>
> Live with the pain he's caused the victim's family? Don't think for a minute that he's going to sit in prison and wonder and feel bad about the pain that he's caused this victim's family.
>
> You saw the mother testify and cry up on the stand, the pain that it has caused her. Were there any tears shed then?
>
> You only need to look at the facts of the crime. How he cooly and calmly cashed the checks, how he calmly rented a U-Haul. And Mr. Dryer. Remember him, the U-Haul guy? He said, "He's a nice guy. In fact, I patted him on the back. Said, 'Come back. Give me some more business.'"
>
> When he went to the Chevron station, they said, "Nice guy." No big deal. Most people are upset when their car is broken. He said, "Fine. No problem. I'll wait. I'll wait while you fix my car." He had no problem. He had no problem with that.
>
> All of this within a day or two of raping and killing Patricia Gallego. Does that indicate that he's going to feel pain over the loss to the victim's family that they feel so terribly?
>
> Then, throwing her thumb – that extra thumb in the dirt. Remember Ilana Ivascu? She said he put the stuff in the

> dumpster and then he kind of went back and then he kind of nonchalantly threw something in the planter, in the dirt over there, and drove away. Nonchalantly threw away a part of Patricia Gallego's body, a part of her hand. Just tossed it out like it was a cigarette butt or a piece of trash.
>
> Does that lead you to believe that he is going to feel the pain of the victim's family? That he's going to, you know, sit in prison with a picture of Patricia up there and mourn her loss?
>
> If he felt remorse, if he felt pain over the loss of Patricia Gallego, he never would have mutilated her body. He never would have dumped her body on the side of the road in Carlsbad. Don't think for a minute that he's going to feel the pain of the victim's family in this case.

(54 RT 7665-7667.)

In context, the prosecutor was merely responding to the defense's argument that appellant felt remorse for the pain and suffering that he caused Gallego's family. (54 RT 7665.) The prosecutor countered the defense's argument by reminding the jury that appellant felt no remorse when he mutilated Gallego's body, nonchalantly threw parts of her body into the dumpster, and tossed her body on to the side of the road in Carlsbad. The prosecutor argued appellant did not deserve mitigation. (54 RT 7665-7667.) Hence, the prosecutor did not commit misconduct. (See *Hajek, supra*, 58 Cal.4th at pp. 1242-1243.) Moreover, a prosecutor may urge the jury to view a defendant's callousness of acts and lack of remorse at or near the time of the murder as aggravating circumstances of the capital crime. (*Montes, supra*, 58 Cal.4th at pp. 891-892.)

XXIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 8.88 THAT IF IT CONCLUDED THAT THE AGGRAVATING CIRCUMSTANCES WERE SO SUBSTANTIAL IN COMPARISON TO THE MITIGATING CIRCUMSTANCES THAT THEY WARRANT DEATH INSTEAD OF LIFE WITHOUT PAROLE, IT SHALL RETURN A JUDGMENT OF DEATH

Appellant contends that the trial court erred in instructing the jury with a modified version of CALJIC No. 8.88. Specifically, appellant argues that because the jury could have understood this instruction to mean that "a death verdict is mandatory" if it finds that "the aggravating circumstances outweighed those in mitigation," this instruction violated his federal constitutional rights and "failed to accurately describe the weighing process the jury must apply in capital cases." (AOB 288-293.) Appellant's claim is meritless as both this Court and the United States Supreme Court has held that such instructions are proper.

A. Factual Background

During discussions regarding the penalty phase instructions, appellant's defense counsel objected to the prosecution's proposed version of CALJIC No. 8.88 arguing that the word "shall" in this instruction might lead the jury to believe that the death penalty is "mandatory." Counsel requested that, if the trial court overruled its objection to the "shall" language, language be added to this instruction stating that death is "never mandatory." (50 RT 6910-6912.) After further discussion on the current state of the law, the trial court kept the "shall" language in the instruction but, pursuant to defense counsel's request, added to this instruction that "[t]he death penalty is never mandatory." (50 RT 6913-6916.)

Prior to closing arguments in the penalty phase, the trial court instructed the jury with the modified version of CALJIC No. 8.88:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.

A sentence of life without the possibility of parole means confinement to the state prison with no eligibility for parole. A sentence of death means execution either in the gas chamber or by lethal injection.

The death penalty is never mandatory. It is but one of two options the jury may choose after considering and weighing the factors in aggravation and mitigation.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. Each of you is free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. The jury does not have to unanimously agree as to any particular aggravating or mitigating factor. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.

If you conclude that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that they warrant death instead of life without parole, you shall return a judgment of death. However, if you are unable to come to this conclusion, you shall bring back a judgment of life without parole. Each of you must make this determination for yourself as an individual.

> In deciding whether life imprisonment without the possibility of parole or death is the appropriate sentence, you may not consider for any reason whatsoever the deterrent or non-deterrent effect of the death penalty nor the monetary cost to the State of execution or maintaining a prisoner for life. . . .

(54 RT 7605-7607; 8 CT 1920-1922.)

During closing argument, the prosecutor argued in pertinent part:

> Now, there's another portion of the instruction that I read to you that has some language in it that is very important. It's a portion of CALJIC 8.88. And what does it say?
>
> It says, "If you conclude that the aggravating factors are so substantial in comparison to the mitigating factors that they warrant death instead of life without parole, you shall return a judgment of death. However, if you are unable to come to this conclusion, you shall bring back a judgment of life without parole."
>
> "Shall." You shall return a judgment of death if you conclude the aggravating circumstances are so substantial in comparison to the mitigating circumstances.
>
> What does that mean? Well, during jury selection, you were asked a number of questions; some of which sparks controversy, sparks discussion. And one of those questions was, "Which one do you think is worse? Life without the possibility of parole or the death penalty? There were answers that varied all across the board.
>
> And why is this "shall" language so important? Well, the "shall" language is important because you can't go back into that jury room and think, "Well, gosh, if we really want to punish him, if we really want to punish, we'll just sentence him to life without the possibility of parole even though we find that the aggravating factors are so substantial in comparison to the mitigating factors."
>
> Because you can't – you can't replace your values, your judgments, with that of the law. You have to accept the law as the judge gives it to you.

> So if you find that the aggravating factors are so substantial in comparison to the mitigating factors, you shall return a verdict of death even if, in your own mind, you think to yourself, "Well, gosh, I think life without the possibility of parole is worse."
>
> [¶] . . . [¶]
>
> "Shall." So there should be no debate back in that jury room about which punishment is worse. The law says – the law says – and you've taken an oath to uphold the law. The law says that death is worse. And if you find those factors weigh accordingly, then you shall return that verdict of death.
>
> So this is not going to erupt into a debate back in the jury room about which one is worse. It's a simple weighing, regardless of which one you think is worse. That's what that language means. "Shall."
>
> And if anybody back in that jury room says, "Well, I do believe the aggravating factors outweigh – substantially outweigh the mitigating factors outweigh – substantially outweigh the mitigating factors but I want him to sit in jail and think about it for the rest of his life," you have to point to this instruction and say, "If you do that, you're not following the law."

(54 RT 7669-7671.)

B. The Trial Court Properly Instructed the Jury with the Modified Version of CALJIC No. 8.88 as That Instruction Correctly Informed the Jury as to the Weighing Process in Considering Penalty

As an initial matter, appellant's claim that the modified version of CALJIC No. 8.88 violated the federal Constitution is without merit. The United States Supreme Court in *Boyde v. California* (1990) 494 U.S. 370, 376-377, held such an instruction did not violate the federal Constitution.

Appellant's other objections to this instruction also fail on the merits. The language used by the trial court here is similar to the language in Penal Code section 190.3. In *People v. Brown* (1985) 40 Cal.3d 541, this Court

held instructing the jury that "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death" was confusing because the jury might erroneously infer it could perform the balancing process by comparing the number of factors in aggravation by those in mitigation or by an arbitrary assignment of weights to the factors. This Court found it could also be confusing because it could allow the jury to return a death verdict without deciding that the death penalty was appropriate under the facts and circumstances of the particular case. (*Id*. at p. 544, fn. 17; *People v. Clark* (1992) 3 Cal.4th 41, 164-166, overruled on other grounds in *People v. Pearson* (2013) 56 Cal.4th 393, 462.)

Here, the jury would not have been confused about the balancing process because the trial court also instructed the jury that

> [t]he weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. Each of you are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.

(54 RT 7605-7607; 8 CT 1920-1922.) "This instruction made clear the weighing process was not mechanical and, by informing the jurors they should decide the weight and force of the factors, ensured they understood they had discretion to determine the appropriate penalty." (*People v. Carpenter* (1997) 15 Cal.4th 312, 419, overruled on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176, 1185-1187 [holding similar instructions eliminated confusion].)

Also, here the jury would not have been confused that the instruction would allow the jury to return a death verdict without deciding that the death penalty was appropriate under the facts and circumstances of the particular case, because here, unlike in Brown, the trial court instructed that

"[i]f you conclude that the aggravating circumstances are so substantial in comparison to the mitigating circumstances *that they warrant death instead of life without parole*, you shall return a judgment of death." (54 RT 7605-7607; 8 CT 1920-1922, italics added.) Thus, the trial court's added language, italicized above, eliminated the confusion this Court was concerned about in *Brown*, as the jury here was instructed that they would only return a judgment of death if they decided that the aggravating circumstances were so substantial in comparison to the mitigating circumstances that the jury believed they warranted death. Moreover, the jury was also specifically instructed that "[t]he death penalty is *never* mandatory." (56 RT 7605-7607; 8 CT 1920-1922, italics added.)

The modified version of CALJIC No. 8.88 used the same language as issue in *People v. Noguera* (1992) 4 Cal.4th 599, 640-641, which this Court upheld. In the trial court's instruction here, as in that in *Noguera*, there was no "reasonable likelihood that a juror would have misunderstood the nature of his or her role in the capital sentencing process-either as one involving a mechanical quantification of relevant factors or requiring the imposition of the death penalty." (*Id*. at p. 641.) Thus, the trial court did not err in instructing with the modified version of CALJIC No. 8.88.

XXIV. THE TRIAL COURT PROPERLY APPOINTED SEPARATE COUNSEL TO INVESTIGATE APPELLANT'S ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR PURPOSES OF A MOTION FOR NEW TRIAL

Appellant contends the trial court erred and violated his constitutional rights by appointing him separate counsel for the purpose of investigating his allegations of ineffective assistance of counsel while failing to relieve appointed counsel of their duties. (AOB 293-301.) Appellant adds the court should not have allowed him to act as his own counsel when he submitted his own motion for new trial. (AOB 300-301.) Appellant's contentions are without merit.

A. Factual Background

On or about the same day that the jury returned a verdict of death on August 12, 2002, the trial court received a letter from appellant requesting a hearing for a new trial based on ineffective assistance of counsel. (8 CT 1938; 11 CT 2615-2616.) The court appointed the Alternate Public Defender's Office for the limited purpose of representation on the new trial motion issues only. (11 CT 2616; 55 RT 7832-7833.) The trial court specified:

> I will not relieve the Public Defender as counsel, but I will appoint the Alternate Public Defender to deal with the limited new trial motion issue of the adequacy of counsel provided during this trial.
>
> There are, at least theoretically – and I don't have any grounds in mind. But there are theoretically other potential grounds for a new trial motion. I propose to deal first with just the one that Mr. Parker raises.
>
> And if – if that proves successful, then we go back to square 1. If that is unsuccessful, then the Public Defender would still be free to deal with any other new trial motion issues in due course.

(55 RT 7836.)

Defense counsel assured the trial court that they would cooperate with the Alternate Public Defender and give the Alternate Public Defender whatever materials he needed. (55 RT 7837-7838.) When appellant indicated that he would need copies of specific documents and evidentiary materials, the court denied appellant's request. The court reminded appellant that his current attorneys had those materials, that the Alternate Public Defender would have copies of those materials, and that appellant was not the attorney. (55 RT 7837.)

On September 11, 2002, the trial court held a status conference on appellant's request for a new trial based on his trial counsel's performance.

Mike Dealy from the Alternate Public Defender's Office indicated he needed additional time to review the materials surrounding appellant's *Marsden* motions. (56 RT 7842-7843.)

At a subsequent status conference held on October 7, 2002, appellant indicated to the trial court that he believed Mr. Dealy might be more interested in protecting the Public Defender's Office than him. (57 RT 7858-7860.) The court told appellant to give Mr. Dealy any evidence that he had in support of a new trial motion and commented that appellant could not be heard to complain about Mr. Dealy if he hid the ball from Mr. Dealy. (57 RT 7862.) The court did not hear any basis to believe Mr. Dealy was in a "conflicted situation." (57 RT 7862.) At Mr. Dealy's suggestion, the court scheduled a hearing date that would give Mr. Dealy the opportunity to speak with appellant and review appellant's letter and other materials with appellant in detail before filing any further points and authorities in support of the motion for new trial. (57 RT 7862-7865.)

At the hearing on the new trial motion on December 13, 2002, Mr. Dealy stated he reviewed the entire transcript of the trial and the references in the discovery that were made by appellant. Mr. Dealy stated he also reviewed part of an unspecified 85-page handwritten document that appellant was preparing for the court. (58 RT 7872-7873.) Mr. Dealy informed the court that he did not file any points and authorities because he was not certain that the claims raised by appellant were such allegations that Mr. Dealy had the resources to investigate. Mr. Dealy stated in pertinent part:

> . . . Given that this is a capital case, your Honor, and given the type of proceedings that are undertaken on habeas or appeal, I do not believe we have the adequate expertise.
>
> I do not want to say anything on the record or do anything that would jeopardize Mr. Calvin's – Mr. Parker's appeal rights and I don't want to miss anything, is what it got down to. And I

> think, because of that – I think this is more properly – these issues that he's raising are more properly raised on appeal and by way of habeas.
>
> I'm not trying to be disingenuous by saying that. What it gets down to is I don't want to make a mistake that will jeopardize his appellate or habeas rights.

(58 RT 7874.)

The trial court asked Mr. Dealy if he was backing out altogether. Mr. Dealy stated that he was not backing out altogether but that he had given appellant some advice on his *Marsden* motion. Mr. Dealy added that he told appellant that he did not want to be a filter about the *Marsden* issues (i.e., which claims were good ones and which claims were bad ones) and that such issues would be better handled by an attorney on appeal or habeas. The court was genuinely surprised by Mr. Dealy's response and could not understand why Mr. Dealy, an experienced attorney from the office that was experienced in handling ineffective assistance of counsel claims, was saying that a different attorney would be better able to handle those issues than him. (58 RT 7874-7877.) The court eventually stated that it wanted to hear from Mr. Dealy's boss that his office could not do the work that the court asked his office to do. (58 RT 7880.)

Following a brief recess, Chief Trial Deputy Daniel Mangarin of the Alternate Public Defender's Office joined Mr. Dealy in the courtroom. (58 RT 7883-7884.) The court thought Mr. Mangarin would be well served by rescheduling the matter for the following week to give him time to review a transcript of the court proceedings thus far. (58 RT 7886.)

At the outset of the hearing on December 16, 2002, the trial court noted that it received a declaration from Mr. Dealy stating he reviewed the materials and decided not to file a motion for new trial. (59 RT 7889-7890.) The court noted that Mr. Dealy was one of the most experienced attorneys that the court has seen. (59 RT 7891.) Mr. Mangarin agreed,

commenting that Mr. Dealy and many others at the Alternate Public Defender's Office had the experience, capability, and skill to make a decision within the purview of its assignment in the case. (59 RT 7891-7892.)

Mr. Mangarin assured the court that his office understood the purview of the assignment and appointment, reviewed the trial record and any additional records that were provided by the court, and made a determination as to whether his office felt it was in appellant's best interest to file a motion for new trial based on ineffective assistance of trial counsel. (59 RT 7892.) The trial court specified that it did not ask Mr. Dealy to simply review the record, but to review the record and then present any issues that should be presented. (59 RT 7892.) Mr. Mangarin reiterated:

> Within our purview of understanding what we should be doing for Mr. Parker, we made that decision. We have elected not to file a motion for new trial in this case.
>
> And, simply stated, your Honor, I believe that we have looked at that inside and out. We've contacted everyone that should be contacted. And given what we understand the record to be, given what we understand our assignment to be, we have decided, elected not to bring a motion for a new trial on Mr. Parker's behalf.

(59 RT 7893.)

The trial court asked Mr. Mangarin whether he was taking the position that his office was institutionally inadequate to handle such issues. Mr. Mangarin responded, "Absolutely not." (59 RT 7895.) Mr. Mangarin assured the court that Mr. Dealy looked at appellant's case, made an assessment, and elected not to file a motion for new trial based on ineffective assistance of counsel. The court asked Mr. Mangarin whether the decision not to file a motion was because his office did not see any colorable issue to present or because his office saw colorable issues to present but decided not to present them now and would rather wait until

sometime later. Mr. Mangarin stated the decision was because his office did not see colorable issues. (59 RT 7897.)

The trial court asked Mr. Mangarin why Mr. Dealy had previously commented that he feared being a filter for ineffective assistance of counsel issues, i.e., disagreeing with appellant's issues. (59 RT 7897-7898.) Mr. Dealy stated that he did not want to tell the court he did not believe there were no colorable issues and negatively impact appellant's ability to bring the motion on his own if that was what appellant wanted to do. (59 RT 7899-7900.)

Before discharging the Alternate Public Defender's Office, the trial court commented in pertinent part:

> What I wanted, and I think what I got, is an independent evaluation of any potential I.A.C. issues. It appears, at this point, that I've had that not just by one but by two attorneys, two experienced defense attorneys, and they have expressed their professional view that there are no issues properly to be presented at this point.
>
> So with that, it appears to me that the reason for which I appointed the Office of the Alternate Public Defender has been completed.

(59 RT 7903.)

The trial court subsequently released the Alternate Public Defender's Office from the case. (59 RT 7903.)

B. Appellant Did Not Request Substitute Counsel and Had No Basis for an Ineffective Assistance of Counsel Claim

Appellant claims the trial court erred by appointing separate counsel to investigate his allegations of ineffective assistance of trial counsel while failing to relieve appointed counsel of their duties. (AOB 293.) Appellant alleges "[a]ppointed counsel were in the untenable position of having their integrity attacked, while still bearing responsibility for the overall

representation." (AOB 300.) Appellant further alleges "[t]he alternate public defender, having a limited mandate and limited resources for an undertaking that could potentially compromise [his] post-conviction rights, also had their hands tied in respects that could not be full explored on the record." (AOB 300.) The record indicates otherwise. The record shows trial counsel was more than willing to provide the Alternate Public Defender's Office with whatever records and materials necessary to assist the Alternate Public Defender's Office in its review of the matter. (55 RT 7837-7838.) Additionally, the record reflects that limited resources were not at issue for the Alternate Public Defender's Office in its investigation of appellant's issues. (59 RT 7895.) Contrary to appellant's assertion that the court left him with "no coherent representation," he had the representation of "two experienced defense attorneys" for purposes of a motion for new trial based on ineffective assistance of counsel claims. (59 RT 7903.)

Appellant asserts the trial court found a sufficient basis to appoint the Alternate Public Defender to represent him, but it erred in limiting that appointment to representing him on the new trial motion based on ineffective assistance of counsel. (AOB 295.) Citing this Court's decision in *People v. Sanchez* (2011) 53 Cal.4th 80 ("*Sanchez*"), appellant argues a trial court should appoint new counsel when a showing has been made of the need for substitute counsel. (AOB 295-296.)

Appellant's reliance on *Sanchez* is misplaced because his case is factually and legally distinguishable. In *Sanchez*, this Court explained that "if a defendant requests substitute counsel" and makes a showing that his right to counsel has been substantially impaired, substitute counsel must be appointed as attorney of record for all purposes. (*Sanchez*, *supra*, 53 Cal.4th at p. 90.) Here, appellant did not request substitute counsel. Rather, he submitted a handwritten note in which he merely asserted ineffective assistance as a basis for a new trial. (8 CT 1938.) Significantly,

two experienced defense attorneys who conducted a thorough investigation of the case found no colorable claim of ineffective assistance of counsel. (59 RT 7897-7900.)

Based on the foregoing, the trial court did not err or violate appellant's constitutional rights when it appointed the Alternate Public Defender for the limited purpose of representing appellant on the motion for new trial based on ineffective assistance of counsel.

Appellant also complains that he was "essentially permitted to act as his own counsel, submitting his own motion for new trial even as the lawyers he accused of malfeasance were left to litigate as best they could the issues they intended to raise on [his] behalf." (AOB 300.) The record indicates otherwise. When appellant indicated to the court that he would need copies of specific documents and evidentiary materials, the court denied his request and reminded him that his trial attorneys had those materials, that the Alternate Public Defender would get copies of those materials, and that appellant was *not the attorney*. (55 RT 7837.) In short, the court made certain that appellant received legal representation throughout the entire trial. Thus, the court did not leave appellant to serve as his own counsel.

XXV. THE TRIAL COURT PROPERLY FILED APPELLANT'S HANDWRITTEN DOCUMENT AT HIS REQUEST

Appellant contends the trial court erred and violated his constitutional rights by filing an approximately 85-page handwritten document in which he complained about his

trial attorneys' alleged conflict of interest when his attorneys neither endorsed the content of his writings nor believed that it was in his best legal interest to disclose those otherwise confidential materials. (AOB 301-307.) As discussed below, appellant's contention is without merit.

A. Factual Background

As discussed above in Argument XXIV (A), *supra*, on or about the same day that the jury returned a verdict of death on August 12, 2002, the trial court received a letter from appellant requesting a hearing for a new trial based on ineffective assistance of counsel. (8 CT 1938; 11 CT 2615-2616.) That letter read in pertinent part:

> Court Release Deputy,
>
> Could you please give this letter to Daryl Weiss or his partner Jay Scheppel, or whomever may be a Dept. 55 Bailiff today? Thanks.
>
> This letter is for Judge Wellington, from Defendant Calvin L. Parker. Case # SCD 154640, Booking #00156026. Your Honor, through this letter I'm requesting a hearing for a new trial based upon ineffective assistance of counsel. I've waded through the vast bulk of my case evidence, & I've got the documentation to support my claims of ineffective assistance. I'm requesting this hearing for a new trial, at the court's soonest convenience.

(8 CT 1938.)

During the hearings on that motion for new trial, the Alternate Public Defender who was appointed for the limited purpose of representing appellant on the new trial motion informed the trial court that appellant prepared an 85-page document that had been forwarded, but not filed, to the court. (58 RT 7872-7873; see 9 CT 2116-2162; 10 CT 2163-2244.) For the record, the prosecutor stated he had not seen that document. (58 RT 7882.) The court made clear that it had not reviewed the document either, as part of its ongoing effort to help defense counsel protect appellant from himself. (58 RT 7883.) Mr. Dealy from the Alternate Public Defender's Office stated that he would have requested that the document be withdrawn from the court's file but appellant was "insisting" that the document be entered in the court's file. (58 RT 7883.) For the record, appellant's trial

counsel stated they also had not received a copy of appellant's 85-page document. (58 RT 7887.)

After the Alternate Public Defender's Office informed the trial court that there were no colorable issues of ineffective assistance of counsel and that it would not be filing a motion for new trial on appellant's behalf, the court released the Alternate Public Defender's Office on December 16, 2002. (11 CT 2623; 59 RT 7899, 7902-7903.)

Appellant subsequently asked the trial court if he could have the opportunity to raised the issues presented in his "motion." (59 RT 7906.) The court commented that it had not actually seen the document but noted that the document had been presented to the court even though appellant was represented by counsel. The court specified it had not filed or read the document yet and asked trial counsel, Richard Gates, for his thoughts on the matter. (59 RT 7907.) The following colloquy ensued between the court and Mr. Gates:

> Mr. Gates: I have not seen it nor read it, nor know the contents of it. I think it should be returned to trial counsel so that I can speak with Mr. Parker about it.
>
> If it's in the nature of a new trial motion based on ineffective assistance of counsel, it puts us in a very difficult situation for several reasons. One is if it is – if it's actually a motion for a new trial based on ineffective assistance of counsel, the District Attorney will have to receive a copy of it and the court will have to have a hearing on it. It would put me in a position of being at odds again with Mr. Parker and Miss Gilzean and I possibly having to be witnesses and his counsel.
>
> The Court: Well, if it is a request for a new trial based on the issues for which the Alternate Public Defender was appointed, then we've had counsel reviewing that and it doesn't seem like you can properly or should have to reconsider that.
>
> Mr. Gates: And I guess I'm in the situation of having to make that decision. That would be –

The Court: Or should I?

Mr. Gates: Well, your Honor –

The Court: What if I were to review that and to make my own determination whether it's, essentially, an I.A.C. document?

Mr. Gates: Well, frankly, your Honor, since you haven't sentenced Mr. Parker yet, I'm loathed to have you review any documents at all that may reveal information to you that's outside of the current record that may impact your human ability to look at Mr. Parker and consider whether you're going to spare his life or not.

And I think we're all in a very awkward position here because we are – there are only a few people in this room here who know what that document says, and –

The Court: And neither you nor I are within that small group.

Mr. Gates: Exactly.

So I'm doing the best I can right now to keep the court from looking at something that may, just on a human basis, affect your ability to be merciful to Mr. Parker or to consider arguments that I make in his behalf later.

I don't know what he's going to say, and I don't know how – I don't know if other counsel have had an opportunity to speak with him extensively about the substantive – not just the allegations that are contained within it but whether he wants to be speaking about the underlying factual background of this case in a case where he did not testify, where there's no evidence of his statements that have been heretofore introduced to the court.

This is a – this is a very touchy spot for us to be in and to be working in the blind. I think the best thing would be to have it returned to me so that I can read it and then discuss with Mr. Parker what aspects of those he wants to air out and to find out if it's in the nature of a new trial motion or a Marsden.

The Court: Ultimately, if we get to the point where we are at an automatic motion for modification of a judgment and/or a

sentencing following that, if Mr. Parker wanted to say something to me, he would have the right to do that.

Mr. Gates: Absolutely.

The Court: And the thought I've had is that if he wants to speak to me either in writing or orally, especially if he wants to do it in writing, he should be given dignity to be able to do that. And we've had enough discussion of this document on the record that should there ever be any appellate review, it seems a safe bet that somebody is going to want to look at that, have access to it.

What if I were to do this: one, to preserve the record and, two, to preserve your and Mr. Parker's options, what if I order a copy of that made, given to you. We keep the original in the file without me looking at it for the moment. Give you a chance to review it and take whatever thoughts you wish to take in terms of talking to Mr. Parker about whether he wants to share this with me or not, make any legal arguments you may wish to make.

And then after that, I – I have a range of options, one of which is to decide if maybe I better read it. But it would be after you've had a chance to read it and after you've had a chance to talk to Mr. Parker about whether he wants me to read some or all of it.

Does that seem reasonable?

[¶] . . . [¶]

I'll direct my clerk to maintain our current copy, the one we received in a sealed condition. I won't review it until after you've had a chance to talk to it.

Mr. Gates: Nor any representative of the People nor the Probation Department nor anyone else?

The Court: That's correct. I'm ordering that, for the moment, it be sealed. Meaning nobody gets it, including me.

Mr. Gates: All right.

(59 RT 7907-7910; 11 CT 2623.)

The trial court urged appellant to discuss his paperwork with his trial counsel. Appellant stated he understood the court's orders. (59 RT 7911.)

On January 7, 2003, trial counsel informed the trial court that he discussed appellant's paperwork with appellant and that appellant wanted the "motion" to be lodged with the court. (11 CT 2624; 60 RT 7913.) Mr. Gates stated he spoke with appellant about what appellant really wanted to have happen since the title of his document read "Notice of Motion and Marsden Motion for Removal of Counsel and Reversal Based on Ineffective Assistance of Counsel, Prosecutor Misconduct and Witness Tampering." (60 RT 7913-7914.) Specifically, Mr. Gates needed to know if appellant wanted his document to be a *Marsden* motion or another type of motion. Mr. Gates reported that appellant had instructed him to tell the court that his document was alleging a conflict of interest in his attorneys, that he did not want his document to be treated as a *Marsden* motion, and that he understood a copy of his paperwork would consequently be delivered to the District Attorney for the District Attorney's review. Mr. Gates further reported that appellant wanted a full hearing on the issue of whether a conflict of interest existed within his legal representation and that, if such a conflict of interest were to be established, that his case would therefore be reversed. (60 RT 7914-7915; 11 CT 2624.) When Mr. Gates asked appellant if his report to the court was accurate, appellant confirmed that it was. (60 RT 7914.)

The trial court asked appellant if he wanted the court to read his 85-page document. Appellant answered, "That is correct." (60 RT 7918.) The court asked appellant if he understood that, by not presenting his document as a *Marsden* motion, the District Attorney would be getting a copy of the document and reading it. Appellant stated that he understood. (60 RT 7918; 11 CT 2624.)

The trial court ordered appellant's document to be unsealed. Mr. Gates stated he had not yet given a copy to the prosecutor but had prepared a copy of it to give to the prosecutor. (60 RT 7918.) The court granted appellant's request to file his "motion." (11 CT 2624.)

On January 13, 2003, the trial court denied appellant's "motion." (61 RT

B. Appellant Insisted That the Court Unseal and File His Document

In reliance on *Sanchez*, *supra*, 53 Cal.4th 80, appellant argues that when a defendant who requests substitute counsel and makes a showing during a *Marsden* hearing that the right to counsel has been substantially impaired, a court must appoint substitute counsel as attorney of record for all purposes. (AOB 305.)

All indications in the record are that the trial court and appellant's attorneys made every effort to keep his 85-page document sealed, confidential, and unread. (11 CT 2623-2624; 58 RT 7872-7873, 7883; 59 RT 7907-7910; 60 RT 7913-7915.) The court and appellant's attorneys tried to discourage appellant from unsealing his document, but appellant made clear that he did not want his document to be treated as a *Marsden* motion. Despite his attorneys' misgivings, appellant wanted his document to be unsealed and read by the court and the prosecutor. Appellant insisted on filing his document with the court. (11 CT 2624; 60 RT 7913-7918.)

In short, appellant was adamant that he did not file a *Marsden* motion. And, he specifically requested that his 85-page document be unsealed and filed with the court. The instant case is factually and legally distinguishable from *Sanchez*. Appellant's reliance on *Sanchez* is misplaced. The trial court neither erred nor violated appellant's constitutional rights by filing appellant's 85-page document at his insistence.

XXVI. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR NEW PENALTY PHASE TRIAL

Appellant contends the trial court erred and violated his constitutional rights by denying each of the grounds raised in the defense's motion for a new penalty phase trial. (AOB 307-312.) Appellant's contention is without merit because the court properly exercised its discretion in denying the motion.

A. Factual Background

On January 31, 2003, the defense filed a motion for new penalty phase trial pursuant to Penal Code section 1181. (9 CT 2072-2080.) Pursuant to Penal Code section 1181, subsection (5), the motion sought a new penalty phase trial based on the cumulative effect of the following incorrect legal rulings by the trial court: permitting the prosecution to present numerous photographs of Gallego taken while she was alive; permitting the prosecution to present additional autopsy photographs of Gallego's face and mutilated hands; permitting the prosecution to call Kristina Stepanof as a witness and introduce a "thank you" note written by Gallego to Stepanof; and, permitting the prosecution to call Brenda Chamberlain as a rebuttal witness and introduce morphed photographs depicting pornographic images of her. (9 CT 2072-2079.) Pursuant to Penal Code section 1181, subsection (7), the motion sought, in the alternative, a reduction of the penalty to life in prison without the possibility of parole on the ground that the death sentence was contrary to the law and the evidence. (9 CT 2072-2073, 2079.)

On February 10, 2003, the prosecution filed an opposition to the defense's motion for new penalty phase trial. (9 CT 2081-2084.)

Before sentencing appellant on February 24, 2003, the trial court denied the motion for new penalty phase trial. The court addressed each of the issues raised in the motion as follows:

. . . In the new trial motion, in the substantive portion of the new trial motion, essentially, the defense re-addresses a series of issues that were raised, I believe fully developed, during trial, issues as to which the defense continues to disagree with the court's rulings.

The first had to do with photos of the victim in life presented to the jury at the penalty phase. I'm not going to restate all of the reasons that I set out in the record before trial on these. But in terms of highlights, I limited the offered photos, I believe, from three boards down to one.

I also limited them to photographs of the victim as an adult as she encountered the defendant. Those were offered to illustrate the victim impact evidence, which is expressly authorized by the U.S. Supreme Court. I will stand by the rulings I made at that time.

There's an additional argument that additional autopsy photos were allowed at the penalty phase. There were particularly upsetting photographs, specifically of the victim's hands, which I excluded under 352, essentially at the guilt phase of this trial but believed that, as evidence of the circumstances of the crime, they were properly admissible at the penalty phase. I – that is still my view.

Concerns are addressed with regard to the testimony of Kristina Stepanof with regard to the testimony of Kristina Stepanof and the – what's been characterized as a thank-you note from the victim. The – in essence, as I understood the defense argument with regard to that testimony, as well as the letter itself, it is that victim impact evidence should not be received with regard to people who go beyond the family circle or the scene of the crime.

I disagreed with that. I continue to disagree with that. This was offered as part of the victim impact evidence to demonstrate the characteristics of the life that was lost. I think it was appropriate in that context and, again, I will stand by the ruling I made pre-trial.

The final issue raised has to do with the rebuttal testimony that was offered from Brenda Chamberlain. That testimony

followed significant evidence of the defendant's abysmal childhood background.

It was offered to show that his ability to form relationships, although, perhaps, impaired, was not as impaired as was represented by the defense evidence by virtue of the fact that he had, for that portion of time, a successful relationship with Miss Chamberlain. It was also supported by evidence of the – what's been called the morphed pornography, which evidence suggested was created at the time of the relationship with Miss Chamberlain.

The purpose of that was not simply to offer more of the pornography, but the People's offer, which I accepted and I thought legitimate, and I still think was legitimate was to show that the dark side which resulted in his being here in this case was not a recent development but something that was part of his personality at a time when he was able to maintain a relatively normal relationship.

So with those summary comments, I will deny the motion for a new trial based on those substantive arguments.

(62 RT 7957-7959.)

The trial court subsequently listened to the arguments of appellant and his attorneys on the automatic motion to modify the judgment. (62 RT 7960-8005.) Afterwards, the court denied the motion, reasoning as follows:

In a death penalty case, the automatic motion to modify the judgment is a specialized version of a motion for a new trial, asking me to review the evidence presented to the jury, and I'm limited in doing this. I'm limited to just the evidence presented to the jury and for me to consider and take into account, be guided by, the aggravating and mitigating circumstances as set out in Penal Code section 190.3, the same aggravating and mitigating circumstances I instructed the jury about at the penalty phase.

Although attorneys sometimes speak of the judges being the 13th juror, that's really a misleading way to describe my role under the law. This is not a brand-new penalty determination by me. I am not authorized to make my own independent determination of how I would have voted had I been a juror.

Rather, what my obligation is to independently re-weight the evidence. That means make my own decisions as to which witnesses I believe, which evidence I thought was important, which I thought was less important. So I must independently re-weight the evidence regarding aggravation and mitigation, that evidence that was presented to the jury alone, and then determine – and here's the task for me: to determine whether the weight of that evidence supports the jury's verdict.

What I propose to do here is – obviously, I sat through the trial. I am familiar with the evidence presented to the jury. I've independently considered all that evidence and the arguments of counsel.

It's not my intention here this morning to list every piece of evidence or every argument that was made by the attorneys. It's just that for the purpose of clarifying my reasoning, I propose to go over the principal factors that most powerfully inform and influence the decision that I have to make here. I propose to do that by going through the statutory factors, (A) through (K), and outlining what – which of those factors I believe are important to this decision.

Factor (A) is the circumstances of the offense and the special circumstances in this case. The evidence presented in this case, evidence presented to the jury, persuasively establishes that motivated by a mixture of love, lust, fury, and aberration, the defendant planned the circumstances and the aftermath of Patricia Gallego's murder, as evidenced by his writings and by his extensive, customized photographic collection, defendant was romantically and sexually obsessed with the victim and was deeply angry with her.

Other evidence shows advanced planning by the defendant to take control of the victim's money following her death. All of this planning is demonstrated by his writings, his extensive writings; notably, perhaps most chillingly, the document that was referred to in this trial as the to-do list, People's Exhibit 59. It's also established by his methodical dealings with the victim's accounts following her death. In my view, the degree and the detail of this planning is particularly chilling.

Also of substantial significance is the fact that the victim was set upon by surprise in her own home, in a place where she

should have the right to feel secure but, in fact, was utterly defenseless. The fact of her assault, rape and murder in this setting is serious, indeed.

Factor (B) asks whether there is any past violent activity by the defendant. Violent criminal activity. There is none. That is a significant mitigating factor, I believe.

Factor (C) asks whether there are prior felony convictions by the defendant. There are none. That, too, is a mitigating factor.

Factor (D) asks whether the defendant was influenced by extreme mental or emotional disturbances. There can be an argument, I think, about this.

There is certainly significant evidence of a very troubled childhood, leading to a significantly impaired ability to form and maintain attachments. There's also significant evidence of a sexual obsession focused on the victim in this case.

In my mind, it's doubtful that either of these qualify as extreme in the context of a capital case. However, it – it's a matter of definition, and these factors are equally relevant under Factor (K), which I'll get to, and are fully entitled to complete consideration here. But I think they better fit under Factor (K).

Factor (E) asks whether there was participation or consent by the victim, and there was none in this case.

Factor (F) asks whether the defendant had a reasonable belief that his acts were morally justified or whether they were extenuated. There is no such reasonable belief, no such extenuation.

Factor (G) asks whether there was extreme duress or there was a substantial domination of another person, and there was none in this case.

Factor (H) looks to the question of whether the defendant had the capacity to appreciate the criminality of his conduct, and there was no evidence of significant impairment in this regard. I believe he was fully able to appreciate the criminality of his conduct.

Factor (I) looks to the age of the defendant at the time of the crime. I believe that is, essentially, neutral here. Defendant was neither particularly young nor particularly old.

Defense counsel makes a legitimate argument, however, under this category, and it's notable, that the defendant reached the age of 31 without having any trouble with the law. I think that's a legitimate way of looking at that factor. It's also legitimately considered under Factors (B), (C), and (K).

The flip side of that consideration, however, is that his reaching that age without having trouble with the law demonstrates an ability to control his behavior in a way that he chose not to do in this case.

Factor (J) asks whether the defendant's participation in this crime was passive or relatively minor. It was not. Defendant was the sole planner and the sole perpetrator of this crime.

And Factor (K) asks that we look at any other factors which might extenuate the gravity of the crime, and this I, in my view, the appropriate place to consider the defendant's background.

And I – there is no question in my mind that this defendant's demonstrably-proved upbringing brings shame on any civilized society, and he bears the scars of that background in his character and his relationship with the world around him. Even in the time after he went to the Nunns, his appearance there, I think, loudly demonstrates the huge limits on society's power to act as a surrogate parent.

However, as important as this factor is, and I think it is very important in the formation of his character, in understanding the impact of his background, there are two factors that limit the power of his background as a mitigating force. First one is the one I referred to earlier.

The defendant has made – made it through a decade of adult behavior, showing that he can live lawfully and productively in the world. It strongly suggests, to me, that this murder was more a calculated choice than of weakness or psychological compulsion.

> Second, the court was struck during the penalty phase of this case by the presence and the testimony of his sister, Javonica. Again, present here in court today. Javonica, who was raised in a background similar to his and who appears, to the extent that one can tell from the context we have here – appears to have emerged as a responsible, caring mother in her own right. This suggests there's significant limits on the extent to which the defendant's background can be explained – can be used as an explanation for his behavior here.
>
> Essentially, it seems to me that weighing these factors, all of these, balances the horror and the calculated character of the crime against his lack of a prior record and the undeniable darkness of his childhood. Those are the factors the jury weighed in this case and, as I weigh them, based on this independent evaluation and re-weighing of the evidence, I find that the weight of the evidence supports the jury's verdict. Consequently, the motion for modification will be denied.
>
> I want to emphasize that the law requires, as I make this decision, that I consider nothing beyond the evidence actually presented to the jury in this case, and I have not considered anything but that. In fact, to insulate myself from evidence not presented to the jury, I have not even read the probation officer's report which has been submitted in this case.

(62 RT 8010-8016.)

B. The Court Carefully Reviewed the Evidence and Applied the Correct Standard in Ruling on the Motion for New Trial

This Court reviews "'"a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard." [Citations.] "'A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.'"'" (*Lightsey*, *supra*, 54 Cal.4th at p. 729, quoting *People v. Thompson* (2010) 49 Cal.4th 79, 140; see also, *McCurdy*, *supra*, 59 Cal.4th at p. 1108.)

Here, the trial court considered and discussed each of the grounds raised in the defense's motion for a new penalty phase trial. The court explained its reason for rejecting each of those grounds, which had already been raised and fully developed during the trial. Without repeating all of its previously stated reasons for rejecting the numerous photographs proffered by the prosecution, the court simply stated it had already limited the proffered photographs from three photo boards down to one photo board and it had limited the photographs of Gallego to those that were taken of her when she was an adult, those that were taken of her around the time she encountered appellant, and those that were offered to illustrate the victim impact evidence. (62 RT 7957.)

With respect to the additional autopsy photographs, the trial court simply explained it had excluded the photograph showing Gallego's hands during the guilt phase because its probative value was outweighed by its potential for prejudice under Evidence Code section 352. However, the photograph was admissible as evidence of the circumstances of the crime during the penalty phase. (62 RT 7958.) Indeed, this Court "repeatedly [has] determined that photographs of victims' bodies may be admissible at the penalty phase to demonstrate graphically the circumstances of the crime, a factor relevant to the issues of aggravation and penalty." (*Smithey*, *supra*, 20 Cal.4th at p. 990.)

With regard to the testimony of Kristina Stepanof and the thank you note from Gallego, the trial court disagreed with the defense argument that victim impact evidence should not be received from individuals who are not family members. (62 RT 7958.) The court was not wrong. "'Victim impact evidence . . . is not limited to family members, but may include the effects on the victim's friends . . . ." (*People v. Henriquez* (2017) 4 Cal.5th 1, 38, quoting *People v. Brady* (2010) 50 Cal.4th 547, 578; *People v. Pollock* (2004) 32 Cal.4th 1153, 1183 ["We have approved victim impact

testimony from multiple witnesses who were not present at the murder scene and who described circumstances and victim characteristics unknown to the defendant."].)

As for the rebuttal testimony of Brenda Chamberlain and the introduction of the morphed photographs depicting pornographic images of her, the trial court explained the testimony was relevant to rebut the significant evidence of appellant's abysmal childhood background. Indeed, Chamberlain's testimony showed appellant was able to have a normal and successful relationship with a woman despite his past. More importantly, Chamberlain's testimony demonstrated the sexually sadistic side of him that resulted in the killing of Gallego was not a recent development but rather, was a part of his personality at a time when he was able to maintain a relatively normal relationship with a woman. (62 RT 7958-7959.) Hence, Chamberlain's testimony and the morphed photographs of her were proper rebuttal evidence for the penalty phase of the trial.

Based on the foregoing, the trial court properly exercised its discretion when it denied the defense motion for a new penalty phase trial. (*McCurdy*, *supra*, 59 Cal.4th at p. 1108; *Lightsey*, *supra*, 54 Cal.4th at p. 729.)

Furthermore, to the extent appellant claims the evidence was insufficient to establish death was the appropriate punishment, he is mistaken. (AOB 311-312.) "In ruling on defendant's application for modification of the verdict, the trial court must reweigh the evidence; consider the aggravating and mitigating circumstances; and determine whether, in its independent judgment, the weight of the evidence supports the jury's verdict. [Citation.] On appeal, although the trial court's ruling is subject to independent review, [this Court does] not make a de novo determination of penalty." (*People v. Sanchez* (2016) 63 Cal.4th 411, 485-486.)

As demonstrated by the trial court's detailed application of each of the statutory factors in ruling on the motion for modification of the verdict, the court carefully reviewed the evidence and properly performed its duty. The court understood its role perfectly and applied the correct standard.

XXVII. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant challenges the constitutionality of California's death penalty statute and accompanying instructions in general and as applied in his case, acknowledging that each of his claims has previously been rejected by this Court. (AOB 313-346.) As appellant presents no new arguments or persuasive reasons to revisit these issues, respondent urges this Court to reaffirm its prior holdings finding California's death penalty statute, relevant instructions, and sentencing scheme constitutional.

Appellant first claims that Penal Code section 190.2 is impermissibly broad because it fails to meaningfully narrow the types of first degree murderers eligible for the death penalty. (AOB 315-317.) This claim was previously rejected in *People v. Johnson* (2015) 61 Cal.4th 734, 785 ("*Johnson*"), *Sattiewhite*, *supra*, 59 Cal.4th at p. 489, *People v. Myles* (2012) 53 Cal.4th 1181, 1224-1225, *People v. Cowan* (2010) 50 Cal.4th 401, 508 ("*Cowan*"), and *People v. Verdugo* (2010) 50 Cal.4th 263, 304 ("*Verdugo*"), and should be rejected again here.

Appellant also claims that Penal Code section 190.3, factor (a), is impermissibly overbroad because it permits the jurors to consider "the circumstances of the crime" without limitation, thus allowing arbitrary and capricious imposition of the death penalty in violation of the Constitution. (AOB 317-319.) Similar claims were rejected in *Johnson*, *supra*, 61 Cal.4th at p. 785, *Sattiewhite*, *supra*, 59 Cal.4th at p. 489, *Foster*, *supra*, 50 Cal.4th at pp. 1362-1364, *Russell*, *supra*, 50 Cal.4th at p. 1274, and *People*

v. Jennings (2010) 50 Cal.4th 616, 688-689, and appellant provides no new argument warranting reconsideration of the issue here.

Appellant claims that California's death penalty statute and accompanying jury instructions are constitutionally infirm because they do not require the jury to find unanimously and beyond a reasonable doubt that one or more aggravating factors exist and that the factors in aggravation outweighed those in mitigation before imposing the death penalty. Appellant argues that *Apprendi v. New Jersey* (2000) 530 U.S. 466, and its progeny including *Ring v. Arizona* (2002) 536 U.S. 584, require such a burden of proof for the weighing of aggravating and mitigating factors in the penalty phase, and asks this Court to reconsider its decisions holding otherwise. (AOB 319-333.) Appellant claim should be rejected.

In *McCurdy*, *supra*, 59 Cal.4th at pp. 1110-1111, this Court reaffirmed that "'"[T]he death penalty statute is not unconstitutional because it does not require 'unanimity as to the truth of aggravating circumstances, or findings beyond a reasonable doubt that an aggravating circumstance (other than § 190.3, factor (b) or (c) evidence) has been proved, that the aggravating factors outweighed the mitigating factors, or that death is the appropriate sentence.' [Citation.] Nothing in… *Blakely v. Washington* (2004) 542 U.S. 296, *Ring v. Arizona* (2002) 536 U.S. 584, or *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], affects our conclusions in this regard. [Citations.] No burden of proof is constitutionally required, nor is the trial court required to instruct the jury that there is no burden of proof. [Citations.]" (See also *People v. Banks* (2014) 59 Cal.4th 1113, 1207 ("*Banks*"), overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3 ("*Scott*"). [same]; *People v. Capistrano* (2014) 59 Cal.4th 830, 881[same].) Appellant presents no valid basis for this Court to reconsider its previous holdings.

Appellant claims California's death penalty statute is unconstitutional and violates defendants' rights to meaningful appellate review because it does not require written findings from the jury. (AOB 333-336.) This claim was previously rejected by this Court and appellant provides no valid reasons for this Court to revisit its prior holdings. (See *Banks*, *supra*, 59 Cal.4th at p. 1207 ["'Written findings by the jury during the penalty phase are not constitutionally required and their absence does not deprive defendant of meaningful appellate review'"], quoting *Mendoza*, *supra*, 52 Cal.4th at p. 1097; *Johnson*, *supra*, 61 Cal.4th at p. 786; *Sattiewhite*, *supra*, 59 Cal.4th at p. 490; *People v. Trinh* (2014) 59 Cal.4th 216, 254; *People v. Howard* (2010) 51 Cal.4th 15, 39 ("*Howard*"); and *Foster*, *supra*, 50 Cal.4th at pp. 1365-1366.)

Appellant claims California's capital sentencing scheme is unconstitutional because it does not allow for intercase proportionality review. (AOB 336-337.) "'The federal constitutional guarantees of due process and equal protection, and against cruel and unusual punishment (U.S. Const., 6th, 8th, & 14th Amends.), do not require intercase proportionality review on appeal.'" (*McCurdy*, *supra*, 59 Cal.4th at p. 1111; accord, *Banks*, *supra*, 59 Cal.4th at p. 1207 ["'Review for intercase proportionality is not constitutionally compelled.'"], quoting *People v. Williams* (2013) 58 Cal.4th 197, 295; *Capistrano*, *supra*, 59 Cal.4th at p. 882 ["The failure to require intercase proportionality does not guarantee '"arbitrary, discriminatory, or disproportionate impositions of the death penalty."'"]; *People v. Jones* (2012) 54 Cal.4th 1, 87 ("*Jones*"); *People v. Famalaro* (2011) 52 Cal.4th 1, 77; *Russell*, *supra*, 50 Cal.4th at p. 1274; *Loker*, *supra*, 44 Cal.4th at pp. 755-756; *People v. Williams* (2006) 40 Cal.4th 287, 338; see also *Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [federal Constitution does not require intercase proportionality review].) Appellant has provided no valid reason for this Court to reconsider its

previous holdings.

Appellant claims that Penal Code section 190.3, factor (b), is unconstitutional because it does not require juries to unanimously find the existence of unadjudicated prior criminal acts beyond a reasonable doubt. (AOB 338.) Here, during the penalty phase, the prosecution did not present evidence that appellant committed any unadjudicated criminal activity. (See 51 RT 7014-7037; 53 RT 7553-7586.) In any event, juror unanimity on factor (b) allegations is not required. (*People v. Watkins* (2012) 55 Cal.4th 999, 1036 ("*Watkins*"); *Moore*, *supra*, 51 Cal.4th at pp. 1139-1140; *Cowan*, *supra*, 50 Cal.4th at p. 489; *People v. Valencia* (2008) 43 Cal.4th 268, 311 ("*Valencia*"); *People v. Brown* (2004) 33 Cal.4th 382, 402.) Appellant offers no new argument to warrant reconsideration of this issue here.

Appellant claims that the inclusion in the list of potential mitigating factors of such adjectives such as "extreme" and "substantial" acted as "barriers" to the jury's consideration of mitigation. (AOB 338-339.) This claim has been repeatedly rejected by this Court. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 165 ["The adjectives 'extreme' and 'substantial' do not render vague the sentencing factors that include those words."]; see also *Casares*, *supra*, 62 Cal.4th at p. 854; *People v. Arias* (1996) 13 Cal.4th 92, 171 [instruction is not vague or ambiguous]; *Watkins*, *supra*, 55 Cal.4th at p. 1036; *Tully*, *supra*, 54 Cal.4th at p. 1069; *People v. Streeter* (2012) 54 Cal.4th 205, 268; *People v. Lomax* (2010) 49 Cal.4th 530, 595; *Burney*, *supra*, 47 Cal.4th at pp. 260- 261; and *People v. Monterroso* (2004) 34 Cal.4th 743, 796.) Appellant's identical contentions should be rejected here.

Appellant contends that the penalty phase instructions unconstitutionally failed to inform the jury that certain statutory factors were relevant solely as potential mitigators. (AOB 339-341.) This

contention was rejected in *People v. Romero* (2015) 62 Cal.4th 1, 57, *Scott*, *supra*, 61 Cal.4th at p. 407, *People v. Dement* (2011) 53 Cal.4th 1, 56-57, disapproved on another ground in *Rangel*, *supra*, 62 Cal.4th at p. 1216, *Verdugo*, *supra*, 50 Cal.4th at p. 305, and *Valencia*, *supra*, 43 Cal.4th at p. 311, and appellant offers no new argument to warrant reconsideration of this issue.

Appellant argues California's death penalty procedures violate the Equal Protection clause because non-capital defendants receive greater procedural protections than do capital defendants. (AOB 341-344.) Similar arguments were rejected in *Pearson*, *supra*, 56 Cal.4th 393, *Tully*, *supra*, 54 Cal.4th at p. 1069, *People v. Souza* (2012) 54 Cal.4th 90, 142, and *People v. Eubanks* (2011) 53 Cal.4th 110, 154, and this argument should be rejected here as well.

Appellant claims California employs the death penalty "as a regular form of punishment" which violates evolving constitutional standards of decency and falls short of international norms. (AOB 344-346.) This argument was rejected in *Adams*, *supra*, 60 Cal.4th at pp. 581-582, *People v. Booker* (2011) 51 Cal.4th 141, 197, *Howard*, *supra*, 51 Cal.4th at pp. 39-40, *Foster*, *supra*, 50 Cal.4th at p. 1368, and should be rejected again here.

Appellant also contends that the imposition of the death penalty violates the Eighth and Fourteenth Amendments. (AOB 345-346.) This Court has repeatedly rejected this argument. (See *People v. Boyce* (2014) 59 Cal.4th 672, 723 ["California's death penalty law does not violate the Sixth Amendment right to a jury trial, the Eight Amendment prohibition against cruel and unusual punishment, or the Fourteenth Amendment right to due process . . . ."]; *People v. DeHoyos* (2013) 57 Cal.4th 79, 151 [imposition of the death penalty "'does not violate international norms of decency or the Eighth Amendment's prohibition against cruel and unusual punishment. [Citation.]'"]; *Jones*, *supra*, 54 Cal.4th at pp. 87-88.)

Appellant has provided no valid reason why this Court should reconsider its previous holdings.

Appellant's sentence is constitutional, and the penalty judgment should be affirmed.

CONCLUSION

For all of the above reasons, respondent respectfully requests that appellant's judgment be affirmed in its entirety.

Dated: April 20, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 72,934 words.

Dated: April 20, 2018

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
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Case Number: **S113962**
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